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November 16, 2016

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

2014AP2471-CRNM State of Wisconsin v. Douglas C. Rupp (L.C. # 2010CF873)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Douglas C. Rupp appeals from judgments of conviction entered upon his no contest pleas to false imprisonment and fourth-degree sexual assault. Rupp's appellate counsel, Devin C. Shanley, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Rupp filed a response to the no-merit report. Counsel then filed a supplemental no-merit report to which Rupp filed another response. Upon

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

our independent review of the record, we determined there was a potentially meritorious sentence credit issue and ordered counsel to file a second supplemental no-merit report.[2] Additionally, we directed counsel to further address Rupp's claim that the sentencing court considered inaccurate information about a prior conviction from Kentucky. Pursuant to our order, counsel filed a second supplemental no-merit report. As to the sentence credit issue, the second supplemental no-merit report and supporting documents confirm that by order entered April 25, 2016, the circuit court granted Rupp's motion and awarded an additional seventeen days of sentence credit for the time he spent in an inpatient facility while undergoing a competency examination as required by WIS. STAT. § 971.14(2)(a). Upon consideration of the original and supplemental no-merit reports and Rupp's responses, and based on our independent review of the record, we conclude that the judgments may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In 2010, the State filed a three-count complaint charging Rupp with first-degree sexual assault of a child under age sixteen by use of threat of force or violence, incest, and second-degree sexual assault of a child under the age sixteen. The first two charges related to a May 2009 incident wherein Rupp had sexual intercourse with a fifteen-year-old relative (hereafter, the

[2] Specifically, we questioned whether Rupp was entitled to additional sentence credit for time spent in an inpatient facility while undergoing a competency examination pursuant to WIS. STAT. § 971.14(2)(a). We informed appellate counsel that it appeared the University of Wisconsin Law School's LAIP program had already filed a sentence credit motion on Rupp's behalf.

related child victim). The third charge concerned a May 2009 incident of sexual conduct with a non-relative child. The case remained pending for several years for reasons including changes in judges, trial attorneys, and competency proceedings. Eventually, the parties reached an agreement wherein Rupp would plead no contest to reduced charges of false imprisonment, a Class H felony, and fourth-degree sexual assault, a Class A misdemeanor, and the State would recommend a withheld sentence in favor of five years of probation. The agreement also required that Rupp write a letter of apology to the related child victim. At sentencing, the court imposed the maximum, namely, a six-year bifurcated sentence on the felony count, with three years each of initial confinement and extended supervision, and a consecutive nine-month sentence on the misdemeanor count.

The circuit court engaged in an appropriate plea colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the circuit court properly relied upon Rupp's signed plea questionnaire to establish his knowledge and understanding of his pleas. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). We agree with counsel that no issue of arguable merit arises from the plea-taking procedures in this case.

The remaining issues addressed by counsel's no-merit and supplemental no-merit reports and identified in Rupp's responses thereto relate to sentencing. We agree with counsel that no arguably meritorious issues arise from the sentencing proceedings in this case. In fashioning the sentence, the court considered the seriousness of the offenses, the defendant's character and history of prior offenses, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49,

¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentencing court focused on the severity of the offenses, observing that the reduced charges of conviction were the result of a plea bargain and that in the PSI, Rupp admitted having intercourse with the related child victim. At the time of Rupp's plea, the case had been pending for about three and one-half years and he appeared with his fourth appointed attorney. The victim stated at sentencing that the prolonged proceedings and postponements "set my life back quite a bit." The sentencing court determined that a considerable portion of the delay was attributable to Rupp's conduct, which the court described as "wearing the victim down to the point that she just wants the case to be over." The court determined that this aggravated the severity of the offense and reflected negatively on Rupp's character. The sentencing court also considered to be "[v]ery important[]" Rupp's prior criminal record, which included several batteries, convictions for child endangerment and child abuse, and a sexually-related conviction in Kentucky. The sentencing court agreed with the PSI that there is "a clear pattern of the Defendant engaging in violent and deviant behavior that escalates," and determined this reflected negatively on his character and ability to be safely rehabilitated in the community.

In his response to the original no-merit report, Rupp asserts that the sentencing court erroneously exercised its discretion by considering the delay in the case's disposition to his detriment. Rupp points out that some of the delay was occasioned by judicial transfers, competency proceedings, and litigation pursued by his final trial counsel. On review, we afford the sentencing court a strong presumption of reasonability and we follow "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***State v. Gallion***, 2004 WI 42, ¶18, 270 Wis. 2d 535, 678 N.W.2d 197. We will sustain a sentencing court's reasonable exercise of discretion even if this court or another judge might have reached a

different conclusion. ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. Here, the record supports the sentencing court's determination that Rupp's conflicts with and firing of numerous attorneys constituted delay tactics. Further, the sentencing court considered other relevant factors such as Rupp's prior criminal record and the more serious conduct alleged. Additionally, given the facts of this case and the reduced charges, we cannot conclude that the sentence imposed is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). *See also* ***State v. Kaczynski***, 2002 WI App 276, ¶13, 258 Wis. 2d 653, 654 N.W.2d 300 (where defendant received the benefit of a substantial charging concession, the trial court's imposition of the maximum sentence did not shock "the community's sense of justice").

Next, Rupp alleges that the PSI contained and the sentencing court relied on inaccurate information. The PSI indicated that in 1993, Rupp was convicted of "Sexual Abuse I" in Oldham County, Kentucky, and sentenced to one year in prison. According to the PSI, Rupp told the author he believed he had actually been convicted of a misdemeanor that was pled down from "Sexual Abuse I" and provided details of the underlying facts, stating the offense involved the consensual body piercing of a woman he was dating, who later claimed nonconsent after her husband became involved. At sentencing, trial counsel informed the court that Rupp maintained he was convicted of only a misdemeanor in connection with this offense. In his response to the no-merit report, Rupp asserted for the first time that he was never charged with "Sexual Abuse I" and that his conviction had nothing to do with the facts stated in the PSI. Rupp asserted that his conviction was out of Jefferson County, Kentucky, and that the sexually-related offense in the PSI was not his but instead "the conviction of another Douglas Rupp out of Oldham County, Kentucky." Appellate counsel's second supplemental no-merit report and its attachments

demonstrate that Rupp was indeed convicted of "Sexual Abuse, 1st Degree" out of Jefferson County, Kentucky. The attached records reflect that the conviction was attributed to an offender bearing Rupp's exact name, date of birth, and FBI number. Rupp's letter response to the second supplemental no-merit report does not effectively dispute this representation.[3] We conclude that no arguably meritorious challenge arises from the circuit court's consideration of Rupp's Kentucky conviction.

Rupp's responses also raise claims concerning his apology letter considered by the sentencing court. As an integral part of the plea agreement, Rupp was required to submit a letter of apology to the related child victim. At sentencing, the court quoted the letter as stating, "What [the victim] accused me of is true[,]" and that Rupp "regretted the events of that day every day for almost five years, and will continue to do so for the rest of my life." In his original response to counsel's no-merit report, Rupp alleged that the court misquoted him and that his letter did not state the accusations were "true." Appellate counsel filed a supplemental no-merit report with a supporting affidavit and exhibits establishing that the submitted apology letter indeed stated "What [the victim] accused me of is true." *See* WIS. STAT. RULE 809.32(1)(f) (permitting counsel to rebut allegations made in an appellant's response by filing a supplemental no-merit report and affidavits concerning matters outside the record). Rupp then filed a response to the supplemental no-merit report asserting that the submitted apology letter is "a fake, a fraud, a

[3] Prior to the filing of counsel's second supplemental report, Rupp filed a July 15, 2016 letter response anticipating appellate counsel's assertions and averments. Rupp's letter asks this court to refuse to accept the forthcoming second supplemental no-merit report due to delay. As to the Kentucky records furnished by appellate counsel, Rupp states that because in Wisconsin the crime of first-degree sexual assault carries with it a sixty-year maximum, he "would guess that it carries something similar in Kentucky," and suggests that due to the relatively short length of his Kentucky sentence, "[s]omewhere there has been a mistake made."

fabrication" that does not "show up anywhere in the court transcripts." Rupp's claim is incredible and contradicted by both the record and appellate counsel's first supplemental no-merit report. The disputed apology letter is quoted verbatim in the (presentence investigation report) PSI and in the sentencing transcript, and its contents were repeatedly discussed during the course of Rupp's sentencing. Rupp did not contest or correct the letter's contents at sentencing and did not claim fraud until appellate counsel provided this court with a copy of the signed apology letter. We agree with appellate counsel's conclusion that no arguably meritorious issue arises from this claim.

Rupp's response to the no-merit report alleges that trial counsel was ineffective for allowing him to be interviewed by the PSI author while Rupp was taking narcotic medications. He suggests that the PSI statements attributed to him describing his assault of the related child victim are misleading because he believed he was simply describing the allegations made in the complaint. The assertions in Rupp's response are incredible and belied by the record. At sentencing, trial counsel made numerous and detailed corrections and qualifications to the PSI; none concerned Rupp's description of the offense. Instead, trial counsel argued that Rupp's statements to the PSI author demonstrated his remorse and reflected positively on his character, even asking permission to read his PSI statements to the victim. Additionally, Rupp's statements to the PSI author are not reasonably construed as a mere description of the complaint's allegations. Rupp's statements provide additional detail about the offense and indicate that the only disputed allegation in the complaint was that he offered the related child victim money to stay silent. Rupp's responses to the PSI author's follow-up questions and his repeated expressions of remorse further demonstrate that he was aware he was describing his version of the assault.

Our review of the record discloses no other potential issues for appeal.[4] Accordingly, this court accepts the no-merit report, affirms the convictions, and discharges appellate counsel of the obligation to represent Rupp further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Devin C. Shanley is relieved from further representing Douglas C. Rupp in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] We conclude that the circuit court properly exercised its discretion in ordering the DNA surcharge and that Rupp register as a sex offender. Additionally, Rupp's no contest pleas 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.