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DISTRICT III

April 14, 2015

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

2014AP2509-CRNM State of Wisconsin v. Kaleb D. Ross (L. C. No. 2011CF505)

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

Counsel for Kaleb Ross has filed a no-merit report concluding there is no arguable basis for Ross to appeal judgments of conviction and a postconviction order denying Ross's motion to withdraw his guilty and no-contest pleas to sexual assault of a child under sixteen years of age, two counts of disorderly conduct and criminal damage to property. Ross was advised of his right to respond to the report 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 basis for appeal.

The complaint charged seventeen-year-old Ross with eight crimes: (1) sexual assault of a child under sixteen years of age; (2) attempted sexual assault of a child under sixteen years of age; (3) sexual assault of a child under sixteen years of age; (4) false imprisonment; (5) (6) disorderly conduct; (7) misdemeanor theft; and (8) criminal damage to property as a party to a crime. The complaint alleged Ross pulled a shirt out of one of the victims' backpacks and refused to give it back. Later, Ross and two of his friends called the victims asking them to meet at a Pizza Hut so they could return the shirt. When the victims arrived, Ross was wearing the shirt and refused to give it back. The boys, all intoxicated, attempted to grab and kiss the victims. The victims rejected Ross's suggestion that the boys go back to the apartment with the victims, and the victims ran toward their apartment with the boys chasing them. When the victims arrived at the apartment, they closed the door, leaving the boys in the hall.

When one victim tried to leave, Ross grabbed her "crotch" and her "boobs." The victims reentered the apartment and the boys started kicking at the door, eventually breaking it. When the boys left, the victims heard a crash in the hallway and later discovered a microwave had been knocked to the ground. Another victim reported that during the incident, Ross "walked up to me and tried to make me feel his penis," and tried to kiss her and take off her shirt and pants. She reported he grabbed her breasts, "butt" and "crotch."

Pursuant to a plea agreement, Ross entered no-contest pleas to one count of sexual assault of a child and one count of criminal damage to property, and guilty pleas to two counts of disorderly conduct. The agreement called for deferred entry of the sexual assault conviction and probation for the disorderly conduct convictions. If Ross successfully completed the five years' probation, the sexual assault charge would be reduced to fourth-degree sexual assault, a misdemeanor. The court accepted the agreement, deferred entry of the judgment of conviction

on the sexual assault charge, withheld sentence and placed Ross on probation for five years on the disorderly conduct charges (later modified to two years), and sentenced Ross to eight months in jail for criminal damage to property, with credit for 228 days.

Shortly thereafter, Ross violated the conditions of his probation and the deferred judgment by committing additional crimes.[1] Before the sentencing hearing, Ross filed five motions to withdraw his pleas. First, he alleged he was pressured by his attorney into accepting the plea agreement, he did not understand the conditions of probation would make him subject to sex offender rules, and he believed there were "positive defenses" to the sexual assault charge. The second motion alleged Ross was not "provided with knowledge of all of the elements" of the sexual assault charge. The third motion again alleged that Ross was not told the elements of the sexual assault charge "other than a reference to a document that does not appear in the record" (the jury instruction), and that "there was a failure to indicate that he would have sex offender restrictions with regard to his probation, even though there were specific references made into the record as to other types of conditions he would have." The fourth motion alleged Ross's trial counsel told Ross there was no way for Ross to access the video of the victim interviews at the jail, but Ross's subsequent discussion with jailers established that arrangements could have been made for him to view the videos. The fifth motion to withdraw his pleas alleged Ross suffers from Graves disease, causing him to not fully consider all of the consequences before accepting the plea agreement. The court denied all five motions to withdraw the pleas and proceeded to sentencing.

[1] Other offenses charged in separate complaints are not the subject of this appeal.

On the disorderly conduct charges, the court imposed and stayed concurrent sixty-day jail sentences and placed Ross on probation. On the sexual assault charge, the court imposed and stayed a sentence of eight years' initial confinement and five years' extended supervision, and placed Ross on probation.

Ross filed a postconviction motion to withdraw his pleas, alleging the plea agreement was invalid under WIS. STAT. § 971.39(1)(f) (2013-14),[2] because that statute requires the court to dismiss with prejudice any charge subject to the agreement upon completion of the period of the agreement, and does not authorize reduction of the charge to fourth-degree sexual assault. The court denied the motion without a hearing.

The record discloses no arguable basis for Ross to withdraw his guilty and no-contest pleas. The court's acceptance of the agreement to defer entry of the judgment of conviction constituted a sentencing for purposes of determining which standard should be used to decide the motions to withdraw the pleas. ***State v. Daley***, 2006 WI App 81, ¶18, 292 Wis. 2d 517, 760 N.W.2d 146. Therefore, Ross was required to meet the manifest injustice standard for all six of his motions to withdraw his pleas. None of the motions met that standard.

First, the record does not support Ross's claim of undue pressure from his counsel to accept the plea agreement. At the plea hearing, the court specifically asked whether "anyone put any pressure on you, promise you or threaten you to make you give up your rights and enter into a plea?" Ross answered "No." If Ross had complied with the terms of his probation and deferred judgment, the plea agreement would have reduced his prison exposure by more than

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

100 years, resulting in only an eight-month jail sentence with credit for 228 days. Even strong urging by counsel to accept that agreement would not make the pleas involuntary.

Second, Ross's lack of knowledge that sex offender rules could be imposed by his probation agent does not constitute grounds for withdrawing the pleas. The court is required to inform a defendant of the direct consequences of a plea. ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Conditions of probation imposed by the Department of Corrections are collateral consequences that need not be disclosed before the court can validly accept guilty and no-contest pleas. *See* ***State v. James***, 176 Wis. 2d 230, 244, n.6, 500 N.W.2d 345 (Ct. App. 1993).

Third, Ross's assertion that there were "positive defenses" to the charges lacks specificity. A varied guilty or no-contest plea constitutes a waiver of defenses. ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986).

Fourth, Ross's motions do not establish lack of knowledge of the elements. Ross claims he was not told the elements of the sexual assault charge "other than a reference to a document … not … in the record." The court's colloquy mentioned the jury instructions for sexual assault, although the instructions were not appended to the Plea Questionnaire/Waiver of Rights Form. Other jury instructions were attached to the form. Nonetheless, Ross's motions do not claim lack of knowledge of the elements. At the plea hearing, Ross assured the court that his counsel explained everything so that he could understand it and he understood all of the charges. The court asked whether Ross wanted the court to go over the elements again, and Ross responded, "No, sir."

Fifth, Ross's trial counsel's failure to show Ross the video recordings of the victims' statements does not provide a basis for withdrawing the pleas. Ross was given copies of the transcripts of the interviews. His motions do not identify any aspect of the video recordings that might reasonably have persuaded him to forgo the very generous plea agreement and go to trial on the eight charges. *See* ***Hill v. Lockhart***, 474 U.S. 52, 58-59 (1985).

Sixth, Ross's diagnosis with Graves disease provides no basis for withdrawing his pleas. The court noted Ross did not appear unduly anxious or nervous at the plea hearing, and there was no indication that any medical condition interfered with Ross's ability to enter knowing, voluntary and intelligent pleas.

Finally, the court properly denied the postconviction motion to withdraw the pleas without a hearing. The motion was based on WIS. STAT. § 971.39, which applies only to counties with a population less than 100,000. The circuit court found Marathon County's population exceeded 100,000. Therefore the statute does not apply. The court also correctly noted that the statute refers to "deferred prosecutions," not deferred entry of a judgment. Therefore the plea agreement to reduce the charge to fourth-degree sexual assault upon successful completion did not violate § 971.39.

The record discloses no arguable basis for challenging the sentencing court's discretion. The court could have imposed consecutive sentences totaling more than forty-one years' imprisonment and fines totaling $112,000. The court appropriately considered the seriousness of the offenses, Ross'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 considered no improper factors and the

imposition of stayed sentences and probation 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).

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

IT IS ORDERED that the judgments and order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Roberta Heckes is relieved of her obligation to further represent Ross in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals