



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

March 6, 2015

To:

Hon. Stephanie Rothstein
Circuit Court Judge
Criminal Justice Facility
949 North 9th Street
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Michael J. Backes
Law Offices of Michael J. Backes
P.O. Box 11048
Shorewood, WI 53211

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Michael Xiong 511200
Kettle Moraine Corr. Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2014AP2341-CRNM State of Wisconsin v. Michael Xiong (L.C. #2013CF1486)

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

Michael Xiong appeals a judgment convicting him of first-degree sexual assault of a child. Attorney Michael J. Backes filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Xiong responded to the report. After considering the no-merit report and the response,

¹ All references to the Wisconsin Statutes are to the 2013-14 versions unless otherwise noted.

and after conducting an independent review of the record, we conclude that there are no issues of arguable merit that Xiong could raise on appeal.

The no-merit report first addresses whether Xiong could attempt to withdraw his no-contest plea on the grounds that it was not knowingly, voluntarily, and intelligently entered. In order to ensure that a defendant is knowingly, intelligently, and voluntarily waiving the right to trial by entering a plea, the circuit court must conduct a colloquy with the defendant to ascertain that the defendant understands the elements of the crimes, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Although “not intended to eliminate the need for the court to make a record demonstrating the defendant’s understanding of the particular information contained therein,” the circuit court may refer to a plea colloquy and waiver of rights form, which the defendant has acknowledged reviewing and understanding, reducing “the extent and degree of the colloquy otherwise required between the trial court and the defendant.” *State v. Hoppe*, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

At the outset of the plea hearing, the circuit court had before it the plea questionnaire and waiver of rights form completed by Xiong and his lawyer, as Xiong’s lawyer explained to the court that Xiong intended to enter a no-contest plea to the charge of first-degree sexual assault, and understood that the court would find him guilty based on the no-contest plea. Xiong’s lawyer explained that the contact that formed the basis for the charge was the eighty-eight-year-old victim’s statement that Xiong was “spooning behind her ... and ... squeezing her butt.” He also explained to the circuit court that Xiong was advised of the jury instructions attached to the plea questionnaire form, which listed the elements of the crime. Knowing all of that information,

Xiong's lawyer explained that Xiong wanted to enter a plea to the charge. Xiong's lawyer asked Xiong whether what he had just said was correct, and Xiong said that it was correct. Xiong's lawyer then asked Xiong whose choice it was to enter a no-contest plea, and Xiong responded, "It was my choice."

The circuit court reviewed with Xiong the various rights he was waiving by entering the no-contest plea and the potential maximum prison term he faced. Xiong said he understood. The circuit court asked Xiong whether he had reviewed the definition of sexual contact in the jury instructions and the other elements of the offense, and asked whether he understood the information. Xiong said that he did. The circuit court asked Xiong if he read the complaint or had it read to him and understood the charges. Xiong said he did. The circuit court informed Xiong that if he were not a citizen, he could be deported as a result of the conviction. *See State v. Douangmala*, 2002 WI 62, ¶46, 253 Wis.2d 173, 646 N.W.2d 1. The circuit court ascertained that Xiong had obtained his GED and asked him whether anyone had made any promises or threats to get him to plead guilty. Xiong said that they had not. Based on the circuit court's plea colloquy and the plea questionnaire and waiver of rights form, there would be no arguable merit to an appellate challenge to the plea.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion by imposing a sentence that was excessive or too harsh. To successfully claim that the circuit court's sentence was excessive, a defendant "must show an unreasonable or unjustifiable basis for it in the record." *State v. Glotz*, 122 Wis.2d 519, 524, 362 N.W.2d 179 (Ct. App. 1984). Xiong faced a total of sixty years of imprisonment, with up to forty years of initial confinement. The circuit court imposed seven years of imprisonment, with three years of initial confinement and four years of extended supervision. Before imposing the

sentence, the circuit court considered the circumstances of the crime and the effect of the crime on the victim. The circuit court concluded that prison was necessary to protect the public, to punish Xiong and to assist Xiong with his rehabilitative needs. The circuit court explained its application of the various sentencing considerations in depth in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence is not excessive in light of the facts and circumstances of this case. There would be no arguable merit to a claim that the circuit court's sentence was excessive or otherwise a misuse of discretion.

The no-merit report next addresses whether there would be arguable merit to a claim that Xiong's sentence should be modified. Counsel explains that Xiong was unable to provide him with any information that might serve as a basis for modifying the sentence and counsel's review of the record revealed no grounds for a motion to modify the sentence. Our review of the record corroborates counsel's assessment. There would be no arguable merit to this claim.

In his response, Xiong contends that he pled guilty to the charge only because he was told to do so by his lawyer. The record undermines Xiong's claim. During the plea colloquy, Xiong told the circuit court that it was *his* choice to enter the plea. Moreover, the circuit court asked Xiong if anyone had threatened him or coerced him into entering the plea, and Xiong said no. Counsel explains in the no-merit report that Xiong contends that he did not know what he was doing during the assault because he was drunk. This is not grounds for appellate relief because intoxication is not a defense to the crime. Counsel also states that Xiong contends that he did not know he would have to register as a sex offender. The record belies this claim. The circuit court told Xiong during the plea colloquy that he would be required to register as a sex offender if he

entered a plea, and Xiong told the court he understood. These claims do not provide arguably meritorious grounds for appellate relief.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney Michael Backes of further representation of Xiong.

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

IT IS FURTHER ORDERED that Attorney Michael Backes is relieved of any further representation of Xiong in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals