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December 9, 2014

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

2013AP2057-CRNM State of Wisconsin v. Quentin L. Davis (L.C. # 2010CF1355)

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

Counsel for Quentin Davis has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] concluding no grounds exist to challenge Davis's conviction for repeated sexual assault of the same child, with at least three violations of first- or second-degree sexual assault. Davis was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***,

[1] All references to the Wisconsin Statutes are to the 2011-2012 version unless otherwise noted.

386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Davis with repeated sexual assault of the same child. Davis filed a pre-trial motion to suppress statements he made to law enforcement officers. Before that motion was decided, Davis opted to enter an ***Alford***[2] plea to the crime charged. In exchange for his plea, the State agreed to dismiss and read in an identity theft charge from another case and join in defense counsel's recommendation of ten years' initial confinement and ten years' extended supervision. Out of a maximum possible forty-year sentence, the circuit court imposed a twenty-year sentence consisting of thirteen years' initial confinement and seven years' extended supervision.

The record discloses no arguable basis for withdrawing Davis's ***Alford*** plea. The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Davis completed, informed Davis of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering an ***Alford*** plea. The court confirmed Davis's understanding that it was not bound by the terms of the plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. Further, the transcript of the plea hearing shows Davis was aware that by entering his ***Alford*** plea before the suppression motion was

[2] An ***Alford*** plea is a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. ***State ex rel. Jacobus v. State***, 208 Wis. 2d 35, 54, 559 N.W.2d 900 (1997); *see also* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

decided, he was waiving the right to pursue the suppression challenge.[3] *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983) (by entering a plea other than not guilty, the defendant waives the right to challenge non-jurisdictional defects and defenses).

Upon our independent review of the record, this court discovered that at the plea hearing, the circuit court failed to personally advise Davis of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). A potential issue arises if Davis can show that his plea is likely to result in his "deportation, exclusion from admission to this country or denial of naturalization." WIS. STAT. § 971.08(2); *see also* ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1. Because Davis confirmed on the record that he is a citizen of the United States and, thus, not subject to deportation, any challenge to the plea on this basis would lack arguable merit. Ultimately, the record shows the plea was knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

There is no arguable merit to a claim that there was no factual basis for Davis's ***Alford*** plea. In order to determine whether a defendant committed a charged crime, the circuit court must establish a factual basis that the defendant committed the crime. WIS. STAT.

[3] Although Davis waived his right to pursue the suppression challenge, we conclude there is no arguable merit to any claim that trial counsel was ineffective for permitting the waiver. Before Davis entered his ***Alford*** plea, counsel explained "I believe part of the reason he wants to proceed now [is] that he wants to show good faith and wants to show that much additional cooperation to the court so that the court can take that into consideration at sentencing." Davis did not dispute counsel's recitation.

Ultimately, the record shows a strategic decision was made to go forward with a favorable plea agreement rather than pursue the suppression motion. Any contention counsel was ineffective for not pursuing the motion is unavailing because counsel cannot be faulted for failing to litigate a motion that became irrelevant by virtue of a strategic decision to enter an ***Alford*** plea. *See* ***Strickland v. Washington***, 466 U.S. 668, 689-91 (1984) (reasonable strategic decisions do not constitute ineffective assistance of counsel).

§ 971.08(1)(b). Here, the court reviewed the probable cause section of the criminal complaint, in which the thirteen-year-old victim alleged that Davis encountered her on the street after she ran away from home. The victim further alleged that Davis took her to a party at a Green Bay residence and had sexual intercourse with her in a back bedroom. According to the victim, she felt unable to leave the residence for approximately one week and during that week, she had sexual intercourse with Davis two times. The victim further alleged that she had sexual intercourse with Davis on two other occasions over the course of the next two months. The court also considered Davis's videotaped interview with police, in which Davis corroborated several details of the victim's account and admitted having sex with the victim on one occasion. Based on the facts alleged in the complaint, as partially corroborated by Davis's own admission, the court found "strong proof of guilt" as to each element of the crime. *See* ***State v. Smith***, 202 Wis. 2d 21, 27-28, 549 N.W.2d 232 (1996) (with ***Alford*** plea, there must be strong proof of guilt as to each element of crime).

Finally, there is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Davis's character, including his extensive criminal history; the need to protect the public; and the mitigating circumstances Davis raised. *See* ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Davis's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The no-merit report questions whether there is any arguable merit to a claim that the sentencing court inappropriately considered Davis's Correctional Offender Management Profile for Alternative Sanctions (COMPAS) assessment. The COMPAS, submitted as part of the

presentence investigation report (PSI), is an actuarial assessment tool that predicts the general likelihood that those with a similar history of offending are either less likely or more likely to commit another crime generally within the two year period following release from custody. In addition to identifying general levels of risk to re-offend, COMPAS identifies criminogenic needs specific to that offender which are most likely to effect future criminal behavior. The PSI specifies:

> For purposes of Evidence Based Sentencing, actuarial assessment tools are especially relevant to: 1. Identify offenders who should be targeted for interventions. 2. Identify dynamic risk factors to target with conditions of supervision. 3. *It is important to remember that risk scores are not intended to determine the severity of the sentence or whether an offender is incarcerated*. [Emphasis added.]

Here, the court discussed several sentencing factors it considered, including the following:

> The COMPAS assessments are important in this case. The COMPAS assessments are certainly considered by me. I concur. Just based on the narrative in comparison to the COMPAS report that he has a weak social tie. He has changing, unstable and disorganized lifestyle, and those are concerning. The COMPAS assessment score shows a high probability that he's likely to have drug or alcohol problems and needs substance abuse treatment prevention.

The court said generally that COMPAS assessments are important and were "certainly considered." Davis's COMPAS scores, however, were not determinative of the fact of his incarceration or the length of his sentence. Rather, the court properly considered the COMPAS results as a tool in establishing Davis's rehabilitative needs. Any challenge to the court's consideration of COMPAS would therefore lack arguable merit.

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

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

IT IS FURTHER ORDERED that attorney Ralph J. Sczygelski is relieved of further representing Davis in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals