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February 11, 2015

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

2014AP666-CRNM State of Wisconsin v. Lane M. Lewandowski (L.C. #2012CF89)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Lane M. Lewandowski appeals from a judgment of conviction entered upon his no contest plea to an amended count of physical abuse of a child-recklessly causing bodily harm, contrary to WIS. STAT. § 948.03(3)(b) (2011-12).[1] Lewandowski's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Lewandowski received a copy of the report, was advised of his right to file a response,

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

and has elected not to do so. Upon consideration of the no-merit report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In 2012, the State filed a criminal complaint charging Lewandowski with one count of physical abuse of a child by intentionally causing bodily harm to SMC, a Class H felony, contrary to WIS. STAT. § 948.03(2)(b). The complaint alleged that in responding to a report of possible child abuse, police were informed by multiple witnesses that Lewandowski grabbed six-year old SMC by the neck and lifted her off the ground after discovering that she had entered the kitchen to get some soda. SMC reported that Lewandowski clasped his hands around her neck and lifted her about eight to twelve inches off the ground. She said that Lewandowski did this two times and it caused her pain.

Pursuant to a plea agreement, the State filed an amended information containing a lesser charge of recklessly causing bodily harm to a child. Lewandowski pled no contest to the amended charge and as part of a written plea agreement, the State moved to dismiss and read in two other circuit court cases. The plea agreement specified that the State would request a presentence investigation report (PSI) and that both parties were free to argue at sentencing. A PSI was filed and the court imposed a bifurcated twenty-seven-month sentence comprised of fifteen months of initial confinement and twelve months of extended supervision. The court also ordered that Lewandowski have no contact with SMC. Postconviction counsel wrote a letter to the court asking that it modify the no contact condition to allow contact with agent approval. The court denied the request, explaining that "Given Mr. Lewandowski's long history of impulse control issues, this Court does not believe contact with the victim in any form is safe or appropriate."

The no-merit report addresses whether there is any basis for a challenge to the validity of Lewandowski's no contest plea and whether the trial court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

The record demonstrates that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). As part of the plea colloquy, the trial court drew Lewandowski's attention to the signed plea questionnaire/waiver of rights form and its attachments, and ascertained that he had reviewed and understood the documents. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken). The trial court questioned Lewandowski about his age, education, and mental health, and Lewandowski confirmed that he understood the proceedings and that his medications were not causing any confusion. The trial court specifically ascertained Lewandowski's understanding of the parties' plea agreement, the applicable maximum penalty, and that the court was not bound by any recommendations and could impose the maximum sentence.[2] The court explained the significance of the read-in offenses, including that they could be considered for sentencing and restitution purposes. The trial court recited the constitutional rights waived by Lewandowski's

[2] Though the plea questionnaire states the maximum penalty for the original Class H felony charge, the trial court informed Lewandowski of the correct penalty, and the correct maximum was stated in the amended information to which Lewandowski pled no contest. The record establishes that the trial court ascertained Lewandowski's understanding of the correct maximum penalty prior to accepting his plea.

plea and ensured he understood that by pleading no contest, he was waiving those rights and would be found guilty. The trial court ascertained Lewandowski's understanding of the nature of and factual basis for the charge, and determined that the criminal complaint contained a factual basis for the offense of conviction. There is no arguably meritorious challenge to the plea-taking procedures in this case.

Appointed counsel next addresses whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (sentencing is committed to the trial court's discretion, and our review is limited to determining whether the court erroneously exercised that discretion). Here, in fashioning its sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In terms of Lewandowski's character, the court considered his history of serving his country while in the Navy and that he was "apparently pretty good at it." The court considered that Lewandowski had been involved in a motorcycle accident and had "never been quite the same," and that though Lewandowski had been kicked out of school, he received his GED and went on to serve in the Navy. The court also considered what it characterized as some negative behavioral patterns, such as a long period of unemployment and substance abuse and a lengthy criminal record which included numerous prison incarcerations and revocations of supervision. In the end, the court determined that probation was an insufficient behavioral control given Lewandowski's prior revocations and demonstrated violations of court-imposed bond conditions.

The court characterized the offense as "a serious and significant violation" in that Lewandowski, while responsible for the child's welfare, exerted "significant physical force" that

caused her to "hurt real bad." The court emphasized that Lewandowski, on his own, "made the decision to do this, and you took advantage of a vulnerable child who was only six years old."

In terms of needing to protect the public and achieve its sentencing goals, the court explained that the real decision was whether to impose a jail sentence or a prison sentence. The court reminded Lewandowski of his lengthy criminal history dating back to 1990 and determined that Lewandowski had "a history of physical violence and a short temper that puts people around [him] at risk." The court acknowledged that Lewandowski had been taking his medications, but determined that he would stop taking them if left to his own devices, thus presenting "a significant risk to the public because you have a short fuse, and if you're not taking your medications, it is all the worse." The court concluded that a prison sentence was necessary and appropriate given Lewandowski's criminal and supervision history, the severity of the offense, the bond condition violations, the assessment in the PSI that Lewandowski presented a significant risk of violent recidivism, and the PSI author's recommendation for a prison sentence. On review, we afford the sentencing court a strong presumption of reasonability, and if discretion was properly exercised, we follow "a consistent and strong policy against interference" with the court's sentencing determination." ***Gallion***, 270 Wis. 2d 535, ¶18. We will sustain a sentencing court's reasonable exercise of discretion "even if this court or another judge might have reached a different conclusion." ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. In this case, the trial court identified the proper sentencing

factors, explained its process, and reached a reasonable conclusion. There is no meritorious challenge to the trial court's exercise of sentencing discretion. [3]

Further, we cannot conclude that the sentence imposed was unduly harsh. A sentence may be considered unduly harsh or unconscionable only when it 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." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citations omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.*** at ¶¶31-32 (citation omitted). Here, the twenty-seven-month bifurcated sentence was well below the forty-two month maximum authorized by statute, and is not so excessive or unusual as to shock the public's sentiment.

Finally, we agree with appellate counsel's analysis and conclusion that the court properly exercised its discretion in imposing and refusing to modify its no contact provision.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Lewandowski further in this appeal.

Upon the foregoing reasons,

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

[3] The trial court awarded twelve days of sentence credit and our review of the record does not provide any reason to doubt the propriety of the court's sentence credit award.

IT IS FURTHER ORDERED that Attorney Katie R. York is relieved from further representing Lane M. Lewandowski in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals