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DISTRICT IV

January 29, 2014

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

2013AP1694-CRNM State of Wisconsin v. Thomas Andrew Davies
(L.C. # 2008CF3564)

Before Lundsten, Higginbotham and Sherman, JJ.

Appointed counsel for Thomas Davies has filed a no-merit report seeking to withdraw as appellate counsel.¹ See WIS. STAT. RULE 809.32; *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Davies' plea, revocation of Davies' hold-open agreement, or sentencing. Davies was sent a copy

¹ Attorney Donna Hintze was appointed to represent Davies on appeal and filed a no-merit report on Davies' behalf. Attorney Donald Lange, was subsequently substituted as Davies' counsel in this appeal.

of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Davies was charged with second-degree sexual assault of a child and exposing a child to harmful material. Pursuant to a plea agreement, Davies pled no contest to an amended charge of fourth-degree sexual assault and guilty to exposing a child to harmful material. The parties entered a hold-open agreement to jointly request the court defer judgment on the exposing a child to harmful material charge and impose two years of probation on the sexual assault charge. The parties agreed that, if Davies successfully completed probation, they would jointly move to dismiss the exposing a child to harmful material charge; if Davies' probation was revoked, Davies would not oppose the State's motion to enter judgment on that charge. The circuit court followed the joint recommendations in the hold-open agreement.

Davies' probation was revoked and the State moved to revoke the hold-open agreement. Davies did not oppose the motion, and the court found Davies guilty of exposing a child to harmful material. In March 2013, the court sentenced Davies to one and one-half years of initial confinement and two years of extended supervision.

This appeal is from the March 2013 judgment of conviction for exposing a child to harmful material following revocation of the hold-open agreement. Accordingly, the issues addressed in the no-merit report and this opinion are limited to those arising from the March 2013 judgment.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the validity of Davies' plea. A post-sentencing motion for plea withdrawal must establish that

plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the record discloses no arguable basis for withdrawing Davies' guilty plea. The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Davies completed, confirmed Davies' understanding of information such as the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering his plea. *See State v. Hoppe*, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. The court confirmed Davies' 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, and also advised Davies of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support a conclusion that Davies committed the crime charged. The record shows that 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 indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Davies' plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to the hold-open agreement or the circuit court's entry of the judgment of conviction on the State's motion to revoke the agreement. We agree with counsel's assessment that there would be no arguable merit to postconviction proceedings based on the hold-open agreement or the court's entry of the judgment of conviction after Davies' probation for the sexual assault conviction was revoked.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to Davies' sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. *State v. Ramuta*, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered facts relevant to the standard sentencing factors and objectives, including the gravity of the offense, Davies' character, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the applicable penalty range, and was not so excessive or unduly harsh as to shock the conscience. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We discern no erroneous exercise of the court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate 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 Lange is relieved of any further representation of Davies in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals