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DISTRICT III

April 18, 2017

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

2016AP1530-CRNM State v. Martin McKinney (L. C. No. 2015CF277)

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

Counsel for Martin McKinney has filed a no-merit report concluding no grounds exist to challenge McKinney's conviction for one count of first-degree sexual assault by sexual contact with a child under age thirteen, contrary to WIS. STAT. § 948.02(1)(e) (2015-16).[1] McKinney was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967),

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

we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged McKinney with first-degree sexual assault of a child under age twelve, contrary to WIS. STAT. § 948.02(1)(b). The charge arose from allegations regarding McKinney's contact with four-year-old H.W., who reported to her father, and then to a child forensic interviewer, that McKinney put his finger in her "pee pee." A police detective interviewed McKinney, who agreed to come to the police department and was told at the start of the interview that he was not in custody and was free to leave. During the interview, McKinney admitted he had experienced sexual urges toward children but denied any attraction to H.W. Although McKinney initially indicated he had only touched the child's private area while cleaning her with a wipe, he later described an incident in which he picked up H.W. and his hand slid up her shorts and touched her vagina. McKinney stated his finger penetrated H.W.'s vagina by about one-half inch. After the interview, the detective gave McKinney a ride to work. McKinney was charged the next day.

Pursuant to a plea agreement, the State amended the charge to first-degree sexual assault by sexual contact with a child under age thirteen; McKinney pleaded no contest to the amended charge; and the State remained free to recommend "up to 25 years of initial confinement." Out of a maximum possible sixty-year sentence, the court imposed a twenty-eight-year sentence, consisting of eighteen years' initial confinement followed by ten years' extended supervision.

The record discloses no arguable basis for challenging the effectiveness of McKinney's trial counsel. To establish ineffective assistance of counsel, McKinney must show that his counsel's performance was not within the range of competence demanded of attorneys in

criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, McKinney must demonstrate "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty [or no contest] and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

Any claim that trial counsel was ineffective by failing to pursue a pretrial motion to suppress McKinney's statements to police would lack arguable merit. As noted above, McKinney agreed to come to the police department and was told at the start of the interview that he was not in custody and was free to leave. Nothing about this non-custodial interview would support a non-frivolous argument that trial counsel was ineffective by failing to move to suppress McKinney's statements. *See* ***State v. Brockdorf***, 2006 WI 76, ¶39, 291 Wis. 2d 635, 717 N.W.2d 657 (holding that police are not required to give ***Miranda***[2] warnings if the suspect is not in custody). Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[3] hearing.

The record discloses no arguable basis for withdrawing McKinney's no-contest plea. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that McKinney completed, informed McKinney of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no-contest plea. The circuit court confirmed that McKinney understood the court was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

advised McKinney of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the circuit court properly found that a sufficient factual basis existed in the record to support the conclusion that McKinney committed the crime charged. The record shows the plea was 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 circuit court considered the seriousness of the offense; McKinney's character, including his criminal history; the need to protect the public; and the mitigating factors McKinney 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 McKinney'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). Further, there is no arguable merit to any claim that the conditions of extended supervision were not "reasonable and appropriate" under the circumstances of this case. *See* ***State v. Koenig***, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499.

There is likewise no arguable merit to any claim that the sentencing court improperly considered the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment. The sentencing court stated that its decision was "driven by the facts and the biographical information" in the record and that COMPAS had not played any role in its ultimate determination, in conformity with ***State v. Loomis***, 2016 WI 68, ¶99, 371 Wis. 2d 235, 881 N.W.2d 749.

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

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

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

Diane M. Fremgen
Clerk of Court of Appeals