



OFFICE OF THE CLERK
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 III

June 21, 2016

To:

Hon. Michael T. Judge
Circuit Court Judge
Oconto County Courthouse
301 Washington
Oconto, WI 54153

Michael C. Hodkiewicz
Clerk of Circuit Court
Oconto County Courthouse
301 Washington
Oconto, WI 54153-0078

Edward D. Burke Jr.
District Attorney
301 Washington Street
Oconto, WI 54153

Joseph N. Ehmann
First Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Eileen A. Hirsch
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

David A. Wilson 396230
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:

2015AP589-CRNM State of Wisconsin v. David A. Wilson
(L. C. No. 2013CF116)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for David Wilson has filed a no-merit report concluding no grounds exist to challenge Wilson's conviction for second-degree sexual assault of a child under the age of

sixteen, contrary to WIS. STAT. § 948.02(2).¹ Wilson was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

An Amended Information charged Wilson with second-degree sexual assault of a child under age sixteen and first-degree sexual assault by sexual contact with a child under age thirteen. The allegations involved a seven-year-old girl and a three-year-old girl. In exchange for his no contest plea to the second-degree sexual assault charge, the State agreed to dismiss and read in the remaining count and recommend fifteen years' initial confinement and ten years' extended supervision. Out of a maximum possible forty-year sentence, the circuit court imposed a twenty-year term, consisting of twelve years' initial confinement followed by eight years' extended supervision, the sentence to be served consecutive to any other sentence Wilson was then serving.

The record discloses no arguable basis for withdrawing Wilson's no contest plea. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Wilson completed, informed Wilson of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no contest plea. The circuit court acknowledged that Wilson was receiving treatment for bipolar depression, and Wilson indicated that the disorder did not impact his ability to understand or appreciate the proceedings.

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

The circuit court confirmed Wilson's understanding that it was not bound by the terms of the plea agreement, *see State v. Hampton*, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Wilson committed the crime charged. Although the circuit court failed to advise Wilson of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c), the record shows Wilson is a United States citizen not subject to deportation. Any challenge to the plea on that basis would therefore lack arguable merit. The record shows the plea was knowingly, voluntarily, and intelligently made. *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the circuit court considered the seriousness of the offense; Wilson's character; the need to protect the public; and the mitigating factors Wilson raised. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court placed particular emphasis on the severity of Wilson's conduct, especially in light of his relationship with the victim. It cannot reasonably be argued that Wilson's sentence is so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

There is no arguable merit to a claim that the circuit court erred by denying Wilson's postconviction motion for resentencing or sentence modification. With respect to his resentencing claim, Wilson argued he had been sentenced based on erroneous information. Defendants have a due process right to be sentenced on the basis of accurate information. *State v. Johnson*, 158 Wis. 2d 458, 468, 463 N.W.2d 352 (Ct. App. 1990). In order to establish a due process violation, the defendant has the burden of proving by clear and convincing evidence both

that the information was inaccurate and that the court actually relied on the inaccurate information in sentencing. *State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. “Once actual reliance on inaccurate information is shown, the burden then shifts to the state to prove the error was harmless.” *Id.*

Here, Wilson established that the circuit court relied on inaccurate information at sentencing. Although the court properly acknowledged Wilson’s five prior felony convictions, the court incorrectly stated Wilson had fourteen prior misdemeanor convictions, when he actually had nine prior misdemeanor convictions. In imposing sentence, the court characterized Wilson’s criminal history as “atrocious” and “most aggravating.” Pursuant to *Tiepelman*, the burden shifted to the State to prove Wilson was not prejudiced. At the motion hearing, the circuit court acknowledged the error, but found that Wilson’s correct prior record was “still as atrocious,” emphasizing that Wilson was on probation from 2007 to 2012 as a result of felony convictions and had a long series of rule violations, including nonpayment of financial obligations, dishonesty to his agent, violations of no-contact and residency restrictions, operating after revocation, and drinking alcohol. In light of the five prior felony convictions, the circuit court determined that its miscounting of Wilson’s prior misdemeanor convictions was not a substantial factor in its sentencing decision. The record supports the circuit court’s conclusion that the inaccurate information regarding the misdemeanor convictions did not contribute to a greater sentence.

Wilson’s postconviction motion also alleged the sentencing court erroneously exercised its discretion by failing to explain why it imposed a consecutive sentence. At the postconviction motion hearing, the circuit court described Wilson’s offense as “horrendous,” concluding, “I don’t believe and I didn’t believe at the time [of sentencing] that he should receive some type of

a credit or concurrent sentence that would take away from the sentence that I am giving to him for the conduct” in this case. The circuit court has an additional opportunity to explain its sentence when challenged by postconviction motion. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). Because the court adequately explained its discretionary decision to impose a consecutive sentence, any claim that Wilson is entitled to sentence modification on this ground lacks arguable merit.

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Eileen Hirsch is relieved of further representing Wilson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals