



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 III

April 7, 2015

To:

Hon. James J. Duvall
Circuit Court Judge
407 Second St South
Alma, WI 54610

Sally L. Wellman
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Margaret Feuerhelm
Clerk of Circuit Court
Pierce County Courthouse
P.O. Box 129
Ellsworth, WI 54011-0129

Joseph N. Ehmann
First Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Sean E. Froelich
Pierce County District Attorney
P.O. Box 808
Ellsworth, WI 54011-0808

Michael Dennis Kelly
P.O. Box 1273
Wellton, AZ 85356-1273

Ellen J. Krahn
Assistant State Public Defender
P. O. Box 7862
Madison, WI 53707

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

2014AP1067-CRNM State of Wisconsin v. Michael Dennis Kelly
(L. C. #2013CF54)

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

Counsel for Michael Kelly has filed a no-merit report concluding there is no basis to challenge Kelly's conviction for stalking. Kelly was advised of his right to respond and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal and summarily affirm.

Kelly's ex-wife contacted the River Falls Police Department on numerous occasions to report Kelly confronting her at her workplace, sending her text messages and sitting in his car outside the window where her desk was situated at work. On April 7, 2013, she called police to report Kelly was ringing the door bell and knocking on the door at her home. A police officer was dispatched to the home and found Kelly yelling in the backyard. The officer also saw Kelly use a toolbox to break the window of a car parked in the driveway. Kelly was yelling that this was not his car and it should not be in his driveway. The officer told Kelly he was under arrest but he continued to yell and stepped toward the officer in a fighting gesture.

A restraining order put in place after the Kellys' divorced, and later converted to a harassment restraining order, was in effect at all times relevant to this appeal. Bond had also been placed in an unrelated case on April 5, 2013, and one condition required Kelly to have absolutely no direct or indirect contact with his ex-wife at her home or place of employment by telephone, e-mail, or mail, among other things.

Kelly was charged with two counts of felony bail jumping; one count of stalking; one count of criminal damage to property; one count of resisting an officer; and one count of violating a harassment injunction. A plea agreement was reached whereby Kelly pled to one count of felony bail jumping, under a three-year deferred prosecution agreement, and to the stalking charge. The parties jointly recommended one year in the county jail on the stalking charge. In addition, the criminal damage to property charge would be dismissed and read in, and the remaining charges would be dismissed outright, as well as charges in numerous other cases pending against Kelly. The circuit court followed the plea agreement, and imposed a sentence of one year in jail on the stalking charge.

There is no manifest injustice upon which Kelly could withdraw his pleas. See *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, together with the plea questionnaire and waiver of rights form, informed Kelly of the constitutional rights he waived by pleading, the elements of the offenses and the potential penalties. The complaint provided an adequate factual basis for the convictions. The court did not specifically advise Kelly it was not bound by the terms of the plea agreement. See *State v. Hampton*, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. However, the court followed the plea agreement and imposed the jointly recommended sentence. The court's failure to provide the *Hampton* warning is therefore harmless. See *State v. Johnson*, 2012 WI App 21, ¶14, 339 Wis. 2d 421, 811 N.W.2d 411. The court also did not advise Kelly of the potential deportation consequences of his pleas, but that provides no grounds for relief. The no-merit report represents that Kelly could not show his pleas are likely to result in deportation, and Kelly failed to refute that representation. See WIS. STAT. § 971.08(2)¹; *State v. Douangmala*, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1. The record shows the pleas were knowingly, intelligently and voluntarily entered. See *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Entry of a valid guilty or no contest plea constitutes a waiver of nonjurisdictional defects and defenses. *Id.* at 265-66.

The record also discloses no basis to challenge the court's sentencing discretion. A defendant who affirmatively approves his sentence cannot attack it on appeal. See *State v. Scherreiks*, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

¹ References to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Our independent review of the record discloses no other issues of arguable merit.

Therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Ellen Krahn is relieved of further representing Kelly in this matter.

Diane M. Fremgen
Clerk of Court of Appeals