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DISTRICT III

November 4, 2014

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

2013AP858-CRNM State of Wisconsin v. Roman A. Zareczny (L. C. #2011CF858)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Roman Zareczny has filed a no-merit report concluding there is no basis to challenge Zareczny's conviction for third-degree sexual assault. Zareczny was advised of his right to respond and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal and summarily affirm.

An Information charged three counts of sexual assault of a twelve-year-old child.[1] The parties filed various motions, including a motion regarding the statute of limitations. At the arraignment on June 12, 2012, the court scheduled a hearing for August 3 to address all motions. On August 3, however, the parties informed the court they had reached a proposed resolution in which Zareczny would plead no contest to one count of third-degree sexual assault, which at the time of the offense was punishable by a maximum of five years' imprisonment. In exchange for Zareczny's plea, the State agreed it would not issue any further charges in this incident and would not challenge the court's ruling that an incident involving a prior victim was barred by the statute of limitations.[2] The court accepted Zareczny's plea and subsequently sentenced Zareczny to five years' imprisonment.[3]

There is no manifest injustice upon which Zareczny could withdraw his plea. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, buttressed by the plea questionnaire and waiver of rights form, informed Zareczny of the elements of the offense and the potential penalty. The court also advised Zareczny of the

[1] An amended Information corrected the maximum penalties for each count from forty years to twenty years.

[2] During the plea colloquy, trial counsel explained Zareczny was waiving his challenges to a statute of limitations defense. Counsel stated, "Mr. Zareczny is aware that he is receiving the benefit of the bargain here by the state agreeing to a lesser charge which has much less exposure, and … in analyzing the risk and potential consequences of a trial has determined to waive that option and is submitting to the court's jurisdiction on this issue."

The circuit court engaged in a discussion with Zareczny about the statute of limitations and his waiver of it for purposes of the plea, and specifically advised Zareczny that motions filed in anticipation of trial would not be decided once he pleaded.

[3] The sentence was not bifurcated because Zareczny was subject to penalties that existed at the time of the commission of the crime, prior to truth-in-sentencing.

constitutional rights he waived by pleading no contest, and specifically verified Zareczny's express and informed waiver of the statute of limitations defense pursuant to the plea bargain.[4] Zareczny voluntarily represented to the court that he was a citizen of the United States. Zareczny was therefore not prejudiced by the court's failure to advise him of the deportation consequences outlined in WIS. STAT. § 971.08(1)(c).[5] *See also* WIS. STAT. § 971.08(2). An adequate factual basis supported the conviction.

The court did not specifically advise Zareczny that it was not bound by the parties' agreement and could impose the maximum sentence. However, this particular agreement did not provide for a specific sentencing recommendation, and left both sides free to argue. The court twice referenced the maximum penalty Zareczny faced upon conviction. The court stated, "[T]he potential penalties are exactly what it says, up to five years in prison and up to a $10,000 fine." The court also stated, "Okay. So you understand that under this agreement, the state is free to recommend up to the maximum permissible for this offense, what I mentioned before, up to five years and $10,000. You understand that?" Zareczny each time represented to the court that he understood.[6]

[4] At the time of the offenses, the state crime lab was unable to create a DNA match to any known individual in the database. However, the biological evidence was resubmitted to the crime laboratory subsequent to Zareczny's conviction. The Appleton Police Department was subsequently notified by the Wisconsin Department of Justice that the DNA data bank had received a "hit" linking the evidence to Zareczny, who had been convicted of a felony in Outagamie County and ordered to submit to a DNA test. Zareczny admitted many details when asked for an explanation as to "where he may have left his DNA."

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

[6] The penalties are also found on the second amended Information and a memorandum describing the plea agreement submitted by the State. In addition, the plea questionnaire and waiver of rights form, signed by Zareczny, indicates the court is not bound by an agreement and may impose the maximum penalties.

We therefore agree with the no-merit report that the record shows the plea was knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Entry of a valid no contest plea constitutes a waiver of nonjurisdictional defects and defenses. ***Id.*** at 265-66.

The record also discloses no basis for challenging the circuit court's sentencing discretion. The court considered the proper factors, including Zareczny's character, the seriousness of the offense and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court articulated the offense as "really grave and indisputable." It then went on to discuss the terror of a brutal assault by a stranger, including the "forcible detention which is facilitated by a threat to her life with a weapon." The court noted the child was "forced to engage in these highly intimate sexual acts utterly foreign to a child of—of that age." The five-year sentence was allowable by law and not unduly harsh or excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other issues of arguable merit. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Michelle Velasquez is relieved of further representing Zareczny in this matter.

Diane M. Fremgen
Clerk of Court of Appeals