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September 22, 2015

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

2015AP564-CRNM State of Wisconsin v. Eddie Albert Gordon (L.C. #2014CF1062)

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

Eddie Albert Gordon pled guilty to one count of repeated sexual assault of the same child and one count of child enticement. For the first count, the circuit court imposed a thirty-five-year term of imprisonment, bifurcated as twenty years of initial confinement and fifteen years of extended supervision. For the second count, the circuit court imposed an evenly-bifurcated

twenty-year term of imprisonment. The circuit court also ordered Gordon to pay two DNA surcharges. He appeals.

Appellate counsel, Attorney Jeremy C. Perri, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Gordon did not file a response. This court has considered the no-merit report, and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, J.A.B., born February 16, 1999, reported to police in March 2014 that she had been sexually assaulted by her mother's boyfriend, Gordon. J.A.B. told police that Gordon first sexually assaulted her by fondling her breasts on one occasion when she was ten or eleven years old. Beginning in August 2013, she alleged, Gordon had sexual intercourse with her on intermittent occasions, and in January and February of 2014, he had sexual intercourse with her every weekend. The criminal complaint went on to say that police also spoke to S.S., whose date of birth is December 29, 1998. S.S. alleged that Gordon, who she described as J.A.B.'s "stepdad," drove the two girls to his home on February 27, 2014. There, he took them to the basement, displayed his penis, played a pornographic DVD, offered the girls marijuana and alcohol, and discussed a "threesome."

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

The State charged Gordon with nine crimes: (1) first-degree sexual assault of a child, J.A.B., in violation of WIS. STAT. § 948.02(1)(e), a class B felony; (2) repeated sexual assault of a child, J.A.B., in violation of WIS. STAT. § 948.025(1)(e), a class C felony; (3) second-degree sexual assault of a child, J.A.B., in violation of § 948.02(2), a class C felony; (4) child enticement with intent to expose a sex organ to J.A.B., in violation of WIS. STAT. § 948.07(3), a class D felony; (5) causing a child, J.A.B., to view or listen to sexual activity in violation of WIS. STAT. § 948.055(1) & (2)(a), a class F felony; (6) child enticement with intent to have sexual contact with S.S., in violation of § 948.07(1), a class D felony; (7) causing a child, S.S., to view sexually explicit conduct in violation of § 948.055(1) & (2)(a), a class F felony; and (8)-(9) two counts of exposing genitals to a child in violation of WIS. STAT. § 948.10(1)-(1)(a), each count a class I felony. If convicted as charged, Gordon faced a possible maximum penalty of 222 years of imprisonment and $470,000 in fines. *See* WIS. STAT. §§ 939.50(3)(b)-(d), (f) & (i); 973.15(2)(a). Gordon waived a preliminary examination and decided within three months to resolve the case with a plea bargain.

We first consider whether Gordon could challenge the validity of his guilty pleas. "[A] plea will not be disturbed unless the defendant establishes by clear and convincing evidence that failure to withdraw the guilty ... plea will result in a manifest injustice." ***State v. Taylor***, 2013 WI 34, ¶48, 347 Wis. 2d 30, 829 N.W.2d 482. A plea that is not knowing, intelligent, and voluntary constitutes a manifest injustice. ***State v. Rodriguez***, 221 Wis. 2d 487, 492, 585 N.W.2d 701 (Ct. App. 1998).

At the outset of the plea hearing, the State described the terms of the plea bargain. Gordon would plead guilty to two of the crimes charged, namely: (1) repeated sexual assault of J.A.B. during the period between August 1, 2013, and March 1, 2014, in violation of WIS. STAT. § 948.025(1)(e); and (2) child enticement with intent to have sexual contact with S.S. on February 27, 2014, in violation of WIS. STAT. § 948.07(1). The State would move to dismiss and read in the other seven charges and recommend "substantial prison." Gordon confirmed that he understood the terms of the plea bargain.

The circuit court told Gordon he faced forty years of imprisonment and a $100,000 fine upon conviction of repeated sexual assault of a child, and he faced an additional twenty-five years of imprisonment and a second $100,000 fine upon conviction of child enticement. *See* WIS. STAT. §§ 948.025(1)(e), 948.07(1), 939.50(3)(c)-(d). Gordon said he understood. The circuit court explained to Gordon that it was not bound by the terms of the plea bargain or the recommendations of the parties, and that the court was free to impose the penalties that it deemed appropriate. Gordon said he understood. The circuit court described the effect of reading in dismissed charges for sentencing purposes. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. Gordon told the circuit court he understood.

The circuit court warned Gordon that, if he was not a citizen of the United States, his guilty pleas exposed him to the risk of deportation or exclusion from admission to this country. *See* WIS. STAT. § 971.08(1)(c). Gordon said he understood. Although the circuit court did not caution Gordon about the risks described in § 971.08(1)(c) using the precise words required by

the statute, minor deviations from the statutory language do not undermine the validity of a plea.[2] *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

The record contains a signed guilty plea questionnaire and waiver of rights form with an attached addendum. Gordon confirmed that he reviewed the form and addendum with his trial counsel and that he understood them. The plea questionnaire reflects that Gordon was forty-two years old at the time of the plea hearing and had completed twelve years of school. The questionnaire further reflects that Gordon understood the charges he faced and the rights he waived by pleading guilty, and that he had not been threatened or promised anything outside of the terms of the plea bargain to induce his guilty pleas. The signed addendum reflects Gordon's acknowledgment that by pleading guilty he would give up his rights to raise defenses, to challenge the validity of his arrest, and to seek suppression of his statements and other evidence.

The circuit court told Gordon that, by pleading guilty, he would waive the constitutional rights listed on the guilty plea questionnaire and waiver of rights form, and the circuit court reviewed those rights. Gordon said he understood. He also confirmed his understanding that, by pleading guilty, he would give up his rights to raise defenses to the charges and to file motions. Gordon assured the circuit court that he was entering his pleas freely and that he was pleading guilty because he was guilty of the offenses.

[2] We observe that, before a defendant may seek plea withdrawal based on failure to comply with WIS. STAT. § 971.08(1)(c), the defendant must show that "the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Gordon could make such a showing.

"[The] circuit court must establish that a defendant understands every element of the charges to which he pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may determine the defendant's understanding in a variety of ways, including by summarizing the elements or by "refer[ring] to a document signed by the defendant that includes the elements." ***Id.***, ¶56. Here, the circuit court reviewed the elements of each offense with Gordon. Gordon said he understood the elements and confirmed that he and his trial counsel had previously reviewed the jury instructions that describe the elements.[3]

A guilty plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). In this case,

[3] As appellate counsel notes, copies of jury instructions are in the record. Gordon's signature appears on the instructions, and Gordon told the circuit court during the plea colloquy that he reviewed them with his trial counsel. Appellate counsel does not discuss, however, that Gordon signed and filed WIS JI—CRIMINAL 2107 EXAMPLE. This instruction is for use when the defendant is charged with violating WIS. STAT. § 948.025(1)(b), which prohibits committing, during a specified period, three or more sexual assaults of the same child who is younger than twelve years old. Gordon's victim was fourteen years old on the first day of the time period specified in this case. We are satisfied, however, that trial counsel's use of WIS JI—CRIMINAL 2107 EXAMPLE to assist in explaining to Gordon the elements of repeated sexual assault of a child does not give rise to an arguably meritorious appellate issue. Pursuant to his plea bargain, Gordon pled guilty to one count of violating § 948.025(1)(e). To prove that Gordon was guilty of committing that crime, the State would be required to prove that he sexually assaulted the same child at least three times within a specified period, and the assaults constituted violations of either WIS. STAT. § 948.02(1) or § 948.02(2). *See* § 948.025(1)(e); WIS JI—CRIMINAL 2107. The circuit court explained those elements to Gordon on the record. A person violates § 948.02(2) by having sexual intercourse or sexual contact with a child younger than sixteen years old. Gordon filed a signed copy of WIS JI—CRIMINAL 2105, which describes the elements of sexually assaulting a child under sixteen in violation of § 948.02(2). The totality of the record thus demonstrates Gordon's knowledge of the elements that the State must prove to obtain a conviction for repeated sexual assault of a child under § 948.025(1)(e). Accordingly, there would be no arguable merit to challenging Gordon's plea to a violation of that statute on the ground that he lacked knowledge of the elements of the offense. *Cf.* ***State v. Brandt***, 226 Wis. 2d 610, 620-21, 594 N.W.2d 759 (1999) (when circuit court correctly explains elements, mistake regarding elements in document filed with guilty plea questionnaire does not provide a basis for postconviction relief).

Gordon told the circuit court that the facts in the complaint were true. The circuit court accepted Gordon's guilty pleas.

The record reflects that Gordon entered his guilty pleas knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the plea.

In the no-merit report, appellate counsel considers whether Gordon could pursue plea withdrawal on the ground that he entered his guilty pleas with a misunderstanding of the benefit he would receive through the plea bargain. Specifically, appellate counsel points out that the plea bargain included dismissal of two counts alleging that, on February 27, 2014, Gordon caused a child younger than thirteen years of age to view or listen to sexual activity. These allegations describe class F felonies, each carrying a maximum penalty of twelve years and six months of imprisonment and a $25,000 fine. *See* WIS. STAT. §§ 948.055(1) & (2)(a), 939.50(3)(f). J.A.B. and S.S. were the alleged victims, however, and both were older than thirteen years of age on February 27, 2014. Therefore, appellate counsel says, the State should properly have charged Gordon with two counts of violating § 948.055(2)(b) by causing a child younger than eighteen years of age to view or listen to sexual activity. A violation of that statute is a class H felony carrying a maximum penalty of six years of imprisonment and a $10,000 fine. *See* § 939.50(3)(h). Counsel nonetheless concludes that the charging errors do not give rise to an arguably meritorious issue. We agree, in light of the supreme court's holding in ***State v. Denk***, 2008 WI 130, ¶¶64-78, 315 Wis. 2d 5, 758 N.W.2d 775.

In ***Denk***, the defendant entered a plea bargain that included the State's promise to dismiss three charges: two misdemeanor counts carrying a combined maximum of seven months in jail; and a felony count carrying a maximum of six years of imprisonment. *See* ***id.***, ¶¶66-67, 76. The defendant subsequently moved for plea withdrawal, arguing that the facts underlying the dismissed felony charge could have supported only a misdemeanor conviction carrying a possible maximum penalty of thirty days in jail and a $500 fine. ***Id.***, ¶¶64, 68. The defendant argued that his plea bargain therefore conferred an illusory benefit, rendering his guilty plea unknowing and involuntary. ***Id.***, ¶65. The supreme court disagreed, concluding that, even if the defendant in fact faced only a possible misdemeanor penalty for the disputed charge, the defendant nonetheless received the benefit of his bargain because the State moved to dismiss the three charges as promised, and the bargain "substantially minimized [the defendant's] exposure." *See* ***id.***, ¶¶76-78.

Pursuant to ***Denk***, the errors identified by appellate counsel in this case do not constitute arguably meritorious grounds for further postconviction proceedings. Although the State mistakenly classified two of the charges against Gordon, he nonetheless, like the defendant in ***Denk***, received the benefit of his bargain when the State moved to dismiss seven charges as promised and substantially reduced his exposure. A motion for plea withdrawal based on the classification errors would lack arguable merit. *See* ***id.***, ¶78.

We next consider whether Gordon could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of

the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16. Additionally, the circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court indicated that punishment, rehabilitation, and protection of the community were the primary sentencing goals, and the circuit court discussed the factors that it deemed relevant to those goals. The circuit court described the crimes as "very serious," emphasizing the traumatic effect they had on the victims. The circuit court considered Gordon's character at length, noting he had a violent criminal history that included a conviction for false imprisonment as well as multiple convictions for both battery and substantial battery. *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). The circuit court further noted Gordon's sporadic employment history and his admission that he had a "marijuana problem." Although the circuit court acknowledged that Gordon was cooperative and remorseful, the circuit court noted with concern that he blamed J.A.B. for the

offenses, claiming that she "pressured [him] to get involved in a sexual relationship with her." The circuit court considered the need to protect the public, finding that Gordon had "groomed" J.A.B., sexually assaulted her, and then "wanted to expand" and "bring in S.S., another young child."

The circuit court determined that Gordon had significant rehabilitative needs. The court was particularly disturbed by his denial that he is sexually attracted to children and by his efforts to minimize his culpability. In the circuit court's view, he needed to address the "seriousness of the offense[s]" and his "deviant ... belief system." In light of the risk that he posed to the community, the circuit court explained that his "needs have to be addressed in a structured confined setting."

The trial court identified the factors that it considered in choosing an appropriate sentence. The factors are proper and relevant. Moreover, the sentence is not unduly harsh. A sentence is unduly harsh "'only where the sentence 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Given the nature of Gordon's crimes, we cannot say that the circuit court's sentencing decision shocks the public sentiment or violates the judgment of reasonable people concerning what is right and proper. Indeed, "[i]n our society, sexual abuse of a child ranks among the most heinous crimes a person can commit." ***Johnson v. Rogers Mem'l Hosp., Inc.***, 2005 WI 114, ¶80, 283 Wis. 2d 384, 700 N.W.2d 27 (Prosser, J., concurring). We conclude that a challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

Last, we have considered whether Gordon could mount an arguably meritorious challenge to the two DNA surcharges imposed at his July 29, 2014 sentencing on the ground that the multiple surcharges violate the *ex post facto* clauses of the Federal and State Constitutions. *See* U. S. CONST., art. I, § 10; WIS. CONST., art. I, § 12. Effective January 1, 2014, the law requires a sentencing court to impose a $250 DNA surcharge on a defendant for each felony conviction, regardless of when the defendant committed the crime. *See* WIS. STAT. § 973.046(1r); 2013 Wis. Act 20, §§ 2355, 9426(1)(am). "One way a law violates the *ex post facto* clauses is if it 'makes more burdensome the punishment for a crime' ... after the crime has been committed." ***State ex rel. Singh v. Kemper***, 2014 WI App 43, ¶9, 353 Wis. 2d 520, 846 N.W.2d 820. We conclude that Gordon cannot rely on the *ex post facto* clauses to mount an arguably meritorious challenge to the DNA surcharges.

We recently held that the *ex post facto* clauses prohibit subjecting a person to a mandatory DNA surcharge for each of several convictions at sentencing if, at the time the person committed the crimes, the law provided for a single, discretionary DNA surcharge. *See* ***State v. Radaj***, 2015 WI App 50, ¶¶7, 35-36, 363 Wis. 2d 633, 866 N.W.2d 758. The two DNA surcharges imposed on Gordon do not run afoul of ***Radaj***. A $250 DNA surcharge was mandatory for any violation of WIS. STAT. § 948.025 throughout the period from August 2013 to March 1, 2014, when Gordon violated the statute by repeatedly sexually assaulting J.A.B. *See* WIS. STAT. §§ 973.046(1r) (2011-12) & 973.046(1r); *see also* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. A $250 DNA surcharge for each felony conviction was mandatory on February 27, 2014, when Gordon violated WIS. STAT. § 948.07(1) by enticing a child, S.S., with intent to have sexual contact with her. *See* § 973.046(1r); *see also* ***Radaj***, 363

Wis. 2d 633, ¶¶4, 9. Accordingly, a challenge to the multiple DNA surcharges imposed in this case would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Jeremy C. Perri is relieved of any further representation of Eddie Albert Gordon on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals