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November 14, 2014

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

2014AP357-CRNM State of Wisconsin v. Douglas T. Richards (L.C. #2012CF593)

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

Douglas T. Richards appeals from a judgment of conviction, entered upon his guilty plea, on one count of repeated sexual assault of a child. Appellate counsel, Hannah B. Schieber, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Richards was advised of his right to file a response, and he has responded. Counsel filed a supplemental report, to which Richards filed an additional response.

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

Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Richards' responses, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Background

On May 20, 2012, Kenosha police took a statement from a witness who wanted to report that during a Facebook chat, B.M.R. told the witness that she (B.M.R.) had been raped by her father during the summer that she was eleven years old. When interviewed, B.M.R., who had just turned eighteen, recalled at least three specific instances of intercourse and told police that the assaults basically continued Monday through Friday for that entire summer. During an interview in which Richards was advised of, then waived, his rights, he recalled several encounters with B.M.R. and claimed that in at least one case, she protested when he tried to stop.

Richards was charged with one count of repeated sexual assault of a child for a period between June 1 and August 31, 2005. He was also charged with three counts of incest, based on the specific assaults that B.M.R. remembered. Richards ultimately agreed to resolve this case through a plea agreement. In exchange for his guilty plea to repeated sexual assault, the State would dismiss and read in the incest charges. Both parties would be free to argue for an appropriate sentence. The circuit court accepted the plea and ultimately sentenced Richards to twenty-three years' initial confinement and twelve years' extended supervision.

As a condition of Richards' sentence, the circuit court ordered him to have no contact with B.M.R. "or her family, her siblings or her mother or their residence" until after Richards had served the entirety of his thirty-five-year sentence. Richards filed a postconviction motion, challenging the circuit court's authority to impose a condition on the initial confinement portion

of the sentence. The circuit court denied the motion, concluding its no-contact provision was permitted and appropriate.

Discussion

Counsel identifies three potential issues: whether there is any basis for a challenge to the validity of Richards' guilty plea, whether the circuit court appropriately exercised its sentencing discretion, and whether the circuit court erred in denying Richards' postconviction motion. Richards raises several issues, which we categorize as challenges to his guilty plea, challenges to the effective assistance of his trial attorney, and a challenge to a portion of his sentence.[2]

There is no arguable basis for challenging whether Richards' plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Richards completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of his offense. Attached to the form was a copy of the applicable jury instruction. The form correctly acknowledged the maximum penalty that Richards faced and the form also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08 and ***Bangert***. The colloquy was largely compliant with the various requirements for a colloquy, as

[2] To the extent that Richards may have raised other issues not specifically addressed herein, they are deemed to lack arguable merit and they are rejected. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).

collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, with two notable exceptions.

First, the circuit court failed to provide the immigration warning required by WIS. STAT. § 971.08(1)(c). However, in order to obtain relief because of such an omission, a defendant must show that the plea is likely to result in deportation, exclusion from admission, or denial of naturalizations. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749; ***State v. Douangmala***, 2002 WI 62, ¶¶3-4, 253 Wis. 2d 173, 646 N.W.2d 1. There is nothing in this record to suggest that Richards is not a citizen of the United States, and Richards makes no such claim in his response..

Second, a circuit court accepting a guilty plea "must advise the defendant personally on the record that the court is not bound by any plea agreement and ascertain whether the defendant understands the information." *See* ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. ***Hampton*** requires that "[i]f the court discovers that 'the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court.'" ***Id.***, ¶32 (citation and emphasis omitted). Here, though, there were no sentencing concessions requiring court approval—both sides were free to argue the sentence length—and the circuit court approved the charge concessions by dismissing the three other charges. Accordingly, Richards was not affected by the defect in the plea colloquy, so there is

no arguable merit to a claim that he should be permitted to withdraw his plea under ***Hampton***.[3] *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 411.

Aside from those two errors, which cannot sustain a challenge to the plea, the plea questionnaire and waiver of rights form and the court's colloquy appropriately advised Richards of the elements of his offenses and the potential penalties he faced, and complied with the remaining requirements of ***Bangert*** and its progeny for ensuring that a plea is knowing, intelligent, and voluntary. There would be no arguable merit to a challenge to the plea's validity.

Regarding the plea process, Richards complains that his attorney never suggested "that terms of the agreement could be negotiated to include sentence limits, or any other stipulations." He also complains that trial counsel failed to "specifically advise me they did not have to accept" the defense's sentencing recommendation, and that trial counsel told Richards "that if he was successful in my case, I would likely get 10 years."

With respect to Richards' first complaint, he does not tell us what "other stipulations" counsel should have proposed. Moreover, this complaint presumes that any proposed "negotiation" would have been accepted by the State. To the extent that Richards' complaint is that counsel did not negotiate enough to reduce his exposure, we note that the State's first offer on record had Richards pleading to the repeated-sexual-assault charge *and* one of the incest charges.

[3] Although the circuit court is required to personally inform a defendant that it is not bound by the plea agreement, we note that both the plea questionnaire form and a document called "acknowledgment of plea offer/agreement" cautioned Richards that the circuit court was not bound by the plea terms. Richards himself acknowledged that he reviewed, signed, and understood both forms.

Richards' second complaint is undermined by the plea colloquy transcript. In an apparent attempt to inform Richards that it was not bound by the plea agreement, the circuit court confirmed Richards' understanding that "each side has a free hand to make a recommendation," that the State could ask for the maximum penalty, and that Richards "could receive that maximum penalty." Richards confirmed his understanding on each point.

Finally, an incorrect sentencing prediction does not provide grounds for relief. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. There is no arguable merit to Richards' complaints related to the plea process.

The second issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Here, the circuit court was aware of several mitigating factors, like Richards' minimal criminal record and the fact that he had a decent employment history and had obtained his GED. However, it noted that Richards' offense was very serious because it involved repeated acts.

Further, Richards did not deny his actions, but either blamed drugs and alcohol or suggested that his victim found the repeated assaults to be fun and enjoyable. The circuit court rejected probation because of the seriousness of the offense and emphasized protection of the community and, more importantly, punishment, for crossing the line and committing “disgusting” acts that had destroyed B.M.R.’s life.

The maximum possible sentence Richards could have received was forty years’ imprisonment. The sentence totaling thirty-five years’ imprisonment is within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public’s sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). As long as discretion was properly exercised, we will sustain the sentence, even if we might have imposed a different sentence. *See* ***Odom***, 294 Wis. 2d 844, ¶8. There would be no arguable merit to a challenge to the sentencing court’s discretion.[4]

The third issue counsel raises is whether there is any arguable merit to a claim the circuit court improperly denied Richards’ postconviction motion, which challenged the circuit court’s order barring Richards from contacting not only B.M.R. but also her mother, her siblings, and her residence for the entirety of his sentence, not just during extended supervision. Generally, a circuit court may not impose conditions on the confinement portion of a sentence. *See* ***State v. Gibbons***, 71 Wis. 2d 94, 99, 237 N.W.2d 33 (1976). However, WIS. STAT. § 973.049(2) “plainly

[4] There is no arguable merit to a claim the circuit court failed to consider Richards’ sentencing recommendation or that it somehow blindly followed the State’s recommendation. The record plainly reveals the circuit court properly considered appropriate factors to arrive at its sentence.

allows a sentencing court to prohibit a defendant from contacting victims of [or witnesses to] a crime considered at sentencing." *See* ***State v. Campbell***, 2011 WI App 18, ¶23, 331 Wis. 2d 91, 794 N.W.2d 276. The same statute gives the circuit court the discretion to determine who constitutes a victim or a witness. *See* ***id.***; *see also* § 973.049(2).

Here, the circuit court concluded that B.M.R.'s family members were witnesses for the purposes of a no-contact order because they were all going to testify "that they were treated different, they were told to go outside while he was … committing these crimes, that they talked about the degree of control, the fear that he exercised over them." These individuals had also submitted statements that they wanted no contact with Richards, so the circuit court concluded that the no-contact order was in the public interest. *See* WIS. STAT. § 973.049(2). We discern no erroneous exercise of discretion, so there is no arguable merit to a challenge to the circuit court's entry of the no-contact order or its denial of the postconviction motion.

Richards makes several complaints in his response that fall into the rubric of ineffective assistance of counsel. There are two elements to such claims: deficient performance by the attorney and prejudice from the deficiency. *See* ***State v. Mayo***, 2007 WI 78, ¶60, 301 Wis. 2d 642, 734 N.W.2d 115. We need not address both prongs if there is an insufficient showing on one of them. *See* ***id.***, ¶61.

One of Richards' complaints is that trial counsel had an obligation to see that the disputed portions of the presentence investigation were "fully resolved by a proper hearing." *See* ***State v. Anderson***, 222 Wis. 2d 403, 410, 588 N.W.2d 75 (Ct. App. 1998). First, we note that trial counsel brought several disputed points to the circuit court's attention, and the circuit court made note of these disputes. Richards does not suggest that there were additional discrepancies to

point out. Second, while the defendant in ***Anderson*** could claim a due process violation for being sentenced on potentially inaccurate information when the circuit court failed to resolve significant disputes about allegations in the presentence investigation, the circuit court in this case did not rely on any of the disputed points in setting Richards' sentence. Accordingly, there was nothing that needed to be resolved by hearing, so there was neither deficient performance nor prejudice from trial counsel's "failure" to pursue one.

Richards complains that he asked trial counsel to pursue bond modification, but counsel did not do so, causing Richards to be unable to complete work contracts, which would have allowed him to be paid and possibly retain his own attorney. Further, he claims to have lost all of his possessions from the room he was renting and he was unable to secure his work equipment at job sites. However, even if it were deficient performance of counsel to not seek bond reduction, there is nothing in the record that allows us to conclude Richards was prejudiced. At the initial appearance, Richards' attorney informed the court commissioner that Richards had open work contracts he would like to complete and that Richards could post about $600. Knowing this, the court commissioner set the bond at $15,000. We have no reason to believe the circuit court would have reduced the bond, since it was originally set with the knowledge of Richards' outstanding contract, nor is there reason to believe that Richards could have or would have posted some other amount less than $15,000 but above $600. Therefore, there is no arguable merit to a claim of ineffective assistance for failure to pursue a bond reduction motion.

Richards also complains that trial counsel should have requested a mental health evaluation or investigated a not-guilty-by-reason-of-mental-disease-or-defect (NGI) plea. The critical inquiry for an NGI plea is whether, because of a certain medical condition, the defendant lacks the substantial capacity to either appreciate the wrongfulness of his conduct or to conform

his conduct to the requirements of the law. *See* ***State v. Duychak***, 133 Wis. 2d 307, 316, 395 N.W.2d 795 (Ct. App. 1986). Appellate counsel reports that she had staff investigate, and the client services specialist found no evidence of any mental illness that would sustain an NGI plea, even though Richards evidently does have a diagnosis of borderline personality disorder. Further, Richards' "delusional thinking" is not a mental disorder and, because his borderline personality disorder is characterized by manipulative behavior, it would not even support a sentence modification motion. We, too, see nothing in this record that would have supported an NGI plea nor, for that matter, caused trial counsel to question Richards' competency.[5] Trial counsel is not ineffective for failing to pursue a meritless issue. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

Finally, Richards complains because his judgment of conviction originally declared him eligible for the challenge incarceration and substance abuse programs. Subsequently, the Department of Corrections wrote to the circuit court to advise that Richards was statutorily ineligible for both programs. The circuit court ordered the judgment be amended. Richards complains that "it is unfair for the court to include its approval on my judgment of conviction. Then to be revoked at a later date."

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[5] Richards points to a comment the circuit court made during sentencing as an indication that the circuit court observed his mental illness even though counsel did not. The statement, made to refute Richards' claim that the victim was happy to have sex with him, was "You are sick. She didn't have a choice." It is clear that the statement was a comment on the vulgarity of Richards' crimes, not a mental health diagnosis.

We have reviewed the sentencing transcript multiple times. At no point did the circuit court deem Richards eligible for either program. The original judgment of conviction therefore appears to have contained a scrivener's error made by the clerk of the circuit court. The circuit court was entitled to order such error corrected. *See* ***State v. Prihoda***, 2000 WI 123, ¶¶26-29, 239 Wis. 2d 244, 618 N.W.2d 857. It is not "unfair" to remove a sentencing term that the circuit court did not impose.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Hannah B. Schieber is relieved of further representation of Richards in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals