



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

June 20, 2017

To:

Hon. Neal A. Nielsen III
Circuit Court Judge
Vilas County Courthouse
330 Court Street
Eagle River, WI 54521

Jean Numrich
Clerk of Circuit Court
Vilas County Courthouse
330 Court Street
Eagle River, WI 54521

Martha J. Milanowski
District Attorney
330 Court Street
Eagle River, WI 54521

Dennis Schertz
Schertz Law Office
P.O. Box 133
Hudson, WI 54016

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Andrew Lee Rosner 630889
Dodge Corr. Inst.
P.O. Box 700
Waupun, WI 53963-0700

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

2016AP62-CRNM State of Wisconsin v. Andrew Lee Rosner (L. C. No. 2014CF26)

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

Counsel for Andrew Rosner filed a no-merit report concluding there is no arguable basis for Rosner to withdraw his no-contest pleas or to challenge the sentences imposed for one count of attempted first-degree intentional homicide/domestic abuse with a dangerous weapon and one count of recklessly endangering safety. Rosner filed a response alleging ineffective assistance of trial counsel and arguing his sentence was excessive. Rosner's appellate counsel filed a supplemental no-merit report with an attached letter from Rosner's trial counsel addressing

Rosner's response. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

The complaint alleged Rosner stabbed his pregnant girlfriend in the chest while she was driving a vehicle. Rosner told her, "I stabbed you in the heart and I'm going to watch you die." When she stopped the car, Rosner took her cell phone and exited the vehicle. As the victim began to speed off, Rosner stabbed at one of the tires and accidentally severed a finger in the process.

Pursuant to a plea agreement, the State reduced an attempted first-degree intentional homicide of an unborn child charge to recklessly endangering the unborn child's safety, and Rosner entered no-contest pleas to that charge and a charge of attempted murder of his girlfriend. The court imposed concurrent sentences totaling fifteen years' initial confinement and ten years' extended supervision.

Before accepting Rosner's pleas, the court ordered a psychological examination. Two psychologists found no basis for challenging Rosner's competency to stand trial or for entering a plea of not guilty by reason of mental disease or defect (NGI). Rosner's response to the no-merit report describes his actions as going "temporarily insane." Counsel reasonably relied on the psychological examinations that refuted any possible NGI defense.

The record discloses no arguable manifest injustice upon which Rosner could withdraw his no-contest pleas. See *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, supplemented by a Plea Questionnaire and Waiver of Rights form with an attached letter from defense counsel outlining the elements of the offenses, informed Rosner of the elements of the offenses, the potential penalties, and the constitutional rights he

waived by pleading no contest. As required by *State v. Hampton*, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, the court informed Rosner that it was not bound by the parties' plea agreement or their sentence recommendations. The court did not give the deportation warning required by WIS. STAT. § 971.08(1)(c) (2015-16).¹ However, the presentence investigation report says Rosner's mother always lived in Eagle River. Therefore, Rosner would not be subject to deportation. The record shows the pleas were knowingly, voluntarily, and intelligently entered. See *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

In his response to the no-merit report, Rosner complains that his trial counsel never offered a defense and did not counter the district attorney's plea offer, and "the only reason I ended up taking the plea was because I had zero confidence in my lawyer defending me at trial." However, Rosner also acknowledges that he "never denied [his] actions." He stresses the stabbing was a crime of passion and not a premeditated attempted murder. Premeditation is not an element of attempted first-degree intentional homicide. The requisite intent can be formed an instant before the act. See WIS JI—CRIMINAL 1010 (2000). Rosner's statement immediately after the stabbing shows his intent to kill the victim. Based on the strength of the State's case, Rosner's trial counsel cannot be deemed ineffective for failing to find a viable defense. Negotiating a plea agreement appears to have been the best strategy counsel could employ.

The record also discloses no arguable basis for challenging the twenty-five-year sentence. The court could have imposed consecutive sentences totaling more than seventy-two years' imprisonment. A sentence well within the maximum is presumptively reasonable. *State v.*

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

Grindemann, 2002 WI App 106, ¶31, 255 Wis.2d 632, 648 N.W.2d 507. The court appropriately considered the seriousness of the offenses, Rosner's character, and the need to protect the public. See *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633 (1984). The twenty-five-year sentence is not arguably so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457 (1975).

In his response to the no-merit report, Rosner notes the extreme provocation that resulted from his girlfriend's informing him that she had been sleeping with another man for the past six or seven months, and his questioning whether he was the father of the unborn child. To the extent this provocation could be considered a mitigating circumstance, the sentence of far less than the maximum allowable sentence already reflects that factor.

In his response to the no-merit report, Rosner alleges his trial counsel tried to stop his mother from giving a statement and "censored her statement." Rosner's trial counsel's letter explains that counsel believed "his mother came off as a narcissist who focused on how these events [affected] her life." Counsel denied censoring her testimony at the sentencing hearing. The record shows Rosner's mother gave lengthy testimony at the hearing and made her beliefs known through the presentence investigation report and an alternative presentence report submitted by the defense. Rosner's trial counsel reasonably advised Rosner not to attempt to blame the victim because that tactic would not impress the sentencing court.

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

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

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of his obligation to further represent Rosner 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