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September 27, 2016

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

2015AP1202-CRNM State v. Christopher Scott Wampole (L. C. No. 2013CF881)

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

Counsel for Christopher Wampole has filed a no-merit report concluding there is no basis to challenge Wampole's convictions for sexual assault of a child under sixteen years of age, and for exposing a child to harmful materials. Wampole has responded and counsel submitted a supplemental no-merit report. 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 and summarily affirm.

Wampole and his son were charged with numerous crimes arising out of sexually explicit text messages, soliciting pornographic images, sending digital photos of their penises, and incidents of sexual trysts with high school girls. An Information alleged Wampole's use of a computer to facilitate a child sex crime, as a party to a crime; two counts of sexual assault of a child under sixteen years of age, lifetime supervision of serious offender; child enticement, as party to a crime; possession of child pornography; and two counts of exposing a child to harmful material. After the circuit court denied a suppression motion, Wampole pled no contest to one count of sexual assault of a child under sixteen years of age, and one count of exposing a child to harmful material. The remaining charges in the Information were dismissed and read in.

Prior to sentencing, Wampole sought to withdraw his pleas, claiming he did not understand that by entering his pleas he would be found guilty. However, Wampole subsequently withdrew his motion to withdraw his pleas, and at sentencing Wampole advised the circuit court that he wished to proceed with sentencing and was not making a request to withdraw his pleas. The court sentenced Wampole to a total of fifteen years, consisting of seven years' six months' initial confinement and seven years' six months' extended supervision on the sexual assault charge and one year jail concurrently on the exposing-a-child-to-harmful material count.

There is no manifest injustice upon which Wampole could withdraw his pleas. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The circuit court's plea colloquy, together with the plea questionnaire and waiver of rights form with attachments, informed Wampole of the constitutional rights he waived, the elements of the offenses and the

potential penalties.[1] The court specifically advised Wampole of the potential deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c),[2] and confirmed Wampole's understanding that it was not bound by the parties' agreement and could impose the maximum sentence. *See* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. A sufficient factual basis supported the convictions. The record shows the pleas were knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Entry of a valid no contest or guilty plea constitutes a waiver of nonjurisdictional defenses and defects. ***Id.*** at 265-66.

The record also discloses no basis for challenging the sentence imposed. The circuit court considered the proper factors, including Wampole's character, the seriousness of the offenses and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. The court found Wampole used his son as "bait to have illicit carnal sexual intercourse with a child." The court also articulated a need to protect the public from "predatory sexual offenses." The sentences imposed were well within the forty-three and one-half years maximum limit and therefore presumptively neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶29-33, 255 Wis. 2d 632, 648 N.W.2d 507.

[1] Wampole's response to the no-merit report argues his trial counsel "neglected to tell him count 2 was no longer a party to a crime charge." However, neither the Information nor the plea questionnaire and waiver of rights form refers to count 2 as party to a crime. In addition, during the plea hearing, the State described the counts in open court and did not mention party to a crime. The circuit court asked Wampole how he would plead "to Count Two, sexual assault of a child under 16 years of age in which lifetime supervision as a serious sex offender is being sought, a Class C felony?" Wampole replied, "No contest." Accordingly, the record belies Wampole's argument, and no issue ofr arguable merit appears.

[2] All references to the Wisconsin Statutes are to the 2013-14 version.

We note the court referenced the COMPAS risk assessment at sentencing. However, the record shows it was not "determinative" of the sentence imposed. *See* ***State v. Loomis*** 2016 WI 68, ¶¶98-99, ___ Wis. 2d___, 881 N.W.2d 749. Accordingly, we conclude that any challenge to the sentence based on a reference to COMPAS would lack arguable merit.

Wampole's response to the no-merit report argues the circuit court erroneously denied his suppression motion. Wampole's pleas waived his right to raise nonjurisdictional defects and defenses. *See* ***Bangert***, 131 Wis. 2d at 265-66. However, suppression issues are not waived by a plea. *See* WIS. STAT. § 971.31(10).

After being advised of his ***Miranda***[3] rights, and during transportation to the jail in Eau Claire, Wampole mentioned he should probably have an attorney because he is a sex offender. The police officer stated to Wampole that he would be able to think about it, because when they arrived the officer would "go through it with him one more time before the interview started." When they arrived, Wampole commented, "[L]et's just do the interview." The officer read Wampole the ***Miranda*** rights again, and Wampole "signed off stating that he would talk to me, that he wanted to cooperate."

The circuit court correctly concluded Wampole "hedged his statement, I probably should get a lawyer." Wampole did not unequivocally ask for an attorney, and his ambiguous statement was therefore insufficient to invoke the right to counsel. *See* ***State v. Jennings***, 2002 WI 44, ¶¶32, 36, 252 Wis. 2d 228, 647 N.W.2d 142. Officers need neither stop an interrogation nor ask

[3] Referring to ***Miranda v. Arizona***, 384 U.S. 436 (1966).

clarifying questions when a suspect makes an equivocal request for counsel. ***Id.***, ¶36 (citing ***Davis v. United States***, 512 U.S. 452, 459 (1994)).

Wampole also insists his trial counsel was ineffective for failing to file other suppression motions. According to Wampole, counsel failed to "impeach the prosecution's witness on spousal privilege." The complaint alleged one of the victims stated that prior to Wampole and his son having sex with her, Wampole said he wanted to smell her to make sure she was "fresh." The victim took off her pants and Wampole smelled her vagina. Wampole also told her that he needed to assure that she was "tight" by putting his penis in her vagina. The victim stated she gave Wampole a "blow job" to make him erect and, after intercourse, Wampole put his penis back in her mouth and ejaculated. The victim told police Wampole did not use a condom and also described Wampole as having something like a "big toe with no nail" that "protruded from his lower belly button."

Wampole showed police a scar on his belly as described by the victim, but said the victim saw it when she was over at his residence and he did not have his shirt on. When police interviewed Wampole's wife, however, she stated Wampole "always wears a shirt at the residence and is supervised when [the victim] has been over to visit" because he is on the Wisconsin sex offender registry. The State was also prepared to have Wampole's wife testify at trial that Wampole would ask her if she was "fresh" during intercourse, the same question Wampole asked the victim at issue during her sexual encounter with Wampole.

The spousal privilege prohibiting one spouse from testifying against the other is based upon the public policy of encouraging marital confidence between husband and wife and thereby preserving the marital relationship. *See* ***State v. Richard G.B.***, 2003 WI App 13, ¶13, 259

Wis. 2d 730, 656 N.W.2d 469. ***Id.*** When a married person commits the crime of sexual assault against a third person, the justification for preventing one spouse from testifying against the other no longer outweighs the interests of ascertaining the truth, and the spousal privilege no longer exists. ***Id.***, ¶16. Wampole was charged with sexual assault of a child under sixteen years of age, constituting the crime of adultery against his wife. *See* ***id.***, ¶¶10, 16. Accordingly, under established law the spousal privilege did not apply, and trial counsel was not ineffective for failing to file a groundless suppression motion.

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

Therefore,

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

IT IS FURTHER ORDERED that attorney Melissa Petersen is relieved of further representing Wampole in this matter.

Diane M. Fremgen
Clerk of Court of Appeals