



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 IV

August 29, 2017

To:

Hon. Richard T. Werner
Circuit Court Judge
Rock County Courthouse
51 S. Main Street
Janesville, WI 53545

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
51 S. Main Street
Janesville, WI 53545

Suzanne Edwards
Law Office of Suzanne Edwards
P.O. Box 70
Dodgeville, WI 53533-0070

Gerald A. Urbik
Asst. District Attorney
51 S. Main St.
Janesville, WI 53545

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

Christopher Tracy Rutherford 304263
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:

2016AP1429-CRNM State of Wisconsin v. Christopher Tracy Rutherford
(L.C. # 2014CF922)

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Attorney Suzanne Edwards, appointed counsel for Christopher Rutherford, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a claim that Rutherford was denied the effective assistance of counsel, or a challenge to Rutherford's plea or sentencing. Rutherford was sent a copy of the

report, but has not filed a response. We previously sought further input from counsel as to a potential issue we identified based on Rutherford's plea colloquy, and counsel has filed a response. Upon independently reviewing the entire record, as well as the no-merit report and counsel's response to our order, we accept the no-merit report and relieve counsel of further representation of Rutherford in this matter.

Rutherford was charged with first-degree reckless homicide. Pursuant to a plea agreement, Rutherford pled guilty, and charges in another case stemming from the same incident were dismissed and read-in for sentencing purposes. The circuit court sentenced Rutherford to thirty years of initial confinement and twenty years of extended supervision.

The no-merit report addresses whether Rutherford was denied the effective assistance of counsel. We agree with counsel's assessment that there is no basis in the material before us to support a non-frivolous claim that Rutherford's counsel was ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense"); *State v. Bentley*, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996) (defendant seeking to withdraw plea based on ineffective assistance of counsel shows prejudice by establishing "that there is a reasonable probability that, but for the counsel's errors, he would not have pleaded guilty and would have insisted on going to trial" (quoted source omitted)).

The no-merit report also addresses whether there would be arguable merit to a challenge to the validity of Rutherford's plea. *See State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594,

716 N.W.2d 906 (post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary). We were unable to determine from the record and the no-merit report whether it would be wholly frivolous to argue that the circuit court failed to comply with its plea colloquy duties by misstating the elements of first-degree reckless homicide. See *State v. Brandt*, 226 Wis. 2d 610, 619, 594 N.W.2d 759 (1999) (explaining that the circuit court’s colloquy duties include that the court “determine that the plea is made voluntarily with understanding of the nature of the charge,” and that “a defendant’s understanding of the nature of the charge must ‘include an awareness of the essential elements of the crime’” (quoted sources omitted)); *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986) (if a postconviction motion for plea withdrawal identifies a defect in the plea hearing and alleges that the defendant did not understand the information that should have been provided, the defendant is entitled to an evidentiary hearing). We requested further input from counsel as to whether there would be arguable merit to a postconviction motion for plea withdrawal. Counsel then informed us that counsel discussed the issue with Rutherford, and that Rutherford does not wish to pursue plea withdrawal based on the issue we identified, regardless of whether the issue has arguable merit. Our review of the record indicates that the circuit court otherwise complied with its mandatory duties at the plea hearing. See *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Rutherford’s sentence. A challenge to a circuit court’s exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. *State v. Ramuta*, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered

facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Rutherford's character, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was not so excessive or unduly harsh as to shock the public sentiment. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We discern no erroneous exercise of the court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We accept the no-merit report and relieve counsel of further representation of Rutherford.

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

IT IS FURTHER ORDERED that Attorney Suzanne Edwards is relieved of any further representation of Christopher Rutherford in this matter. *See WIS. STAT. RULE 809.32(3).*

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals