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March 29, 2017

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

2015AP2102-CRNM State of Wisconsin v. Mariono L. Weaver (L.C. # 2014CF1440)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Mariono Weaver appeals a judgment convicting him of second-degree sexual assault by use of force. Attorney Lane Fitzgerald has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2015-16);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of Weaver's plea and sentence. Weaver was sent a copy of the report, but has not filed a response.

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

Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Weaver entered his plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Weaver's plea, the State agreed to reduce the sexual assault charge from first-degree to second-degree; to dismiss three additional felony charges of attempted first-degree sexual assault, strangulation, and attempted armed robbery, and to make a joint sentencing recommendation for eight years of initial confinement and twelve years of extended supervision. The plea agreement reduced Weaver's total imprisonment exposure by seventy-six years, and limited his initial incarceration exposure to twenty-five years.

The circuit court conducted a standard plea colloquy, inquiring into Weaver's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. In addition, Weaver provided the court with a signed plea questionnaire. Weaver indicated to the

court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). In particular, the form noted that the court would not be bound by any plea agreement or recommendations, and could impose up to the maximum penalty of "25 in + 15 out."

The facts set forth in the complaint—namely, that a woman reported to police that an assailant had pulled her off a sidewalk, forced her behind some bushes as she was walking to a pharmacy, and sexually assaulted her at gunpoint, and that DNA from the rape kit matched Weaver—provided a sufficient factual basis for the plea. In addition, the State had surveillance video of Weaver sitting outside a store, watching the victim walk by, and then following her. Weaver indicated satisfaction with his attorney at the plea hearing, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Weaver has not alleged any other facts outside of the record that would give rise to a manifest injustice.

Because there is no arguable basis to challenge Weaver's plea, the plea operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Weaver's sentence would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record shows that Weaver was afforded an opportunity to address the court, both personally and through counsel, and took the opportunity to apologize to the victim. The court

proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court described the assault as "barbaric" and an "act of pure savagery," noting that Weaver was apparently getting thrills out of exercising dominion over the victim, while the victim thought she was going to die. Beyond what the offense itself revealed about Weaver's character, the court also noted that Weaver had initially come up with a story of "dope dating" rather than admitting what he had done. The court concluded that a longer sentence than that recommended by the parties was required to protect the public and adequately address the seriousness of the offense.

The court then sentenced Weaver to twelve years of initial confinement and eight years of extended supervision. The court also awarded 218 days of sentence credit and imposed standard costs and conditions of supervision. By an amended judgment, the court clarified that that Weaver was not eligible for either the challenge incarceration program or the substance abuse program.

The components of the bifurcated sentence imposed were within the applicable penalty ranges and the total imprisonment period constituted half of the maximum exposure Weaver faced. *See* WIS. STAT. §§ 940.225(2)(a) (classifying second-degree sexual assault as a Class C felony); 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class C felony).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentence imposed here was not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment

of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. That is particularly true when taking into consideration the amount of additional sentence exposure Weaver avoided on the read-in offenses.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals