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DISTRICT I

November 4, 2014

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

2014AP806-CRNM State of Wisconsin v. Joe A. Hernandez (L.C. #2012CF5756)

Before Curley, P.J., Kessler and Brennan, JJ.

Joe A. Hernandez appeals a judgment convicting him of second-degree sexual assault with use of force. Attorney George Tauscheck filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Hernandez was informed of his right to file a response, but he has not done so. After considering the no-merit report and conducting an independent review of the record, we

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

conclude that there are no issues of arguable merit that Hernandez could raise on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether Hernandez's guilty plea was knowingly, voluntarily, and intelligently entered. In order to ensure that a defendant is knowingly, intelligently, and voluntarily waiving the right to trial by entering a guilty plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which he is pleading guilty, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Although "not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding of the particular information contained therein," the circuit court may refer to a plea colloquy and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the trial court and the defendant." ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

During the plea hearing, the prosecutor stated the plea agreement on the record. Hernandez told the circuit court that the agreement as recited was in accord with his understanding. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court informed Hernandez that it was not bound to accept the recommendation of his attorney or the district attorney despite the plea agreement, and Hernandez said that he understood.

The circuit court informed Hernandez of the potential maximum prison term and asked Hernandez whether he had gone over the information on the plea questionnaire and waiver-of-rights form, which included the constitutional rights Hernandez was waiving by entering a plea, the penalties for the crime and the elements of the crime. Hernandez told the circuit court he understood the information on the form, which both he and his lawyer signed. The circuit court also personally reviewed some of the constitutional rights that Hernandez was waiving and informed Hernandez that he was giving up his right to bring suppression motions, and other claims and defenses. Hernandez told the circuit court that he understood.

The circuit court verified that Hernandez was twenty-six years old and had completed nine years of school. The circuit court informed Hernandez that if he was not a citizen, he could be deported as a result of the conviction and also informed him that he would have to register as a sex offender. Hernandez agreed that the circuit court could use the criminal complaint as a factual basis for the plea. Based on the circuit court's plea colloquy and the plea questionnaire and waiver-of-rights form, there would be no arguable merit to an appellate challenge to the plea.

The no-merit report next addresses whether the circuit court erred in denying Hernandez's motion to withdraw his plea prior to sentencing. Hernandez moved to withdraw his plea on the grounds that he was confused about the elements of the crime because they were not clearly written on the plea questionnaire and waiver-of-rights form by his attorney and the circuit court did not review them with him. He also argued that he did not know the elements of kidnapping, which was dismissed but read in.

We will overturn a circuit court's decision denying a motion to withdraw a plea prior to sentencing if the circuit court misuses its discretion. ***State v. Kivioja***, 225 Wis. 2d 271, 287, 592

N.W.2d 220 (1999). To support a motion to withdraw a plea, the defendant has the burden of showing by the preponderance of evidence that there is a "fair and just reason" for withdrawing the plea. ***Id.***

After listening to testimony from Hernandez and his former trial attorney, the circuit court concluded that Hernandez knew what the elements of the second-degree sexual assault offense were because his attorney reviewed the elements with him. Based on Hernandez's testimony, the circuit court also found that Hernandez understood the elements at the time his attorney went over them. The circuit court concluded that the fact that the plea questionnaire did not include the elements of kidnapping, which was read in, was not a fair and just reason to withdraw the plea because Hernandez was aware that the kidnapping charge was being dismissed, but would be considered at sentencing, and there is no requirement that the circuit court establish a factual basis for a read-in offense. The circuit court's decision was not a misuse of discretion. Therefore, there would be no arguable merit to a claim that the circuit court should have allowed Hernandez to withdraw his guilty plea before sentencing.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion when it sentenced Hernandez to twenty-eight years of imprisonment, with eighteen years of initial confinement and ten years of extended supervision. The circuit court characterized Hernandez's offense as "horrific" and noted that Hernandez committed this offense mere months after he was released from prison for a different crime. The circuit court concluded the offense was particularly aggravated because Hernandez violently sexually assaulted the victim in a park and bit her in the face when she was just going about her business and trying to take care of her three children. The circuit court explained its application of the various sentencing considerations in depth in accordance with the framework set forth in

State v. Gallion, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197, and its decision was a reasonable exercise of discretion in light of the circumstances presented. Therefore, there would be no arguable merit to a challenge to the sentence on appeal.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney George Tauscheck of further representation of Hernandez.

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

IT IS FURTHER ORDERED that Attorney George Tauscheck is relieved of any further representation of Hernandez in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals