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October 1, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2014AP1663-CRNM State of Wisconsin v. Jorge A. Lopez (L.C. #2012CF31)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Jorge A. Lopez appeals from a judgment convicting him upon pleas of no contest of two counts of third-degree sexual assault in violation of WIS. STAT. § 940.225(3) (2011-12), both as a repeater.[1] Lopez's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Lopez was provided a copy of the report and has filed a response. Upon consideration of the no-merit report and the response and

[1] Lopez does not appeal from the order granting his postconviction motion to modify the judgment in regard to payment of restitution and other costs.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

our independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude there are no issues which would have arguable merit for appeal. We summarily affirm the judgment, *see* WIS. STAT. RULE 809.21, accept the no-merit report, and relieve Attorney Jeffrey A. Mann of further representing Lopez in this matter.

A female staying at the same motel as Lopez reported to police that Lopez invited her to his room to smoke "a joint" and then had sex with her against her will. The State charged him with second-degree sexual assault, third-degree sexual assault, false imprisonment, disorderly conduct, and two counts of obstructing an officer. Pursuant to a plea agreement, Lopez entered no-contest pleas to two counts of third-degree sexual assault. The remaining counts were dismissed and read in. The trial court sentenced Lopez to a total of ten years' initial confinement and ten years' extended supervision, and ordered him to provide a DNA sample and pay the $250 surcharge, *see* WIS. STAT. § 973.046(1r), and to pay $4,113.36 in restitution to the victim, who required ambulance transport and hospitalization. This no-merit appeal followed.

The report first considers whether Lopez could withdraw his plea as not knowingly and voluntarily entered. We agree that no issue of merit could be raised in this regard.

A defendant seeking to withdraw a guilty or no-contest plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). Here, the trial court followed WIS. STAT. § 971.08 to ensure that Lopez's plea was knowingly, voluntarily, and intelligently entered by ascertaining that he understood the essential elements of the charge to which he was pleading, the potential punishment for the charge, and the constitutional rights he was giving up. *See* ***State v. Bangert***, 131 Wis. 2d 246,

260-62, 389 N.W.2d 12 (1986); ***State v. Hampton***, 2004 WI 107, ¶24, 274 Wis. 2d 379, 683 N.W.2d 14. Besides the thorough colloquy, the court properly looked to the plea questionnaire/waiver of rights form Lopez signed reflecting his understanding of the elements, the potential penalties, and the rights he agreed to waive, including the potential for deportation or the denial of naturalization. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Lopez also acknowledged that his counsel advised him of the potential for deportation. *See* 8 U.S.C. § 1227(a)(2) (2012). Lopez would be unable to make a prima facie case that the court did not comply with the procedural requirements of § 971.08 and that he did not understand or know the information that should have been provided. *See* ***Bangert***, 131 Wis. 2d at 274. A challenge to the plea would have no merit.

The no-merit report next considers whether any arguable issue could arise because the amended information alleged that Lopez committed the assaults "on or about April 9, 2012," and the police reports indicate the assaults were reported on April 8, 2012. Lopez does not claim an alibi, only that the sex was consensual. The date discrepancy could present no issue of merit.

The final issue the report examines is whether Lopez's appointed counsel, Attorney Jeffrey Haase, had a conflict of interest. Haase ran for Green Lake county district attorney but lost in the primary. His involvement in the race ended in mid-August 2012; he was not appointed to represent Lopez until January 2013. No issue of arguable merit could arise.

We independently consider whether an arguable issue exists in regard to the exercise of sentencing discretion and whether the sentence is excessive.[2] Sentencing is left to the discretion

[2] A no-merit report must address the sentence.

of the trial court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court fully addressed the primary sentencing factors—the gravity of the offense, the character of the offender, and the need to protect the public. ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). It gave the greatest weight to Lopez's character. *See* ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). The court provided a "rational and explainable basis" for the sentence it imposed, satisfying this court that discretion in fact was exercised. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76 (citation omitted).

The court noted the "very serious" nature of the crimes against someone who happened to be in the wrong place at the wrong time, the need to send a message to the general public that such offenses deserve consequences, and that his poor character was amply shown by the read-ins, his lengthy multi-state criminal history, and post-arrest acts such as contending his lawyer gave him a razor blade found with him in the jail and picking up new disorderly conduct charges for jail misbehavior. Considering that he faced twenty-eight years plus a $50,000 fine, and further considering the victim's injuries and the four read-in offenses, Lopez's twenty-year sentence cannot be said to be so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); *see also* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. No basis exists to disturb the sentence.

Lopez's response asserts that the consensual nature of the sexual encounter is shown by the absence of bruises or scratches, torn clothing, or reports from other motel tenants of screams or calls for help. He also noted that police did not come to his motel room until forty-five minutes after the alleged assault and "when a woman get[]s rape[d,] she immediately call[]s 911 or tell[]s family members."

A no-contest plea admits all facts alleged in the complaint. ***State v. Rachwal***, 159 Wis. 2d 494, 506, 465 N.W.2d 490 (1991). Lopez stipulated to using the complaint as a factual basis for the allegations. A properly accepted plea of guilty or no-contest waives any later-presented defense to the charge. *See* ***Peters v. State***, 50 Wis. 2d 682, 688, 184 N.W.2d 826 (1971). Further, the complainant did suffer injuries. She bled profusely from a vaginal laceration, required ambulance transport, and was hospitalized. The officers' arrival forty-five minutes after the victim left Lopez's room does not establish that she did not immediately summon help. Regardless, physical injuries, evidence of resisting, or making a contemporaneous report are not necessary to prove the elements of third-degree sexual assault. *See* WIS. STAT. § 940.225(3).

Although Lopez assured the court during the plea colloquy that his no-contest pleas were not induced by threats or promises, he asserts here that the DA and defense counsel "harassed and pressured" him to plead no contest by reducing the second-degree sexual assault charge to third-degree. He suggests that he agreed in part as he did not think he could get a fair trial in Green Lake county because he is Mexican, has dark skin, only recently came to the area, and the local paper created bias against him by falsely reporting that the alleged victim was underage, thus portraying him as "a monster." Deciding whether to take a chance at trial no doubt was difficult but Lopez shows nothing to suggest coercion.

Lopez next contends he was entitled to an expert witness and to have a psychological examination, both at State expense. He does not flesh out or cite authority for either proposition. Expert assistance is not an absolute if not essential to his criminal defense. *See* ***Polk Cnty. v. State Pub. Defender***, 179 Wis. 2d 312, 318, 507 N.W.2d 576 (Ct. App. 1993), *aff'd*, 188 Wis. 2d 665, 524 N.W.2d 389 (1994). He does not indicate whether he sought authorization

from the state public defender. *See* WIS. STAT. § 977.05(4r). In any event, his no-contest plea waived these issues. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jeffrey A. Mann is relieved of further representing Lopez in this matter.

Diane M. Fremgen
Clerk of Court of Appeals