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**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 II**

October 21, 2015

*To*:

Hon. Jeffrey S. Froehlich
Circuit Court Judge
Calumet County Courthouse
206 Court Street
Chilton, WI 53014

Connie Daun
Clerk of Circuit Court
Calumet County Courthouse
206 Court Street
Chilton, WI 53014

Nicholas W. Bolz
District Attorney
206 Court Street
Chilton, WI 53014

Timothy T. O'Connell
O'Connell Law Office
P.O. Box 1625
Green Bay, WI 54305-1625

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

Keith W. Hacek 608117
Redgranite Corr. Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

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2014AP1452-CRNM State of Wisconsin v. Keith W. Hacek (L.C. #2013CF10)
2015AP1273-CRNM State of Wisconsin v. Keith W. Hacek (L.C. #2013CF10)

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

In these consolidated appeals,[1] Keith Hacek appeals from an October 18, 2013 judgment convicting him of two counts of possessing child pornography contrary to WIS. STAT. § 948.12(1m) (2011-12)[2] and from an April 21, 2015 amended judgment of conviction requiring that he comply with sex offender registration requirements. Hacek's appellate counsel filed no-

[1] We consolidate these appeals on our own motion. WIS. STAT. RULE 809.10(3) (2013-14).

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

merit reports pursuant to WIS. STAT. RULE 809.32 (2013-14) and ***Anders v. California***, 386 U.S. 738 (1967). Hacek received a copy of the reports and has filed a response. Upon consideration of the reports, Hacek's response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgments because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21 (2013-14).

The no-merit reports address the following possible appellate issues: (1) whether Hacek's no contest pleas were knowingly, voluntarily and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; (3) whether Hacek received effective assistance from his trial counsel; and (4) whether the circuit court erred when it required Hacek to register as a sex offender. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his no contest pleas, Hacek answered questions about the pleas and his understanding of his constitutional rights during a thorough colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Hacek's no contest pleas were knowingly, voluntarily and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Hacek signed is competent evidence of knowing and voluntary pleas. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. The circuit court complied with ***State v.***

***Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835, in relation to informing Hacek about the consequences of the dismissed and read-in offenses. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Hacek's no contest pleas.

With regard to the sentences, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Hacek to two, consecutive ten-year terms (five years of initial confinement and five years of extended supervision on each count, consecutive). In fashioning the sentences, the court considered the seriousness of the offenses, Hacek's character, lack of genuine remorse and truthfulness about his conduct, history of other offenses, including the twelve dismissed and read-in offenses,[3] the impact on the victims of Hacek's crimes, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. After considering the offenses, the circuit court deemed Hacek ineligible for the challenge incarceration program or the earned release program. WIS. STAT. § 973.01(3g), (3m). The felony sentences complied with § 973.01 relating to the imposition of a bifurcated sentences of confinement and extended supervision. The circuit court properly considered the dismissed and read-in offenses. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

[3] The dismissed and read-in offenses were: three counts of sexual exploitation of a child and nine counts of possession of child pornography.

The no-merit report addresses whether Hacek's trial counsel was ineffective because counsel did not object when the State arguably breached the plea agreement at sentencing. Hacek's response also raises this issue.

We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

The plea agreement breach claim arises from the State's sentencing recommendation and its reference during sentencing to a recently filed first-degree sexual assault of a child charge against Hacek.[4] As part of the plea agreement, the State agreed to recommend six years of initial confinement and was free to argue regarding the length of extended supervision.

In recommending six years of initial confinement, the State noted that it agreed to that recommendation before learning of the new charge, but affirmed that the State's recommendation was based upon what was before the court that day and did not take the new charge into account. Trial counsel did not object to the State's reference to the newly charged crime. The circuit court stated that it would not consider the new charge. In sentencing Hacek,

[4] This charge, Calumet county circuit court case No. 2013CF166, was dismissed on the State's motion in April 2015.

the circuit court was primarily concerned with the offenses to which Hacek pled and the dismissed and read-in offenses.

We see no breach of the plea agreement. The State did not make an end-run around the plea agreement by indirectly conveying a message to the circuit court that a more severe sentence was in order due to the newly charged crime. ***State v. Ferguson***, 166 Wis. 2d 317, 322, 479 N.W.2d 241 (Ct. App. 1991). Furthermore, regardless of the State's reference to the new charge, the circuit court could independently consider unproven offenses, including the recently charged first-degree sexual assault, in assessing the risk presented the public of Hacek's conduct and character. ***State v. Fisher***, 211 Wis. 2d 665, 678, 565 N.W.2d 565 (Ct. App. 1997). In the absence of a breach of the plea agreement, an ineffective assistance of trial counsel claim would lack arguable merit for appeal.

Hacek complains that his trial counsel should have objected to the State's sentencing recommendation of eight years on each count consisting of three years of initial confinement and five years of extended supervision to be served consecutively. The nature of Hacek's complaint is unclear. It is possible that Hacek objects because he does not understand that the State's recommendation, two three-year terms of initial confinement, satisfied its agreement to cap its confinement recommendation at six years. There was no reason for counsel to object to the State's recommendation. This issue lacks arguable merit for appeal.

Hacek next complains that the circuit court did not place any weight on the supportive statements Hacek's pastor offered to the presentence investigation report author. The circuit court rejected the pastor's opinions because the opinions were partially based on the fact that Hacek had not sexually assaulted anyone, opinions that were undermined by the new first-degree

sexual assault charge. The presentence investigation report states that the pastor did not fully understand the child pornography charges to which Hacek pled no contest and did not know key facts about Hacek's conduct in the course of committing the crimes of conviction. The circuit court found that because Hacek was not truthful with his pastor about his conduct, the pastor's opinions about Hacek's character were not based on accurate information, and the court declined to consider them. The circuit court was free to assess the pastor's credibility and the weight to be given to his opinions. *See* ***State v. Baudhuin***, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987). We see no arguable issue for appeal.

We agree with appellate counsel that challenging Hacek's sex offender registration requirement would lack arguable merit for appeal. The circuit court properly compelled Hacek to register as a sex offender because he was convicted of a crime with a mandatory registration requirement. WIS. STAT. §§ 973.048(2m), 948.12(1m). At the plea hearing, the circuit court warned Hacek that he faced the possibility of registering as a sex offender as a result of his no contest pleas and conviction. Even if Hacek had not been warned, sex offender registration is a collateral consequence of the plea that does not invalidate an otherwise valid plea. ***State v. Bollig***, 2000 WI 6, ¶27, 232 Wis. 2d 561, 605 N.W.2d 199.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit reports, affirm the judgments of conviction and relieve Attorney Timothy O'Connell of further representation of Hacek in these matters.

Upon the foregoing reasons,

IT IS ORDERED that appeal No. 2014AP1452-CRNM and appeal No. 2015AP1273-CRNM are consolidated for purposes of briefing and disposition. WIS. STAT. RULE 809.10(3) (2013-14).

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2013-14).

IT IS FURTHER ORDERED that Attorney Timothy O'Connell is relieved of further representation of Keith Hacek in these matters.

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*Diane M. Fremgen*
*Clerk of Court of Appeals*