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DISTRICT II

(Amended as to footnote 2 on April 6, 2017)

April 5, 2017

To:

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

2016AP2482-CRNM State of Wisconsin v. Jeremy J. TenHaken (L.C. #2015CF211)

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

Jeremy J. TenHaken appeals from a judgment convicting him of second-degree sexual assault of a child under sixteen and two counts of interfering with child custody. TenHaken's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). TenHaken was advised of his right to file a response but has not done so. Upon consideration of the no-merit report and an

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

independent review of the record as mandated by ***Anders*** and RULE 809.32, we modify the judgment[2] and summarily affirm the judgment as modified because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

TenHaken sheltered juvenile runaways in his apartment, shared prescription medication with them, and had sexual intercourse with C.Y. TenHaken was forty years old; C.Y. was fourteen. He claimed not to know the youths were runaways.

TenHaken pled no contest to Count 1, second-degree sexual assault of a child under sixteen, and to Counts 6 and 7, interfering with child custody. A second count of second-degree sexual assault of a child under sixteen, also involving C.Y., two counts of delivering a prescription drug, and another count of interfering with child custody were dismissed and read in at sentencing. One count of child enticement was dismissed outright. The court sentenced him to consecutive terms of fifteen years' initial confinement and fifteen years' extended supervision on Count 1 and eighteen months' IC and twenty-four months' ES on each of Counts 6 and 7.

The no-merit report first addresses TenHaken's plea. A defendant seeking to withdraw a guilty plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v.***

[2] The written judgment incorrectly states that TenHaken's terms of initial confinement and extended supervision on Counts 1, 6, and 7 are to be served concurrently; the sentencing court clearly and unambiguously ordered, however, that "[t]he initial confinement and Extended Supervision in Counts Six and Seven are consecutive to each other and consecutive to Count One." The oral pronouncement controls the written judgment. ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987); ***State v. Schordie***, 214 Wis. 2d 229, 231 n.1, 570 N.W.2d 881 (Ct. App. 1997). The error in the judgment is merely a defect in the form of the certificate of conviction that may be corrected in accordance with the sentencing court's actual determination. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. The circuit court either may correct the clerical error in the sentence portion of the written judgment of conviction itself or may direct the clerk's office to do so. ***Prihoda***, 239 Wis. 2d 244, ¶5.

McCallum, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). The circuit court made the inquiries required by WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 260-62, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶¶24, 33, 274 Wis. 2d 379, 683 N.W.2d 14. The court also utilized TenHaken's signed plea questionnaire/waiver-of-rights form. *See* ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794. TenHaken confirmed that he understood the potential penalties, the rights he agreed to waive, the elements of the crime, and that the court was not bound by any sentencing recommendation. *See* ***Hampton***, 274 Wis. 2d 379, ¶¶20, 23. Counsel agreed that the complaint provided a factual basis to support the plea.

The no-merit report also considers the circuit court's exercise of discretion at sentencing. Sentencing objectives include the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. A sentencing court should indicate the objectives of greatest importance and explain how, under the facts of the particular case, the sentence selected advances those objectives. ***Id.***, ¶¶41, 42. The primary sentencing factors a court must consider "are the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Davis***, 2005 WI App 98, ¶13, 281 Wis. 2d 118, 698 N.W.2d 823.

The court focused on the need to protect the public and what the crimes revealed about TenHaken's character. It noted, for example, that he tried to portray himself as a friend to troubled youths by giving them a safe place to stay so they did not have to fend for themselves on the streets and that he made the "stupid mistake" of "going with it" when C.Y. initiated sex with him because he was drunk.

The court rejected his spin on the facts. It found that TenHaken took advantage of and groomed vulnerable children by allowing them to call him "Dad" and stay at his "crash pad" and in his bed and providing drugs and alcohol, all in the presence of his own teen-aged son and daughter who lived with him. It also found that his minimizing behaviors, victim-blaming, and not caring that parents had reported to police that their children were missing for days underscored the "absolute need to protect the community from [him]." It weighed and applied proper sentencing factors in a reasoned and reasonable manner and provided a thorough and rational explanation for imposing the sentence it did. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶39-40.

TenHaken faced forty-seven years' imprisonment and $120,000 in fines. His thirty-seven year sentence is not so excessive and unusual or so disproportionate to his offenses as to "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We cannot say that there was an "unreasonable or unjustifiable basis in the record for the sentence imposed." ***State v. Echols***, 175 Wis. 2d 653, 682, 499 N.W.2d 631 (1993).

The last potential issue the report considers is whether, after an evidentiary hearing, the circuit court erroneously denied his motion to suppress evidence under the emergency rule exception and the community caretaker doctrine. We agree this issue is meritless.

The two-step analysis for determining the validity of a warrantless search under the emergency rule exception requires both that: (1) the searching officer actually is motivated by a perceived need to render aid or assistance, and (2) the court finds that a reasonable person under the same circumstances would have thought an emergency existed. ***State v. Boggess***, 115 Wis. 2d 443, 450-51, 340 N.W.2d 516 (1983).

Under the community caretaker doctrine, the court first decides if the police conduct was truly a "bona fide community caretaker activity," requiring that the activity be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." ***State v. Horngren***, 2000 WI App 177, ¶9, 238 Wis. 2d 347, 617 N.W.2d 508 (citations omitted). It then weighs the "public good" against the intrusion on the person's privacy. ***Id.***

Nichole, the mother of one of the juveniles, learned that her son might be at TenHaken's apartment. She phoned Detective Tamara Remington, who was involved in locating the runaways, that she and her fiancé were at TenHaken's address. Remington said she was on her way. The fiancé banged on TenHaken's door. No one answered. When S.M.T., TenHaken's daughter, entered the building and opened the door to the apartment, Nichole and the fiancé rushed in. Remington, in the hall speaking to S.M.T., heard loud voices inside; someone yelled, "I will f---ing kill you!" She then heard, "Remington! Here's the girl you were looking for!" Remington entered, saw TenHaken standing in a bedroom; C.Y., clad only in a t-shirt, was on the bed. After arresting TenHaken, she got a search warrant. TenHaken contended a warrant should have been secured before Remington entered his apartment.

The circuit court found that once Remington—from the hallway—heard yelling and threats of violence, and knowing from their conversation that Nichole and the fiancé were upset, angry, and motivated to cause injury, she had no choice but to see if she could render aid. It also found that, despite TenHaken's right to privacy in his home, given the uncertainty of the commotion and the general knowledge that "there is a kitchen and knives," Remington needed to enter in her role as a community caretaker, as there would be "great criticism" if someone were hurt or killed. No issue of arguable merit could arise from the warrantless entry.

We note an additional potential issue but conclude it would be frivolous. TenHaken appeared by videoconference at his initial appearance and bond hearing. His counsel objected that TenHaken's appearance by video was not a legal or functional equivalent of being present in court. WISCONSIN STAT. § 967.08 permits the initial appearance and bond hearing to "be conducted by telephone or live audiovisual means." Sec. 967.08(1), (2)(a), (3)(a).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment of conviction as modified, discharges appellate counsel of the obligation to represent TenHaken further in this appeal, and remands for entry of a corrected judgment of conviction. Therefore,

IT IS ORDERED that the judgment of conviction is modified to conform to the oral sentencing pronouncement, the judgment is summarily affirmed as modified, and the cause is remanded for entry of a corrected judgment of conviction. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Jeremy J. TenHaken in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals