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October 31, 2017

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

2016AP685-CRNM State v. Avel Zamora (L. C. No. 2014CF2991)

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

Counsel for Avel Zamora has filed a no-merit report concluding there is no basis to challenge Zamora's conviction for first-degree sexual assault—sexual contact with a person under the age of thirteen. Zamora has responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal and summarily affirm.

According to the criminal complaint, Zamora's six-year-old step-granddaughter alleged that Zamora touched her outside her clothing on the vaginal area, buttocks and chest. The victim

also stated Zamora showed her "his thing that is long that he pees with … and was rubbing the skin of it up and down." Zamora allegedly took the victim's hand and tried to make her touch his "pee pee," but the victim was able to pull away. The victim further alleged Zamora tickled her on her chest, her "flower" (identified as her vagina) and her "bottom" inside of her clothing. Zamora also allegedly touched the victim on the top of her head with his "bare bottom." The victim stated Zamora did things to her every day when her stepmom and dad were not home. Zamora admitted touching the victim's vaginal area and buttocks three or four times over her clothing. Zamora also admitted he had an erection in the victim's presence, and that the victim may have observed him masturbating.

Zamora was charged with one count of first-degree child sexual assault—sexual contact with a child under the age of thirteen; and one count of exposing genitals to a child. In exchange for Zamora's guilty plea to the sexual assault charge, the State agreed to recommend to dismiss and read in the exposing genitals count.

After new counsel was appointed, and prior to sentencing, Zamora moved to withdraw his plea. In an affidavit supporting his motion, Zamora contended he "felt scared, intimidated, and very hurried in making the decision that I made to plead guilty in court." Zamora further averred his prior attorney "told me that if I were to try to speak up in court and tell the judge about what was on my mind during the hearing, it would affect the Court's decision about my pending case and possibly the charges and result of the case." Zamora asserted he "was also confused as to whether I had pled guilty to first degree sexual assault or another crime." His attorney averred in an affidavit that Zamora "had no understanding whatsoever of the collateral

consequences of his plea including the meaning of a [WIS. STAT.] Chapter 980 petition or a finding that he may be determined to be a sexually violent person."[1]

Following a hearing, at which Zamora and his prior attorney testified, the circuit court made various findings of fact. Among other things, the court stated:

> I find that [prior attorney's] testimony was credible. And it indicates that he went over the elements of the offense with the defendant the day before the plea, he had talked to him about challenging his confession, that the defendant said he didn't want to challenge his confession. He said he knew what he said and what he did.
>
> ….
>
> [Prior attorney] went over all of the elements, all the issues, the rights that he was waiving on the day before ….
>
> ….
>
> He never told the defendant not to speak up or ask questions during the plea. And he doesn't believe in his opinion that it was rushed.
>
> The defendant testified. And much of his testimony I don't find to be credible at all. I think he was trying to be manipulative, I think he's outright lying through a good portion of his testimony. The fact that he says at various times he didn't understand and the very thought and said, I didn't know I was pleading to first degree sexual assault of a child under 13, sexual contact. Even though that question was put to him directly that way multiple different times, he says he doesn't know what he pled to. That is just wholly incredible.
>
> ….
>
> Defendant doesn't assert he's innocent. By his own statements he admits he's guilty. A general misunderstanding of the plea. A hasty entry of a plea, confusion on the part of the defendant. Coercion on the part of a trial counsel. And I find none of that to be true.

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

The circuit court also noted that Zamora had admitted the very facts sufficient to support the first-degree sexual assault charge. Nevertheless, the court granted Zamora's motion to withdraw his plea because the court found he "didn't clearly understand what [WIS. STAT.] chapter 980 is."

Subsequently, Zamora again pled guilty to first-degree sexual assault—sexual contact with a child under the age of thirteen, and the exposing genitals count was dismissed outright. The circuit court imposed a sentence consisting of nineteen years' initial confinement and ten years' extended supervision.

There is no manifest injustice upon which Zamora could withdraw his plea. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The circuit court's plea colloquy, buttressed by the plea questionnaire and waiver of rights form with attachments, informed Zamora of the elements of the offense, the constitutional rights he waived by pleading guilty, and the potential punishment. The court specifically advised Zamora it was not bound by the parties' agreement and could impose whatever punishment it deemed appropriate. The court also advised Zamora of the potential deportation consequences outlined in WIS. STAT. §§ 971.08(1)(c) and (2). Zamora conceded that a proper factual basis supported the conviction. The record shows the plea was knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986).

In his response to the no-merit report, Zamora insists he "did not know the State had to prove as an essential element of first degree sexual assault [WIS. STAT. §] 948.02(1)(e) that sexual contact was for the purposes of … arousal or gratification of the defendant under WIS. STAT. 948.01(5)." He also insists he did not understand "the essential elements of the charges

and the [WIS. STAT.] 980 chapter information." He further contends he was "legally coerced" by his trial counsel into accepting the plea.

The record belies Zamora's contentions. During the most recent plea colloquy, Zamora specifically acknowledged that he discussed the elements of the offense with his attorney, including the jury instructions attached to the plea questionnaire and waiver of rights form. Moreover, Zamora signed the attached jury instructions, attesting, "I have read and discussed this instruction with my attorney." Zamora also conceded at the plea hearing that he understood the meaning of sexual contact, and that "sexual contact also requires that you acted with intent to become sexually aroused or gratified."[2]

Furthermore, the circuit court conducted a lengthy discussion during the most recent plea colloquy concerning WIS. STAT. chapter 980, and Zamora represented to the court that he did not have "any questions at all about what it means to be possibly subject to chapter 980." Zamora agreed he fully discussed chapter 980 with his attorney, including the chapter 980 "sexually

[2] Prior to Zamora's motion to withdraw his plea, the circuit court adjourned the original scheduled sentencing hearing after Zamora's second attorney sought to withdraw his representation, indicating Zamora claimed the attorney "didn't provide documents to him and things of that nature." At the hearing, Zamora also claimed he had pled guilty to fourth-degree sexual assault. Zamora contended he did not remember the court informing him at the initial plea hearing that he was charged with first-degree sexual assault and "what the penalties were for that." Zamora's attorney told the court, "At no point in time did it ever come up [prior to the hearing] that he said that he believes he entered a plea to a fourth degree sexual assault." The attorney indicated, "So I'm not sure if he's playing games …." The court stated:

> Well, Mr. Zamora, you sat in court, I'm satisfied we went through this, you went through the jury instruction regarding what first degree sexual assault is and what sexual contact is, that's all attached and is part of the plea negotiations or the plea that was taken, and we went through all of that ….

The circuit court granted the motion to withdraw as counsel, and set the matter over for a status conference.

violent person commitment" materials attached to the plea questionnaire from the criminal bench book, and the jury instruction titled "Commitment as a sexually violent person under chapter 980, Wis. Stats." Zamora's new trial counsel also represented to the court as follows:

> THE COURT: And in light of the earlier circumstances, are you satisfied he fully and completely understands what it means to possibly subject to chapter 980?
>
> [DEFENSE COUNSEL]: I am. Not only because I have gone over the 980 implications on two separate afternoons with him, I asked him to repeat back to me his understanding, and it was clear that he does understand the possibility exists in the future ….

In addition, there is no evidence in the record supporting coercion of the plea. To the contrary, Zamora specifically stated to the circuit court during the plea colloquy that he was entering his plea freely, and he was satisfied with his lawyer's representation. Zamora also acknowledged he was pleading guilty because he was guilty, and that he had no questions about the proceeding.

The record also discloses no basis for challenging the circuit court's sentencing discretion. The court considered the proper factors, including Zamora's character, the seriousness of the offense, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court emphasized the "very special and important trust" Zamora violated by sexually assaulting his six-year-old step-granddaughter on multiple occasions. The court cited the impact on the victim and indicated it found "one of the most troubling things for me in this case is that you don't really – you may accept that you did this, but you don't think it's really that bad." The court also emphasized Zamora's extensive history of drug and alcohol abuse, and his past refusal of drug and alcohol treatment. The court concluded:

> [T]here's a strong need to send a message to you first that what you did is wrong; it's a crime; and there has to be a strong punishment component to deter you and to deter others in the community, that you have rehabilitative needs that are extensive and need to be addressed in a structured confined setting.

The circuit court's sentence of nineteen years' initial confinement and ten years' extended supervision was well within the maximum allowable and therefore presumptively neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶29-33, 255 Wis. 2d 632, 648 N.W.2d 507.[3]

Our independent review of the record discloses no other potential issues 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 Thomas Erickson is relieved of further representing Zamora 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

[3] We note the circuit court referenced the COMPAS risk assessment at sentencing, but the record demonstrates it was not "determinative" of the sentence imposed. *See* ***State v. Loomis***, 2016 WI 68, ¶¶98-99, 371 Wis. 2d 235, 881 N.W.2d 749. Any challenge to the sentence based on the court's reference to COMPAS would therefore lack arguable merit.