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DISTRICT II

August 26, 2015

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

2014AP2681-CRNM State of Wisconsin v. Kirk P. B. (L.C. #2013CF134)

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

Pursuant to a negotiated plea, Kirk P. B. pled no contest to one count of incest with a child; one count of sexual intercourse with a child age sixteen or older was dismissed and read in at sentencing.[1] Appointed appellate counsel, Erica L. Bauer, has filed a thorough no-merit report

[1] The caption has been amended to use only the initial of appellant's surname so as not to identify the victim.

The judgment of conviction correctly recites the offenses and penalties but indicates that appellant pled not guilty rather than no contest.

pursuant to WIS. STAT. RULE 809.32 (2013-14)[2] and ***Anders v. California***, 386 U.S. 738 (1967). Kirk received a copy of the report and was advised of his right to file a response. Despite being granted the extensions of time he requested, he has not exercised his right to do so. From our independent review of the record as mandated by ***Anders***, we conclude that appellate counsel correctly analyzes the issues raised in the no-merit report as lacking arguable merit.

The no-merit report addresses whether Kirk's no-contest plea was knowingly, intelligently and voluntarily entered. To ensure that a plea is knowing, intelligent, and voluntary, the trial court must ascertain that a defendant understands the nature of the charges, the potential punishment, and the constitutional rights being relinquished by entering the plea, and that the defendant in fact committed the crime charged. WIS. STAT. § 971.08(1)(a), (b); ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The colloquy here satisfied this standard.

The no-merit report also addresses whether the trial court erroneously exercised its discretion when imposing sentence. Sentencing is a matter within the trial court's discretion, ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987), and the court is presumed to have acted reasonably, ***State v. Haskins***, 139 Wis. 2d 257, 268, 407 N.W.2d 309 (Ct. App. 1987). The defendant bears the burden of showing from the record that a sentence is unreasonable. ***Id.*** The primary factors the court must consider are the gravity of the offense, the character of the offender, and the need for protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984).

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

The court imposed a thirty-year sentence, bifurcated as twenty years' confinement and ten years' extended supervision. It gave the greatest weight to the gravity of the "monstrous" offense, sodomizing his sixteen-year-old daughter as "punishment" for recent misconduct. The court was not moved by the fact that the "violent assault" was a one-time occurrence because other behaviors—showing the girl sex toys and pornographic videos when his wife was not home, touching her genitals over her clothing, making inappropriate comments to her—indicated that the "act … had been fermenting for some time."

As to character, the court considered that Kirk was law abiding, worked fifteen years at the same job, went to church, and, according to his wife, other children, and mother-in-law, was a loving husband and family man. The court deemed these virtues insufficient, however, to outweigh the negative side of his character that his family either did not see or chose to ignore.

Kirk faced a forty-year sentence and was sentenced to thirty. Although the court exceeded the parties' and presentence investigation report's recommendations, it explained that the lengthy sentence was necessary to protect Kirk's six sons, until they were grown, from the influence of a father who would excuse as discipline such an "inhuman, horrendous, violent attack" against a female, his own daughter. "A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

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

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved of further representing Kirk P. B. in this matter.

Diane M. Fremgen
Clerk of Court of Appeals