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

2015AP788-CRNM State of Wisconsin v. Jason E. Rybacki, Sr. (L.C. #2013CF1287)

Before Reilly, P.J., Gundrum, and Hagedorn, JJ.

Jason E. Rybacki, Sr., appeals from a judgment of conviction for child enticement. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Rybacki has filed a lengthy response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Rybacki was charged with child enticement and two counts of sexual assault of a child under sixteen years of age after he took a fifteen-year-old girl he met over a phone "app" called Whisper to a hotel room overnight. He entered a guilty plea to the child enticement charge and the other two charges were dismissed as read-ins at sentencing. At sentencing the prosecution complied with the plea agreement by recommending ten years' initial confinement. Rybacki was sentenced to ten years' initial confinement and three years' extended supervision. Rybacki was ordered to provide a DNA sample and pay the surcharge if he had not previously provided a sample, otherwise those requirements were waived.

The no-merit report first addresses whether Rybacki's plea was freely, voluntarily and knowingly entered. As the no-merit report concludes, during the plea hearing the circuit court fulfilled each of the duties required by WIS. STAT. § 971.08(1), and summarized in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court did not address Rybacki during the plea colloquy regarding the impact of the read-in offenses at sentencing. *See* ***State v. Straszkowski***, 2008 WI 65, ¶¶5, 97, 310 Wis. 2d 259, 750 N.W.2d 835 (The circuit court "should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge."). However, Rybacki signed a plea questionnaire which stated his understanding that the judge could consider read-in charges at sentencing but the maximum penalty would not increase, that restitution could be ordered on any read-in charges, and that read-in charges could not later be prosecuted. The circuit court ascertained Rybacki's

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

execution, reading of, and understanding of the plea questionnaire. Rybacki had placed a check mark next to the portion advising him about the effect of the read-in charges. Thus, if the circuit court was required to make advisements about the read-in charges,[2] the failure to personally address Rybacki about the effects of the read-in charge does not render his plea unintelligent. *See* ***State v. Reed***, No. 2009AP3149-CR, unpublished slip op. ¶¶17-18 (WI App Jan. 11, 2011).[3] *See also* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (plea withdrawal is not justified unless the fundamental integrity of the plea is seriously flawed). There is no arguable merit to a challenge to Rybacki's guilty plea.

The other potential issue discussed in the no-merit report is whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes this issue as without merit. The sentence was imposed with the objective of protecting the public and for punishment. *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197 (the basic objectives of the sentence include the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others). The thirteen-year sentence is well within the twenty-five-year maximum and cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983)

[2] It appears unsettled whether the advisements outlined in ***State v. Straszkowski***, 2008 WI 65, ¶¶5, 97, 310 Wis. 2d 259, 750 N.W.2d 835, are part of the circuit court's duties during a plea colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶19, 23, 317 Wis. 2d 161, 765 N.W.2d 794 (claim that the circuit court failed to notify the defendant that the read-in offenses could be considered at sentencing targeted the court's mandatory plea colloquy duties); ***State v. Lackershire***, 2007 WI 74, ¶28 n.8, 301 Wis. 2d 418, 734 N.W.2d 23 (the supreme court declined to adopt the court of appeals' characterization of read-ins as "collateral consequences" and expressly declined to address a circuit court's obligation to explain the nature of read-in offenses).

[3] WISCONSIN STAT. RULE 809.23(3)(b) allows the citation of an unpublished authored opinion issued after July 1, 2009, for its persuasive value.

("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."). The sentencing court exercised its discretion in imposing the DNA surcharge and it was a proper exercise of discretion since the surcharge was tied to the collection of a DNA sample if Rybacki had not previously submitted a sample. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12 (requiring payment of the cost when a sample has not previously been provided presents an acceptable rationale for imposing the surcharge).

Rybacki's entire response is devoted to sentencing. He claims he was sentenced on the basis of inaccurate information because the sentencing court refused to adjourn sentencing so that Rybacki could complete a psychiatric evaluation and give the court a more accurate picture of his circumstances. The sentencing court stated why it would not adjourn sentencing and it relied on proper factors in denying the motion for adjournment; it properly exercised its discretion in denying the motion to delay sentencing. Contrary to Rybacki's contention, no unfair advantage was given to the State by virtue of the denial of the adjournment.

Rybacki also argues that the presentence investigation report (PSI) was completely unreliable. He asks how the sentencing court could utilize a PSI that required fourteen corrections. The answer is that the corrections were brought to the sentencing court's attention and noted. Rybacki's claims about the inaccuracy in the PSI and other information presented at sentencing are simply a disagreement with the characterization of his conduct, the victim's narrative about her contact with Rybacki, and the perception about the impact of the crime on the

victim.[4] Our reading of the sentencing court's remarks does not give rise to the possibility that inaccurate or improper information was relied on.

Rybacki suggests that his sentence violates the constitutional equal protection clause because he is punished for sexual conduct when the person that sexually abused him as a youth was not punished. He also believes it is an equal protection violation to not hold the victim in this case accountable for what he believes was consensual conduct when he was, as a juvenile, and other juveniles are held accountable for crimes. He believes a double standard has been employed and that it demonstrates selective enforcement. These potential claims are so lacking in merit that we summarily reject them.

Rybacki claims the judge was biased against him, the judge was simply inexperienced in determining an unbiased and appropriate sentence, and that it was unfair to have a judge sentence him who had formerly worked in the prosecutor's office.[5] The sentencing court's remarks do not reflect anything approaching bias.

To the extent we may not have discussed other claims suggested in Rybacki's response, we have nonetheless considered and rejected them. Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the

[4] Rybacki claims the sentencing court relied on "opinionated and bias narratives," "nothing more than a dishonest and imaginative work of fiction," "an irrelevant and inaccurate sob story," a statement which is "indicative of the manipulative little apple not falling far from the manipulative tree," and a statement which demonstrates "efforts to simply make [him] a convenient scapegoat."

[5] Rybacki also states that the prosecutor's office wanted to make an example of him because the district attorney was prepping for his candidacy for statewide office and wanted to appear harder on crime. A prosecutor's sentencing recommendation is just that—a recommendation. The sentencing court is not bound to follow it. *See* ***State v. Bizzle***, 222 Wis. 2d 100, 105 n.2, 585 N.W.2d 899 (Ct. App. 1998).

conviction and discharges appellate counsel of the obligation to represent Rybacki further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Susan Alesia is relieved from further representing Jason E. Rybacki, Sr. in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals