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March 2, 2016

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

2015AP1963-CRNM State of Wisconsin v. Raymond R. Davila (L.C. #2011CF749)

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

Raymond R. Davila appeals from a judgment, entered after resentencing, convicting him of second-degree sexual assault of a child. His appellate counsel has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Davila exercised his right to file a response. Upon consideration of the no-merit report, Davila's response, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we

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

conclude that, as there is no arguable merit to any potential appellate issue, the judgment may be summarily affirmed. *See* WIS. STAT. RULE 809.21. We affirm the judgment, accept the no-merit report, and relieve Attorney Dustin C. Haskell of further representing Davila in this matter.

Davila, the live-in boyfriend of the victim's mother, raped the victim on multiple occasions, beginning when she was fourteen. One assault resulted in pregnancy. Shortly after the victim gave birth, the child was placed in foster care and subsequently adopted. Davila was charged with repeated sexual assault of a child and three counts of child enticement with intent to have sexual intercourse. Pursuant to a plea agreement, Davila pled no contest to one count of second-degree sexual assault of a child; the child-enticement charges were dismissed and read in.

Davila faced imprisonment of twenty-five years' initial confinement (IC), fifteen years' extended supervision (ES). The PSI recommended a sentence of seventeen to twenty-three years, with ten to fifteen years' IC and seven to eight years' ES. Apparently adding the recommended IC range to the entire recommendation sentence, the court misstated that the PSI recommended a sentence of twenty-seven to thirty-eight years. The parties did not offer a correction. The court imposed a thirty-five-year sentence, bifurcated as twenty-five years' IC plus ten years' ES.

Postconviction, Davila moved for resentencing on the basis that the court had inaccurately relied on a misreading of the PSI's sentencing recommendation. The court granted his motion but imposed an identical sentence. This no-merit appeal followed.

The no-merit report considers whether a challenge could be made to the trial court's exercise of discretion at the resentencing. "[T]he role of a sentencing court is the same whether the proceeding is an initial sentencing or a resentencing." ***State v. Schordie***, 214 Wis. 2d 229,

233-34, 570 N.W.2d 881 (Ct. App. 1997). The trial court "must consider the gravity of the offense, the offender's character and the public's need for protection." ***Id.*** at 233.

At resentencing, the court said it prepared by reviewing the record, particularly the complaint, the original sentencing transcript, and the PSI. It acknowledged that it had misstated the PSI recommendation and that it was "keenly aware" the original sentence was "significantly higher" than the actual recommendation. The court also stated that it had not relied on the PSI recommendation in fashioning the sentence, however.

The court concluded that the "heinous" nature of Davila's crime demanded the same penalty previously ordered. The court commented on Davila's base motivations, the seriousness of the read-in charges, the terrible consequences for the victim, and the need to protect others from Davila, who the court believed would continue to act "just as criminally" if given the opportunity. At the original sentencing, the court also had commented on the victim's "incredibly strong" impact statement and noted that Davila was a lifelong criminal capable of great violence, such that the need to protect the community was "very high" and was of greater importance that his rehabilitation. Where the same judge presides over an original sentencing and a resentencing, we may take a global approach in assessing the court's explanation for the sentence imposed. ***State v. Wegner***, 2000 WI App 231, ¶7, 239 Wis. 2d 96, 619 N.W.2d 289.

When the legislature granted courts the authority to impose sentences within a certain range, it also gave them discretion to determine where in that range a sentence should fall. ***State v. Setagord***, 211 Wis. 2d 397, 418, 565 N.W.2d 506 (1997). The court's decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The sentence resulted from a careful reconsideration of the proper factors.

Under the circumstances of the case, the sentence, while lengthy, does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree that a challenge to the resentencing decision would lack arguable merit.

We independently examine whether Davila's no-contest plea presents any grounds for an arguably meritorious challenge.[2] Under the United States Constitution, a guilty or no-contest plea must be affirmatively shown to be knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶25, 293 Wis. 2d 594, 716 N.W.2d 906. WISCONSIN STAT. § 971.08 also establishes certain requirements for ensuring that a plea is knowing, voluntary, and intelligent. Our supreme court has provided additional requirements in ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and subsequent cases. ***Brown***, 293 Wis. 2d 594, ¶23.

To withdraw his plea after sentencing, Davila would have to carry "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The court addressed Davila personally and engaged him in a colloquy to verify his understanding and that his plea was knowing, voluntary, and intelligent. *See* ***Brown***, 293 Wis. 2d 594, ¶35. The court also looked to the plea questionnaire/waiver-of-rights form Davila signed reflecting his understanding of the elements, the potential penalties, and the rights he agreed to waive. *See*

[2] The no-merit report addresses only Davila's resentencing. The report states that to appeal his plea, Davila would have had to pursue an appeal after his first notice of intent was filed after the plea and original sentencing. We nonetheless address the plea for the sake of completeness.

State v. Hoppe, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794.[3] There is no issue of arguable merit in regard to the plea.

In his response, Davila complains that the state public defender appointed the same counsel to represent him at resentencing as had represented him prior to filing his postconviction motion. Davila does not elaborate. The same counsel was reappointed because of his familiarity with the case. The aim of the Sixth Amendment right to assistance of counsel is to "guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he [or she] prefers." ***Wheat v. United States***, 486 U.S. 153, 159 (1988). No issue of arguable merit could arise from this point.

Davila also asserts that his son was "given time" for threatening the judge who sentenced Davila and therefore his request for a different judge for the resentencing should have been granted. He apparently suggests that Judge Torhorst could not be impartial on his resentencing. We presume a judge is free of bias and prejudice. ***State v. McBride***, 187 Wis. 2d 409, 413, 523 N.W.2d 106 (Ct. App. 1994). "A litigant is denied due process only if the judge, in fact, treats him or her unfairly." ***State v. Hollingsworth***, 160 Wis. 2d 883, 894, 467 N.W.2d 555 (Ct. App. 1991). As explained, Judge Torhorst's sentence reflects a proper exercise of discretion. Davila's conclusory statement does not come close to raising an arguable claim.

[3] The court did not recite the deportation warning WIS. STAT. § 971.08(1)(c) requires. It should have. We may look to the entire the record, however, to determine whether, considered as a whole, it would support the assertion that manifest injustice will occur if the plea is not withdrawn. ***State v. Cain***, 2012 WI 68, ¶31, 342 Wis. 2d 1, 816 N.W.2d 177. The initial appearance transcript indicates that Davila was "born and raised" in Racine. The deportation warning applies to noncitizens. Davila thus would be unable to show that his plea is likely to result in deportation, exclusion from admission to this country, or denial of naturalization. *See* § 971.08(2).

Davila also argues the SPD should have allowed him a second PSI because he was "not present at [his] first PSI, I walked away from it." The PSI author notes that Davila largely refused to cooperate and ultimately left the room. A PSI is not a right. *Cf.* ***State v. Suchocki***, 208 Wis. 2d 509, 515, 561 N.W.2d 332 (Ct. App. 1997), *abrogated on other grounds*, ***State v. Tiepelman***, 2006 WI 66, 291 Wis. 2d 179, 717 N.W.2d 1 (court has discretion to order PSI). He chose not to participate in the opportunity he was given. There is no arguable merit to this issue.

Finally, Davila includes in his response a copy of an order denying a motion to suppress on another defendant's case that apparently was mistakenly included in Davila's file. The order bears Davila's circuit court case number but a different name. The text of the order states in full:

> The matter having come before the Honorable Eugene Gasiorkiewicz on the 2nd April, 2012, and the court having reviewed the CD of the interrogation of the defendant as well as having heard the evidence and the arguments of the parties hereby orders that the Defense motion is denied for the reasons stated on the record.

The order could have had no arguable bearing on Davila's sentence. Our independent review of the record discloses no other potential issues for appeal. Therefore,

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 Dustin C. Haskell is relieved of further representing Davila in this matter.

Diane M. Fremgen
Clerk of Court of Appeals