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DISTRICT I

November 13, 2014

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

2014AP1667-CRNM State of Wisconsin v. Jose H. Rodriguez-Morales
(L.C. #2013CF1949)

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

Jose H. Rodriguez-Morales pled guilty to one count of first-degree sexual assault of a child. *See* WIS. STAT. § 948.02(1)(e) (2011-12).[1] The trial court imposed a seventeen-year term of imprisonment, bifurcated as ten years of initial confinement and seven years of extended

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

supervision. The trial court also ordered Rodriguez-Morales to pay a $250 deoxyribonucleic acid surcharge.

The state public defender appointed Attorney Dustin C. Haskell to represent Rodriguez-Morales in postconviction and appellate proceedings. Attorney Haskell filed a no-merit report, concluding that further postconviction and appellate proceedings would lack arguable merit. *See* ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Rodriguez-Morales did not file a response. We have considered the no-merit report, and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, M.M.B., born on May 28, 2002, told police that, when she was ten years old, her mother's boyfriend, Rodriguez-Morales, '"tr[ied] to have sex' with her" on multiple occasions between May 28, 2012, and April 5, 2013.[2] M.M.B. went on to describe an incident when she was alone with Rodriguez-Morales and he took her to his bedroom, locked the door, and put his penis on her body near her buttocks. The complaint further alleges that M.M.B.'s mother told police she examined Rodriguez-Morales's telephone and discovered a video of Rodriguez-Morales rubbing his penis on M.M.B.'s body. Additionally, the complaint alleges that police interviewed Rodriguez-Morales, and he admitted lying naked on top of M.M.B. and making a video of the activity.

[2] The criminal complaint identifies the child victim as both "MMB" and "MBC." The record reflects that both abbreviations are accurate and describe the same victim; the State explained at the plea hearing that "M" is the victim's first and middle initial, and that her last name is sometimes hyphenated as "B-C." Rodriguez-Morales agreed. For ease of reference, we use the initials "M.M.B." to identify the victim.

The State charged Rodriguez-Morales with two counts of first-degree sexual assault of a child who had not reached the age of thirteen years old, and one count of sexual exploitation of a child. Rodriguez-Morales quickly decided to resolve the charges with a plea bargain.

We first consider whether Rodriguez-Morales could pursue a meritorious challenge to his guilty plea. At the outset of the plea proceeding, the trial court noted that Rodriguez-Morales appeared in court with a Spanish-language interpreter. The trial court established that Rodriguez-Morales understands some English and that, in addition, his trial counsel speaks Spanish.[3] Rodriguez-Morales confirmed that he did not have any difficulty communicating with his lawyer. The State then described the terms of the parties' plea bargain, explaining that Rodriguez-Morales would plead guilty to one count of first-degree sexual assault of a child, and the State would recommend "substantial confinement and moderate extended supervision, leaving the interpretation of that language up to the court." Additionally, the State would move to dismiss and read in the two other counts. Trial counsel confirmed that the State correctly described the plea bargain.

The record includes a signed guilty plea questionnaire and waiver of rights form with text in both English and Spanish. The form reflects that Rodriguez-Morales understood the charge he faced, the constitutional rights he waived by pleading guilty, and the penalty that the trial court could impose. A signed addendum attached to the form reflects Rodriguez-Morales's acknowledgment that by pleading guilty he would give up his rights to raise defenses, to challenge the validity of his arrest, and to seek suppression of evidence against him. Rodriguez-

[3] Proceedings prior to the guilty plea similarly included explanations on the record that Rodriguez-Morales's trial counsel was fluent in Spanish.

Morales confirmed that he reviewed the form and addendum with his trial counsel and that he understood the documents.

The trial court explained to Rodriguez-Morales that he faced a sixty-year term of imprisonment upon conviction. *See* WIS. STAT. §§ 948.02(1)(e), 939.50(3)(b). Rodriguez-Morales said that he understood. The trial court told Rodriguez-Morales that it was not bound by the terms of the plea bargain and that he therefore might receive the maximum sentence. He said that he understood. He assured the trial court that, outside of the terms of the plea bargain, he had not been promised anything to induce his guilty plea and that he had not been threatened.

The trial court explained to Rodriguez-Morales that by pleading guilty he would give up the constitutional rights listed on the guilty plea questionnaire, and the trial court reviewed those rights. Rodriguez-Morales told the trial court that he understood. The trial court further explained that, by pleading guilty, he would give up the opportunity to raise defenses and to seek suppression of his statement and other evidence. He said that he understood.

The trial court told Rodriguez-Morales that, if he was not a citizen of the United States of America, he "could be deported for this offense or excluded from coming back into the country and any request that [he had made] to become a citizen could be denied." *Cf.* WIS. STAT. § 971.08(1)(c). Rodriguez-Morales said that he understood. Although the trial court did not caution him about the risks described in § 971.08(1)(c) using the precise words required by the statute, minor deviations from the statutory language do not undermine the validity of the plea. ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

A trial "court must establish that a defendant understands every element of the charge[] to which he pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. Here,

the elements are described on the guilty plea questionnaire and waiver of rights form that Rodriguez-Morales signed, and the trial court summarized the elements during the plea colloquy. Additionally, at the trial court's request, the State reviewed the elements in detail on the record, and Rodriguez-Morales told the trial court he understood that the State would have to prove the elements before he could be found guilty.

Before accepting a guilty plea, the trial court must "'make such inquiry as satisfies it that the defendant in fact committed the crime charged.'" *See* ***State v. Black***, 2001 WI 31, ¶11, 242 Wis. 2d 126, 624 N.W.2d 363 (citation and one set of brackets omitted). Here, the State summarized on the record the allegations supporting the charge of first-degree sexual assault of a child, and Rodriguez-Morales admitted that those allegations were true and correct. The trial court properly found a factual basis for his guilty plea.

The record reflects that Rodriguez-Morales entered his guilty plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the plea.

We next consider whether Rodriguez-Morales could pursue an arguably meritorious challenge to his sentence. Sentencing lies within the trial court's discretion, and our review is limited to determining if the trial court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of

the trial court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The trial court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The trial court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16. Additionally, the trial court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

The record here reflects an appropriate exercise of sentencing discretion. The trial court considered the gravity of the offense, explaining that the sexual assault would have a life-long impact on the victim and on her family. Turning to the protection of the public, the trial court concluded that Rodriguez-Morales was dangerous, stating that he had held a position of trust in the victim's family and that he had betrayed that trust on multiple occasions. The trial court discussed Rodriguez-Morales's character, acknowledging that he had no prior criminal record, that he had a substantial history of employment, and that he had industriously supported his family. The trial court determined, however, that these positive attributes did not outweigh the gravity of the harm that he caused by sexually assaulting a ten-year-old child.

The trial court indicated that deterrence and rehabilitation were the primary sentencing goals. The trial court explained that the sentence must be sufficient to "keep [Rodriguez-Morales] from committing these crimes in the future" and to "keep others from this type of crime." The trial court also explained that the sentence "took into account his treatment needs" and was intended to help him "learn to never do these kind[s] of things again."

The trial court explained the factors that it considered when imposing sentence. The factors were proper and relevant. Moreover, we agree with appellate counsel's conclusion that the sentence was not unduly harsh or excessive. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). The sentence imposed here was well within the statutory maximum allowed by law. Such a sentence is presumptively not unduly harsh. *See* ***id.***, ¶32. We cannot say that the sentence imposed in this case is disproportionate or shocking. We conclude that a challenge to the trial court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

We also agree with appellate counsel that a challenge to the deoxyribonucleic acid surcharge imposed at sentencing would lack arguable merit. Pursuant to WIS. STAT. § 973.046(1r), the surcharge is mandatory for the offense in his case. Similarly, a challenge to the trial court's orders denying Rodriguez-Morales eligibility for the challenge incarceration program and the Wisconsin substance abuse program would lack arguable merit, because he is statutorily ineligible to participate in those programs. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved of any further representation of Jose H. Rodriguez-Morales on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals