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DISTRICT I

June 24, 2016

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

2015AP1968-CRNM State of Wisconsin v. Deondre Lamar Abernathy-Duewel (L.C. #2014CF4610)

Before Curley, P.J., Brennan and Brash, JJ.

Deondre Lamar Abernathy-Duewel appeals a judgment convicting him of third-degree sexual assault. Attorney Kiley Zellner filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Abernathy-Duewel was advised of his right to file a response, but he has not done so. After considering the no-merit report and conducting an independent review of the record, we

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

conclude that there are no issues of arguable merit that Abernathy-Duewel could raise on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there would be any basis for arguing that Abernathy-Duewel did not knowingly, intelligently, and voluntarily enter his guilty plea. In order to ensure that a defendant is knowingly, intelligently, and voluntarily waiving the right to trial by entering a guilty plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crime(s) to which he is pleading guilty, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Although forms are "not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding of the particular information contained therein," the circuit court may refer to a plea questionnaire and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the trial court and the defendant." ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

During the plea hearing, the prosecutor stated the plea agreement on the record: in exchange for a plea to an amended charge of third-degree sexual assault, the prosecutor would dismiss and read-in the child enticement charge and would recommend two-and-a-half years of initial confinement and five years of extended supervision. Abernathy-Duewel agreed that the prosecutor's summary of the agreement was correct. The circuit court warned Abernathy-Duewel that it was not required to follow the recommendation of the prosecutor and could

impose whatever sentence it thought was appropriate, up to the maximum term allowed. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

The circuit court conducted a colloquy with Abernathy-Duewel during which it explained the elements of the crime to him and informed him of the maximum penalties he faced by entering a plea. The circuit court also informed him that he would be required to comply with the sex offender reporting statute if convicted of the crime and could possibly be subject to a civil commitment under WIS. STAT. ch 980. Abernathy-Duewel informed the court that he understood. The circuit court reviewed the constitutional rights Abernathy-Duewel was waiving on the record. The circuit court also informed Abernathy-Duewel that if he was not a citizen of the United States of America, he could be deported if he pled guilty to the crime. *See* ***State v. Douangmala***, 2002 WI 62, ¶46, 253 Wis. 2d 173, 646 N.W.2d 1. Abernathy-Duewel said that he understood.

The circuit court ascertained that Abernathy-Duewel had reviewed the plea questionnaire and waiver-of-rights form with his attorney. The circuit court asked Abernathy-Duewel whether he talked with his attorney about what the State would have to prove to convict him. Abernathy-Duewel said that he had. The circuit court asked him whether he was satisfied with his attorney, and Abernathy-Duewel said that he was. The circuit court also explained that although he would not be convicted of the dismissed charge that was being read-in, it could consider the charge in imposing sentence.

The circuit court asked Abernathy-Duewel whether he understood what the criminal complaint said. Abernathy-Duewel said that he understood and that he was pleading guilty because he was guilty. The circuit court asked Abernathy-Duewel's attorney whether he was

satisfied that Abernathy-Duewel understood the rights he was giving up and the elements of the crime. The attorney assured the court that he was satisfied that Abernathy-Duewel understood the information. Based on the circuit court's thorough plea colloquy with Abernathy-Duewel, and Abernathy-Duewel's review of the plea questionnaire and waiver-of-rights form, we conclude that there would be no arguable merit to an appellate challenge to the plea.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion when it imposed four years of initial confinement and five years of extended supervision. In framing its sentence, the circuit court explained that its primary goals in imposing sentence were to punish Abernathy-Duewel for his actions, deter others from similar conduct, and rehabilitate Abernathy-Duewel so that he did not commit crimes in the future. The circuit court emphasized that Abernathy-Duewel had harmed a thirteen-year-old child and noted the prosecutor's concern that Abernathy-Duewel characterized the victim as assertively pursuing a romantic relationship with him when, as a matter of law, a thirteen-year-old child is not capable of consenting to a sexual relationship with a nineteen-year-old. The circuit court also recognized that Abernathy-Duewel had many positive aspects to his character: he was fully compliant with the investigation of this crime, he had a high school diploma, he was continuing his education, and this was his first offense. The circuit court considered appropriate factors in deciding what length of sentence to impose and explained its application of the various sentencing goals as applied to the facts of this case in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, there would be no arguable merit to an appellate challenge to the sentence.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney Kiley Zellner of further representation of Abernathy-Duewel.

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

IT IS FURTHER ORDERED that Attorney Kiley Zellner is relieved of any further representation of Abernathy-Duewel in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals