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DISTRICT III

October 12, 2016

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

2015AP1102-CRNM State of Wisconsin v. Zachary P. McDonnell
2015AP1103-CRNM (L. C. ## 2013CF59, 2014CF17)

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

Counsel for Zachary McDonnell has filed a no-merit report concluding no grounds exist to challenge McDonnell's convictions for first-degree sexual assault of a child by sexual contact; child enticement; and possession of methamphetamine.[1] McDonnell was informed of his right to

[1] The no-merit report was filed by attorney William E. Schmaal, who has been replaced by attorney Suzanne L. Hagopian as McDonnell's appellate counsel.

file a response to the no-merit report and has not responded. Upon our independent review of the records 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 judgments of conviction. *See* WIS. STAT. RULE 809.21 (2013-14).[2]

In Pepin County Circuit Court case No. 2013CF59, the State charged McDonnell with first-degree sexual assault of a child under the age of twelve; child enticement; and use of a computer to facilitate a child sex crime. The complaint alleged that McDonnell had engaged in sexual intercourse with eleven-year-old A. K., had enticed A. K. into a room for that purpose, and had used a computer to facilitate the crimes. In Pepin County Circuit Court case No. 2014CF17, the State filed a five-count complaint alleging McDonnell had possessed methamphetamine, tetrahydrocannabinols and drug paraphernalia; had operated a motor vehicle after revocation; and had violated the conditions of his release on bail in the former case.

In exchange for McDonnell's no contest pleas to child enticement, possessing methamphetamine and an amended charge of first-degree sexual assault of a child by sexual contact, the State agreed to dismiss the remaining charges in these and two other cases. The parties remained free to argue at sentencing. Out of a maximum possible sentence of eighty-eight and one-half years, the court imposed a total of ten years' initial confinement and ten years' extended supervision, followed by a consecutive term of ten years' probation.

The record discloses no arguable basis for withdrawing McDonnell's no-contest pleas. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights

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

form that McDonnell completed, informed McDonnell of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering no-contest pleas. Additionally, the court found that a sufficient factual basis existed in the records to support the conclusion that McDonnell committed the crimes charged. Although the court failed to inform McDonnell that it was not bound by the terms of the plea agreement, as required under ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, McDonnell received the benefit of the plea agreement. Therefore, this defect in the colloquy does not present a manifest injustice warranting plea withdrawal. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441. The circuit court also failed to advise McDonnell of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). Because the record shows McDonnell is a United States citizen not subject to deportation, any challenge to the plea on this basis would lack arguable merit. The record shows the pleas were 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 court considered the seriousness of the offenses; McDonnell's character; the need to protect the public; and the mitigating factors McDonnell raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that McDonnell'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).

We note that the circuit court discussed the COMPAS risk assessment at sentencing. In ***State v. Loomis***, 2016 WI 68, ¶¶98-99, __ Wis. 2d __, 881 N.W.2d 749, our supreme court held:

> [A] sentencing court may consider a COMPAS risk assessment at sentencing subject to the following limitations. As recognized by

> the Department of Corrections, the PSI instructs that risk scores may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.
>
> Importantly, a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing.

After identifying several factors contributing to the sentence imposed, the circuit court acknowledged COMPAS, noting it took the assessment "with a grain of salt" and did "not put[] much weight on [it]." While the circuit court referenced COMPAS at sentencing, the record shows it was not "determinative" of the sentence imposed. Accordingly, we conclude that further proceedings on this possible issue would lack arguable merit.

Our independent review of the records discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Suzanne L. Hagopian is relieved of further representing McDonnell in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals