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November 10, 2015

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

2015AP133-CRNM State of Wisconsin v. Marcos A. Colin (L.C. # 2012CF5357)

Before Kloppenburg, P.J., Lundsten and Higginbotham, JJ.

Marcos A. Colin appeals a judgment convicting him of one count of second-degree reckless homicide and one count of child neglect causing great bodily harm. Appellate counsel, Marcella De Peters, has filed a no-merit report under WIS. STAT. RULE 809.32 (2013-14)[1] and

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

Anders v. California, 386 U.S. 738 (1967).[2] Colin has not filed a response. The no-merit report addresses the validity of the plea and sentence. This court has considered counsel's report and reviewed the record. We conclude that there are no arguably meritorious appellate issues.

Pursuant to a plea agreement, Colin pled guilty to one count of second-degree reckless homicide and one count of child neglect causing great bodily harm. The court sentenced him to fourteen years of initial confinement and ten years of extended supervision on the reckless homicide charge and to five years of initial confinement and four years of extended supervision on the child neglect charge. The court ordered that the sentences run consecutively.

A meritorious challenge to the validity of the guilty plea could not be raised. Colin was originally charged with child neglect, resulting in death, party to the crime; physical abuse of a child by recklessly causing great bodily harm; and misdemeanor bail jumping. The State amended the charges as part of a plea agreement. Colin agreed to plead guilty to the amended charges, and the State agreed to recommend "substantial" prison time. The victim's family was free to speak at sentencing and make a recommendation. The State pointed out that the "party to a crime" allegations had been dropped, and Colin's attorney acknowledged that Colin admitted being "the direct actor." The court explained the potential maximum sentences, and Colin told the court he understood. The court explained that a conviction may subject Colin to deportation, and Colin said he understood.

[2] This is the second no-merit report filed by Attorney De Peters. A previous report was rejected, ***State v. Colin***, Appeal No. 2014AP1170-CRNM. De Peters thereafter filed a successful postconviction motion to vacate a DNA surcharge.

A signed plea questionnaire is in the record. Colin assured the court that he had reviewed the questionnaire with counsel and that he understood its contents, including that his plea would waive the constitutional rights listed on the form. The court explained each constitutional right to Colin, and Colin confirmed that he understood that he was waiving those rights. Copies of the relevant jury instructions were attached to the plea questionnaire. The court explained the elements of the crimes, and Colin told the court that he understood.[3] Colin told the court that no promises or threats had been made to him. Colin assured the court that he was waiving any challenge to statements given to police.[4] The court explained that it was not bound by the parties' sentencing recommendations, and Colin told the court that he understood. The assistant district attorney explained the factual basis for the charges, and Colin's attorney told the court that Colin admitted the facts. Because the plea colloquy shows that the court complied with the requirements of WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), a postconviction challenge to the validity of the plea would lack arguable merit.

A challenge to the sentence also would lack arguable merit. Sentencing is committed to the circuit court's sound discretion, and appellate review is limited to determining whether the court

[3] The court explained the concept of party to a crime to Colin despite the fact that the amended information did not contain a party-to-a-crime allegation. The plea questionnaire's description of the child neglect charge also included a party-to-a-crime notation. The definition of being party to a crime includes the direct commission of the crime. WIS. STAT. § 939.05(2). Because Colin admitted to either directly or indirectly committing the offense, no arguably meritorious issue is created by the reference to party-to-a-crime liability in the plea questionnaire and during the colloquy. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (plea withdrawal not warranted for inconsequential defects in the plea process).

[4] Colin had filed a motion to suppress statements that had not been decided at the time of Colin's plea.

erroneously exercised that discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court considered the nature of the offenses and the seriousness of the offenses, describing Colin's conduct as "horrific, extensive and deadly acts that caused the death of [a] 48-pound child, who was five years old." The court considered Colin's character, as shown by Colin's drug and alcohol abuse, prior acts of domestic abuse, and weapon possession crimes. The court emphasized the need to protect children and the community and to punish Colin for his conduct.

The components of the bifurcated sentence were within the applicable penalty range. *See* WIS. STAT. §§ 940.06(1) (classifying second-degree reckless homicide as a Class D felony); 973.01(2)(b)4. and (2)(d)3. (establishing maximum terms of fifteen years of initial confinement and ten years of extended supervision for a Class D felony); and WIS. STAT. §§ 948.21(1)(c) (classifying child neglect resulting in great bodily harm as a Class F felony); 973.01(2)(b)6m. and (2)(d)4. (establishing maximum terms of seven years and six months of initial confinement and five years of extended supervision for a Class F felony) (all 2011-12 Stats.). There is a presumption that a sentence within statutory limits is not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507. The sentence imposed in this case is not "'so disproportionate to the offense[s] committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***id.***, ¶31 (quoted source omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of any further representation of Marcos Colin in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals