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August 31, 2016

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

2015AP2626-CRNM State v. Kevin D. Clark (L.C. # 2014CF388)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Kevin D. Clark appeals from a judgment of conviction for five counts of possession of child pornography. 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). Clark has filed a 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

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

affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

A search warrant was executed at Clark's residence and child pornography was found on his computer. Clark was charged with eighteen counts of possession of child pornography. Clark entered a guilty plea to five counts and the remaining counts were dismissed as read-ins at sentencing. At sentencing, the prosecution made the promised sentencing recommendation. Clark was sentenced to concurrent terms of six years' initial confinement and six years' extended supervision.

The no-merit report addresses the potential issues of whether Clark's plea was freely, voluntarily, and knowingly entered and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further. Further, the sentencing court properly observed that the mandatory three-year term of initial confinement applied. *See State v. Holcomb*, No. 2015AP996-CR, unpublished slip op. ¶15 (WI App Aug. 3, 2016) (recommended for publication) (a sentencing court may only consider less than the three-year minimum sentence when the offender is less than forty-eight months older than the child victim).

In his response Clark expresses dissatisfaction with the length of his sentence in light of his lack of any prior criminal record, his cooperation with law enforcement, that he had not paid for any of the images he downloaded, his lack of knowledge of the criminal repercussions of his activity, and his deep remorse. The sentencing court was aware of these things which Clark suggests are mitigating circumstances. As was in its discretion, the sentencing court placed more

emphasis on Clark’s minimization of his activity and the length of time—eight years—Clark had been engaged in activity that creates a demand for child pornography.

Clark points to three other offenders who received shorter sentences—one convicted of two counts of second-degree sexual assault of a child and two convicted of five counts of possession of child pornography.² He believes the disparity of the sentences reflects judicial bias and that his sentence is otherwise unfair. We have determined that the sentencing court properly exercised its discretion. It fashioned a sentence based on Clark’s individual circumstances. No bias is reflected in its sentencing remarks. The mere fact that a defendant’s sentence is different than others is insufficient to support a conclusion that it is unduly disparate. *See State v. Perez*, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992).

Clark also faults his trial counsel for not obtaining a presentence investigation report (PSI) or “DSM” evaluation and suggests his counsel “was admonished” by the prosecutor for not producing that background information. We do not agree with Clark’s characterization of the record. At sentencing, Clark’s attorney gave an explanation of sex offender traits and recidivism risks and pointed out that Clark did not share those traits or risks. When the prosecutor objected because no evaluations of Clark had been presented, the prosecutor did not admonish Clark’s attorney in any fashion. The sentencing court understood the argument for what it was—general information about sex offenders in terms that the court was familiar with. Further, Clark’s attorney explained that he had not sought a DSM evaluation because Clark presented absolutely

² The sexual assault conviction is out of Jefferson County and involves the same prosecutor and judge who handled Clark’s case. One of the possession of child pornography cases is from Sheboygan County and the other is from Dane County.

no indicator of any traits that such an evaluation is aimed at. The argument was to Clark's benefit and he was not prejudiced by the lack of a PSI or DSM evaluation.

Our review of the record discloses no other potential issues for appeal.³ Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Clark 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 Suzanne L. Hagopian is relieved from further representing Kevin D. Clark in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

³ Any other possible appellate issues are waived because the defendant's guilty plea waived the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.