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September 29, 2016

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

2016AP849-CRNM State v. Gary Michael Kaquatosh (L.C. #2014CF660)
2016AP850-CRNM State v. Gary Michael Kaquatosh (L.C. #2014CF685)

Before Kessler, Brennan and Brash, JJ.

Gary Michael Kaquatosh appeals from judgments of conviction, entered upon his guilty and no-contest pleas, on one count of failure to update sex offender registry information and one count of child enticement, both as a repeater. Kaquatosh also appeals from an order denying his pre-sentencing motion to withdraw his no-contest plea. Appellate counsel, Andrew R. Hinkel, 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] Kaquatosh was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Kaquatosh's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments and order.

BACKGROUND

Because of a prior conviction, Kaquatosh was subject to sex offender registration requirements and GPS monitoring. The criminal complaint in Brown County Circuit Court case No. 2014CF660 alleged that, between April 13, 2014, and May 17, 2014, Kaquatosh intentionally failed to update his address with the registry. He was therefore charged with one count of failure to update sex offender registry information as a repeater.

The criminal complaint in Brown County Circuit Court case No. 2014CF685 alleged that one day in February 2014, then-seven-year-old A.T.L. woke up to a strange man in her apartment. The man was Kaquatosh, her father's cousin to some degree. A.T.L. told police that at some point in the middle of the night, Kaquatosh stepped out of the apartment to smoke. When he came back in, he asked A.T.L., who had gotten up in the middle of the night with her brother to have a snack, to come sit with him on the couch. A.T.L. alleged that when she did, Kaquatosh took her underpants off and began touching her vagina with his hands. When she went to the bathroom to put pants on, Kaquatosh came in and touched her buttocks. Kaquatosh was charged with one count of first-degree sexual assault of a child under the age of thirteen as a repeater.

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

Kaquatosh agreed to resolve the cases through a plea agreement. The sexual assault charge would be amended to child enticement. The State would recommend a sentence of fifteen months' initial confinement and thirty-six months' extended supervision for the registry violation, plus five years' initial confinement on the child enticement charge. The State would be free to argue for any term of extended supervision on the child enticement charge, and it would recommend that the two sentences be consecutive. Kaquatosh would be free to argue for any sentence. Kaquatosh pled guilty to the registry violation and no contest to the child enticement charge.[2]

After a presentence investigation report (PSI) was prepared, Kaquatosh moved to withdraw the no-contest plea on the child enticement charge on multiple grounds. After a hearing at which only Kaquatosh testified, the circuit court denied the motion. At the sentencing hearing, the circuit court imposed consecutive sentences of one year of initial confinement and three years' extended supervision for the registry violation and eight years' initial confinement and ten years' extended supervision for the child enticement.

DISCUSSION

I. Kaquatosh's Pleas

Counsel identifies three potential issues. The first of these is whether there is any basis for a challenge to Kaquatosh's pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Kaquatosh completed plea

[2] Kaquatosh asked to plead no contest to the child enticement charge because he said he was so drunk that night that he blacked out and had no recollection of the assault.

questionnaire and waiver of rights forms, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. Attached to each questionnaire were the applicable jury instructions for each offense to which Kaquatosh was pleading. Each questionnaire, along with an addendum to each, specified the constitutional rights Kaquatosh was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262, 271.

Accompanying each plea questionnaire was a form entitled "Defendant's Notifications." Evidently prepared by defense counsel, this form contains various acknowledgements, ratified by Kaquatosh's signature, that, among other things, Kaquatosh must not make false statements to the judge and must speak up at the plea hearing if he was pressured to enter his pleas.

The plea questionnaires neglected to note that Kaquatosh was pleading to his offenses as a repeater, but this was clarified at the plea hearing itself. Additionally, the plea questionnaire for the registry violation specified the maximum possible imprisonment term, as enhanced by the repeater allegation. The plea questionnaire for the child enticement specified the correct maximum sentence for the offense without the repeater enhancer, but defense counsel clarified the enhanced maximum at the plea hearing and verified that Kaquatosh still wished to proceed with the plea.

The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court confirmed that counsel had explained the plea questionnaires to Kaquatosh "in a way that [Kaquatosh was] able to understand," and that Kaquatosh understood the information on those forms. The circuit court asked whether defense counsel had explained the elements of

each offense to Kaquatosh, and obtained Kaquatosh's acknowledgement that the State would likely be able to prove those elements at trial. The circuit court also obtained Kaquatosh's admission to his prior conviction, which served as a predicate for the repeater enhancer on each offense. The circuit court further confirmed that counsel had reviewed Kaquatosh's constitutional rights with him and that Kaquatosh understood his pleas would result in waiver of those rights.

The circuit court also complied with its additional duties to ensure that no threats had been made to induce the pleas, to advise Kaquatosh that it was not bound by the plea agreement, and to satisfy itself that a factual basis for the pleas existed. Importantly, the circuit court also asked Kaquatosh if he had enough time to discuss his files with counsel and if counsel had satisfactorily answered all of Kaquatosh's questions. Kaquatosh answered affirmatively. When the circuit court asked, "Is there anything that we're doing in either file that you do not understand," Kaquatosh answered, "No."

Ultimately, the plea questionnaire and waiver of rights forms, addenda, attached jury instructions, "Defendant's Notification" forms, and the circuit court's colloquy appropriately advised Kaquatosh of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that his pleas were knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the pleas' validity.

II. Plea Withdrawal Motion

Counsel next discusses whether there is any arguable merit to a challenge to the circuit court's decision to deny Kaquatosh's pre-sentencing motion to withdraw his no-contest plea to the child enticement charge.

A circuit court should freely allow a defendant to withdraw a plea prior to sentencing for any fair and just reason. *See* ***State v. Jenkins***, 2007 WI 96, ¶¶28, 42, 303 Wis. 2d 157, 736 N.W.2d 24. However, plea withdrawal before sentencing is not an automatic right. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995). While a "'fair and just reason' has never been precisely defined," *see* ***Jenkins***, 303 Wis. 2d 157, ¶31 (citation omitted), it requires "some other adequate reason besides the defendant simply changing his mind," *see* ***State v. Rhodes***, 2008 WI App 32, ¶7, 307 Wis. 2d 350, 746 N.W.2d 599. The defendant bears the burden of showing a fair and just reason by a preponderance of the evidence. *See* ***Garcia***, 192 Wis. 2d at 862.

Whether to grant the motion is a matter for the circuit court's discretion. *See* ***Rhodes***, 307 Wis. 2d 350, ¶7. For this court to sustain a discretionary decision, the circuit court must have "'examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Jenkins***, 303 Wis. 2d 157, ¶30 (citation omitted).

After his pleas, Kaquatosh's attorney moved to withdraw, and a successor was appointed; successor counsel filed the plea withdrawal motion on Kaquatosh's behalf. The motion alleged:

(1) Kaquatosh was "subjected to coercion by his prior defense attorney and made a hasty entry of his plea … thus violating the requirements of [WIS. STAT. §] 971.08(1)";[3] (2) "the pending jury trial caused [Kaquatosh] confusion and anxiety and resulted in a hasty decision … to enter a no contest plea … without sufficient time to thoroughly reflect on his decision"; (3) Kaquatosh "had a misunderstanding of the consequences of his plea and the possible effect of the three strike law";[4] (4) Kaquatosh "was not told by his defense attorney … that the PSI report would contain a risk scale report and recommendation"; (5) Kaquatosh had "reviewed the video recording of [A.T.L.] … and finds that she is not truthful"; (6) Kaquatosh used to buy Vicodin from A.T.L.'s mother, but stopped, and she has been carrying a grudge and "could have coached her daughter to falsely accuse" him after finding out he is a sex offender; and (7) there was "no photo of the alleged victim on the defendant's cell phone as alleged by the alleged victim."[5]

The circuit court held a hearing on the motion; only Kaquatosh testified. Following the hearing, the circuit court entered a written order denying the motion. It explained that, at the hearing, Kaquatosh admitted he had not been coerced and that he understood what was happening during the plea hearing. Kaquatosh also admitted that one reason he was really seeking plea withdrawal is because the PSI had recommended significantly more time than the State was planning to recommend under the plea agreement.[6] The circuit court further noted that

[3] WISCONSIN STAT. § 971.08(1) specifies the circuit court's duties prior to accepting a defendant's guilty or no-contest plea.

[4] *See* WIS. STAT. § 939.62(2m); ***State v. Radke***, 2003 WI 7, ¶16, 259 Wis. 2d 13, 657 N.W.2d 66.

[5] The criminal complaint alleged that Kaquatosh had taken a picture of A.T.L.'s underwear, not of the child herself.

[6] The PSI recommended a total of four to six years' imprisonment for the registry violation and a total of twelve to twenty years' imprisonment for the child enticement.

Kaquatosh "never developed a cohesive argument" on the other reasons for withdrawal alleged in his motion.

In short, the circuit court ultimately determined that none of the reasons for which Kaquatosh wanted to withdraw his pleas were credible. We apply a deferential, clearly erroneous standard to a circuit court's credibility determinations. *See* ***Jenkins***, 303 Wis. 2d 157, ¶33. The circuit court's decision that Kaquatosh was not credible is supported by the record and not clearly erroneous. *See* ***id.*** "If 'the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea.'" ***Id.***, ¶34 (quoting ***Garcia***, 192 Wis. 2d at 863). Thus, there is no arguable merit to a challenge to the circuit court's order denying plea withdrawal.

III. Sentencing

The final issue counsel addresses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

We are satisfied that the circuit court properly exercised its sentencing discretion. It considered mitigating factors in Kaquatosh's favor, like the fact that he appeared remorseful and his pleas spared the victim from testifying, but balanced those against aggravating factors, like the seriousness of the child enticement, a lengthy prior record, and a chaotic lifestyle that made compliance with the registry difficult. The circuit court additionally explained why probation was not appropriate and why consecutive sentences were warranted. The circuit court noted proper sentencing objectives and considered no improper factors.

The maximum possible sentence Kaquatosh could have received was forty-one years' imprisonment. The sentence totaling twenty-two years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.

IV. Appellate Counsel

Kaquatosh raises three main issues in his no-merit response. The first is his complaint that appellate counsel refused to "discuss how we could fight the issues in court on my appeal." He asks to speak to an attorney "that would be more positive that I could win my case[.]"

"While a defendant has the right to counsel on direct appeal, he does not have the right to counsel of his choice, or the right to insist that particular issues be raised." ***State v. Evans***, 2004 WI 84, ¶30, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. "It is the duty of appellate counsel to decide what issues have merit for appeal." ***Id.*** If counsel concludes that an

appeal would be frivolous, he may file a no-merit report; a defendant has a right to insist that such a report be filed if he disagrees with counsel's conclusion that the appeal would lack merit. *See* ***id.***; *see also* WIS. STAT. RULE 809.32. That is precisely what happened here—counsel concluded there would be no merit to an appeal, Kaquatosh disagreed, and a no-merit report was filed.[7] We discern no issue of arguable merit.

V. Witness Credibility

Second, Kaquatosh complains that A.T.L.'s mother is a pathological liar. That may or may not be true. However, the criminal complaint was based on statements A.T.L. herself made. The only meaningful information in the complaint attributed to A.T.L.'s mother is that Kaquatosh was at her apartment on the night of the assault, and Kaquatosh does not deny that fact.[8] Further, a valid guilty or no-contest plea waives all non-jurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. Thus, there is no arguable merit to this issue.

VI. Early Release Eligibility

Finally, Kaquatosh states that while the circuit court stated he was eligible for the Challenge Incarceration Program and the Substance Abuse Program, the Department of Corrections has informed him that these early release programs are "denied for the type of

[7] Additionally, there is no guarantee that a different attorney would find meritorious issues when current counsel, and this court, have found none.

[8] Nor would Kaquatosh be in a position to deny that fact; his presence was confirmed when Green Bay police responded to the apartment building for a neighbor's complaint about children running in the hallway and a man sitting outside one of the apartments.

charges I have." Kaquatosh thus notes, "I would maybe think the judge would reconsider his sentence on me."

However, the circuit court was already invited to reconsider the sentence because of Kaquatosh's statutory ineligibility, but it declined to do so. The Department wrote to the circuit court about this very problem, explaining that the child enticement conviction "is not statutorily eligible for either of these programs," and asked the circuit court to provide an amended judgment of conviction to so reflect.

The circuit court explained in a letter response that its decision did not bind the Department, "which has an independent duty to determine statutory eligibility, as well as suitability of a defendant for the programs." The circuit court informed the Department that its "finding of eligibility is an expression of the Court's intention to support a defendant's request for participation," now or in the future if the law were to change, without involvement necessary from the court itself. It declined to alter the judgment of conviction because doing so would frustrate the court's intent.

In other words, the circuit court was made aware of Kaquatosh's statutory ineligibility for early release programs and has already declined to alter the sentence based on that information. Thus, there would be no arguable merit to asking the circuit court to review Kaquatosh's sentences for a second time in light of information the circuit court has already been asked to consider and declined to act upon.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgments and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Andrew R. Hinkel is relieved of further representation of Kaquatosh in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals