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June 14, 2017

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

2015AP1358-CRNM State of Wisconsin v. Michael A. Fischer (L.C. #2013CF624)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Michael A. Fischer appeals from a judgment of conviction entered upon his no contest pleas to using a computer to facilitate a child sex crime and possession of child pornography. Fischer's 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). Fischer received a copy of the report and filed a response. Appellate counsel then filed a supplemental no-merit report addressing

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

Fischer's response.[2] We determine that the judgment erroneously reflects the circuit court's imposition of DNA analysis surcharges totaling $500. This appears to be a scrivener's error and we order that upon remittitur, the judgment shall be modified to remove the $500 DNA analysis surcharge.[3] *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857 (a defect in the form of the judgment of conviction may be corrected in accordance with the actual determination by the circuit court). Upon consideration of the no-merit reports, Fischer's response, and an independent review of the record, we conclude that the modified judgment 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.

For offenses occurring in September 2013, the State filed a criminal complaint charging Fischer with using a computer to facilitate a child sex crime in violation of WIS. STAT. § 948.075(1r) and two counts of possession of child pornography in violation of WIS. STAT. § 948.12(1m) & (3)(a). Subsequently, the State was permitted to file a seventeen-count amended

[2] At Fischer's request, we provided direction to him and to appellate counsel concerning a potential witness statement. We held the appeal in abeyance to allow Fischer to respond to counsel's supplemental no-merit report. Despite ample opportunity, no response or witness statement was received from Fischer, and we lifted the hold to allow the no-merit appeal to proceed.

[3] The circuit court never ordered Fischer to pay a DNA surcharge. Because Fischer's crimes were committed before January 1, 2014, whether to impose a DNA surcharge was discretionary with the circuit court under WIS. STAT. § 973.046(1g) (2011-12), and only one discretionary $250 DNA surcharge could be imposed. By including a DNA surcharge when the circuit court did not order Fischer to pay it, the form of the judgment does not match the oral sentencing pronouncement. "[T]he circuit court's unambiguous oral pronouncement of sentence trumps the written judgment of conviction." ***State v. Prihoda***, 2000 WI 123, ¶15, 239 Wis. 2d 244, 618 N.W.2d 857. The circuit court may either correct the clerical error in the sentence portion of the written judgment or may direct the clerk's office to make such a correction. ***Id.***, ¶5.

information charging Fischer with the above three offenses along with thirteen more counts of possessing child pornography and one count of violating the sex offender registry rules.

Fisher filed a motion to suppress the fruits of his vehicle search and the State filed a response. The parties agreed that the motion would be heard the morning of trial. On the morning set for trial, Fisher withdrew his suppression motion and, pursuant to a plea agreement, pled no-contest to using a computer to facilitate a sex crime and one count of possessing child pornography. The State moved to dismiss and read in the remaining counts and agreed to cap its sentencing recommendation at a total of twelve years, with eight years of initial confinement followed by four years of extended supervision, to run consecutive to any other sentence. At sentencing, on count one, the circuit court imposed an eleven-year bifurcated sentence with six years of initial confinement followed by five years of extended supervision. On count two, the court imposed an eight-year bifurcated sentence with four years of initial confinement followed by four years of extended supervision, to run consecutive to count one. This no-merit appeal follows.

The no-merit report first addresses whether Fischer's no-contest pleas were freely, knowingly, and voluntarily entered. The trial court engaged in an appropriate plea colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***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 Fischer'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).

Though not discussed in the no-merit report, we observe that Fischer did not expressly articulate his pleas of no contest at the plea hearing. We conclude that no possible issue arises from this circumstance. *See* ***State v. Burns***, 226 Wis. 2d 762, 764, 594 N.W.2d 799 (1999) (affirming the defendant's judgment of conviction even though he did not "expressly and personally articulate a plea of no contest on the record in open court, because the only inference possible from the totality of the facts and circumstances in the record is that the defendant intended to plead no contest."). Here, Fischer completed, signed and filed a plea questionnaire indicating his intent to plead "no contest" to the charges, the court and parties repeatedly stated that the purpose of the hearing was to allow Fischer to plead so that he could proceed to sentencing, and the court's colloquy included the following:

> THE COURT: Specifically, you wish to enter a plea of no contest to Count 1 of the Second Amended Information; that is a count of use of a computer to facilitate a child sex crime?
>
> FISCHER: Yes, sir.
>
> THE COURT: And you also wish to enter a plea of no contest to Count 2, possession of child pornography?
>
> FISCHER: Yes, sir.

As in ***Burns***, it is clear from the record, "that is, from the written plea questionnaire and waiver of rights form and the plea colloquy, that the defendant intended to plead no contest to the charged offense[s]." ***Id.*** at 769-70. No issue of arguable merit arises from the plea-taking procedures in this case.

Next, the no-merit report addresses whether the sentence imposed was an erroneous exercise of discretion. In fashioning the sentence, the court considered the seriousness of the offenses, the defendant's character, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Though the circuit court identified several

mitigating factors, including Fischer's educational and employment history and lack of identifiable drug and alcohol issues, it permissibly determined that its sentence, which, it acknowledged, was longer "than the presumptive minimum," was necessary given the defendant's prior record and character, and the nature of the offenses. *See* ***id.*** (the weight to be given to each factor is committed to the circuit court's discretion). The sentencing court explained:

> This defendant does need to be punished. He does have significant rehabilitative needs that are long-term in nature. There is by way of incarceration hopefully a deterrent effect on this defendant and hopefully on others. So I think not to incarcerate in the Wisconsin state prison would unduly depreciate the seriousness of this offense. I do think that prison is necessary in this offense. And I don't say that lightly because I believe that every prison sentence is a failure of our community and of our society, and this is a situation consistent with that belief.

The circuit court's sentence was a demonstrably proper exercise of discretion with which we will not interfere. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-18, 270 Wis. 2d 535, 678 N.W.2d 197. Further, we cannot conclude that the nineteen-year sentence when measured against the possible maximum sentence of sixty-five years 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).

Pursuant to WIS. STAT. § 939.617(1), count one carried a mandatory minimum penalty of five years of initial confinement, while count two carried a mandatory minimum of three years of initial confinement. Though not discussed in the no-merit report or response, the sentencing court's remarks reflect that it considered these minimum penalties to be presumptive rather than mandatory. In a case released after Fischer's sentencing, this court clarified that a § 939.617 minimum sentence is mandatory unless the defendant is not more than forty-eight months older than the child-victim. ***State v. Holcomb***, 2016 WI App 70, ¶15, 371 Wis. 2d 647, 886 N.W.2d

100. In Fischer's case, while believing it could impose a term of probation, the sentencing court nonetheless determined that confinement in an amount greater than the mandatory minimum was necessary and appropriate. Therefore, Fischer's sentence was not affected by the circuit court's belief that it could impose probation or less than the mandatory minimum. No possible issue arises from the parties' or the court's potential belief that the minimum sentences were presumptive rather than mandatory.

Fisher's response to the no-merit report claims there was "an illegal search and seizure of [his] vehicle." However, trial counsel filed but withdrew a motion to suppress on Fischer's behalf because of Fischer's decision to accept the plea agreement. Upon learning that Fischer intended to accept the plea agreement, the court engaged Fischer in the following colloquy:

> THE COURT: Okay. And defense would be withdrawing the motion to suppress then?
>
> TRIAL COUNSEL: That's correct.
>
> THE COURT: And first of all, sir, it is your desire to withdraw or have [trial counsel] withdraw on your behalf the motion to suppress the vehicle search?
>
> FISCHER: Yes, sir.
>
> THE COURT: And you've discussed that with [trial counsel]?
>
> FISCHER: Yes, sir.
>
> THE COURT: Has anyone promised you anything or threatened you in any way to have you agree to withdraw that motion?
>
> FISCHER: No, sir.
>
> THE COURT: Did you feel you've had enough time to think about that decision?
>
> FISCHER: Yes, sir.
>
> THE COURT: Do you feel you've had enough time to talk with [trial counsel] about that decision?

> FISCHER: Yes, sir.
>
> THE COURT: I will accept the request to withdraw the motion to suppress the vehicle search, finding that the defendant is wishing to do that doing so freely, voluntarily and intelligently, with the advice and assistance of counsel.

By entry of his no-contest pleas, Fischer elected to abandon the suppression motion and any related potential issues have been forfeited. *Cf.* ***State v. McDonald***, 50 Wis. 2d 534, 537, 184 N.W.2d 886 (1971) (deliberate abandonment of a suppression motion prior to trial constituted waiver). *See also* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (a no-contest plea forfeits the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights).

Next, in his response to the no-merit report, Fischer relies on ***State v. McKellips***, 2015 WI App 31, 361 Wis. 2d 773, 864 N.W.2d 106, for the proposition that his cell phone does not constitute a "computerized communication system" under WIS. STAT. § 948.075, and as such, there was no factual basis supporting his conviction on count one. We conclude that Fisher's claim lacks arguable merit because the court of appeals decision in ***McKellips*** was subsequently overruled by the Wisconsin Supreme Court in ***State v. McKellips***, 2016 WI 51, ¶¶2, 39, 369 Wis. 2d 437, 881 N.W.2d 258 (text messages sent with a cellular phone constitute use of a computerized communication system). For that same reason, Fischer's argument that § 948.075 in unconstitutionally vague lacks arguable merit. ***McKellips***, 369 Wis. 2d 437, ¶¶45, 53 (holding that § 948.075 is not unconstitutionally vague).

Similarly, Fischer's response seems to assert that his conduct did not satisfy additional elements of using a computer to facilitate a child sex crime in violation of WIS. STAT. § 948.075. Specifically, he disputes whether he "did an act, other than use a computerized communication

system to communicate with the individual, to effect [his] intent" to have sexual contact or intercourse with the individual. *See* § 948.075(3); WIS JI—CRIMINAL 2135. Fischer's no-contest plea to this offense forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***Kelty***, 294 Wis. 2d 62, ¶18 & n.11; ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. To the extent Fisher is claiming there was no factual basis to support his conviction, we disagree. As addressed in appellate counsel's supplemental no-merit report (and briefly alluded to in the original no-merit report), there are sufficient facts supporting the existence of this element. The e-mail and text conversations with the victim along with Fischer's making and following through on arrangements to meet the victim amply support the charge of conviction. The circuit court properly determined there was a factual basis for count one.

Fisher's response also suggests that he had a valid entrapment defense. In addition to correctly pointing out that Fischer's no-contest pleas forfeited this issue, appellate counsel's supplemental no-merit report goes on to address the merits of Fischer's entrapment claim.[4] We are satisfied that the no-merit report properly analyzes this issue as without arguable merit and will not discuss it further.

[4] This issue was not raised in the trial court. Where a potential issue is forfeited, it may be reviewed within the rubric of the ineffective assistance of trial counsel. ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. We are satisfied that the no-merit report properly analyzes the entrapment issue as without arguable merit, and therefore, trial counsel's failure to raise this issue was not ineffective. ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 ("Trial counsel's failure to bring a meritless motion does not constitute deficient performance.").

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Fischer in this appeal. Therefore,

IT IS ORDERED that upon remittitur, the judgment of conviction shall be modified to vacate the $500 DNA surcharge.

IT IS FURTHER ORDERED that the judgment, as modified, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Daniel R. Goggin, II is relieved from further representing Michael A. Fischer in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals