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

2014AP590-CRNM State of Wisconsin v. Paul J. Klyce (L.C. # 2011CF1339)

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

Counsel for Paul Klyce has filed a no-merit report concluding there is no arguable basis for Klyce to withdraw his no contest plea or challenge the sentence imposed for sexual contact with a child under the age of thirteen. Klyce filed a response arguing: (1) he was originally charged with a crime that unconstitutionally relieved the State of its burden of proof and would deny him his right to a unanimous jury; (2) his appellate counsel failed to inform him that by not objecting to the no-merit procedure, he was giving up his right to direct appeal through the Wisconsin Supreme Court with counsel; and (3) his trial counsel was ineffective for not pursuing a question of his competency to stand trial or enter a plea. Upon our independent review of the

record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

The complaint charged Klyce with having sexual intercourse with a child under the age of twelve and repeated sexual assault of another child. An amended complaint added charges of felony intimidation of a witness and misdemeanor intimidation of a witness. Based on concerns raised by Klyce's attorney, the court ordered a competency examination. Doctor Richard Hurlbut reported Klyce was not competent to stand trial due to cognitive limitations. The report noted Klyce attended high school until tenth grade in special education classes due to a learning disability. As an adult, he had a driver's license and lived independently. He was aware of the charges, understood that a felony is more serious than a misdemeanor, understood that he could go to prison for these offenses, and gave an account of the events that led to the charges. He stated his jealous wife caused one of the victims to make false allegations. He understood the role of his attorney, but thought the district attorney is the one who "types things." However, he was also aware of a lady (the district attorney) who worked against him, saying bad things about him to the judge. He was also aware of what a witness is. He explained the role of a judge as a person who looks at the case, asks questions, talks to the attorneys and makes decisions whether you did something or not. When asked about the role of the jury, Klyce became nervous and emotional. He indicated if found not guilty he would be free to go, but if found guilty he had to stay and the jury or judge decides for how long. Based on his examination, Hurlbut concluded Klyce needed to be exposed to instructional materials concerning his case and courtroom procedures. If that was done, Hurlbut expressed confidence Klyce would be restored to competency.

Approximately five weeks later, Dr. Adrea McGlynn of the Mendota Mental Health Institute submitted a report to the court stating her opinion that Klyce did not lack substantial mental capacity to understand the proceedings and assist in his own defense. Based on several tests and staff observations, McGlynn reported the results suggested Klyce feigned deficits in legal knowledge and did not perform to the best of his ability. Even with that caveat, he scored an I.Q. of 71, which McGlynn described as borderline range of intellectual functioning. His competency assessment for standing trial ranked in the lower end of borderline, and Klyce scored in the range of defendants who were not mentally retarded. McGlynn concluded Klyce was malingering and displayed adult antisocial behavior and borderline intellectual functioning. Based on McGlynn's report, Klyce's counsel conceded Klyce's competency and asked the court to set the matter for a preliminary hearing.

Klyce waived his preliminary hearing based on an offer from the State. In return for waiving the preliminary hearing, Klyce would have the option of pleading guilty or no contest to count one, amended to reflect an allegation of sexual contact rather than intercourse. That charge would eliminate a mandatory twenty-five year confinement. The remaining charges would be dismissed and read in. Klyce eventually accepted a plea agreement with similar terms after the State also agreed to recommend a sentence of ten years' initial confinement and ten years' extended supervision. The court accepted Klyce's no contest plea and imposed a sentence of fifteen years' initial confinement and twenty years' extended supervision.

The record discloses no arguable manifest injustice upon which Klyce could withdraw his no contest plea. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, supplemented by a Plea Questionnaire and Waiver of Rights Form, informed Klyce of the elements of the offense, the definition of sexual contact, the potential

penalties and the constitutional rights Klyce waived by pleading no contest. Klyce repeatedly assured the court that he understood the elements, potential penalties and constitutional rights. As required by ***State v. Hampton***, 2004 WI 117, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, the court informed Klyce it was not part of the plea negotiations and could impose the maximum sentence if the court considered that appropriate. The court also warned Klyce that he could be deported if he was not a citizen of the United States. Klyce agreed the facts alleged in the complaint were true. Klyce confirmed that the no contest plea was not the product of any promise other than the recited plea agreement. The record shows Klyce's plea was knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record also discloses no arguable basis for challenging the sentencing court's discretion. The court could have imposed a sentence of forty years' initial confinement and twenty years' extended supervision. The court appropriately considered the seriousness of the offense, the read-in charges, Klyce's character and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court cited examples of Klyce's failure to conform his behavior to the standards of the community, as evidenced by his prior record, and concluded the offense was aggravated by Klyce's exploitation of a position of trust between himself and the victim. The court considered no improper factors, and the sentence is not arguably so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In his response to the no-merit report, Klyce argues that the charge in the initial complaint of repeated sexual assault of the same child relieves the State of its burden of proof and would deprive him of his right to a unanimous verdict because the jury would not be required to agree on which three sexual assaults constituted that crime. That argument was

rejected in ***State v. Johnson***, 2001 WI 52, ¶28, 243 Wis. 2d 365, 627 N.W.2d 455. In addition, because that offense was dismissed, any constitutional infirmity related to that charge would not create grounds for appeal.

Klyce next complains that his appellate counsel failed to inform that he would lose his right to counsel under the no-merit procedure before he could seek review by the Wisconsin Supreme Court. Counsel's duty after being discharged by this court pursuant to WIS. STAT. RULE 809.32(3) (2011-12),[1] is limited to informing the client of the time limit for filing a pro se petition for review. While the client loses representation by counsel, he/she does not lose the opportunity to seek review by the Wisconsin Supreme Court. Counsel's failure to inform Klyce that he would not have counsel for any petition for review following this court's conclusion that any appeal would lack arguable merit presents no basis for appeal.

Finally, Klyce claims his counsel was ineffective for failing to request an additional competency determination. He contends he "simply did not understand the proceedings." However, at the time his competency was being questioned, Klyce contended he was competent. Throughout the plea colloquy he assured the court that he understood the proceedings. Hurlbut's initial conclusion that Klyce was not competent to proceed indicated he was confident Klyce could become competent if exposed to instructional material concerning his case and courtroom procedures. McGlynn's report five weeks later established his competency and indicated he feigned deficits in legal knowledge and did not perform to the best of his ability when he was

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

tested for competency. Nothing in the record suggests that further competency evaluations would have produced any other result.

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

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

IT IS FURTHER ORDERED that attorney Chad R. Thomas is relieved of his obligation to further represent Klyce in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals