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

December 12, 2017

To:

Hon. Joseph G. Sciascia
Circuit Court Judge
Dodge County Justice Facility
210 West Center Street
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge County Justice Facility
210 West Center Street
Juneau, WI 53039

Ellen J. Krahn
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

James T. Sempf
Asst. District Attorney
210 W. Center Street
Juneau, WI 53039

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

James P. Schmidt 641042
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2016AP2223-CRNM State of Wisconsin v. James P. Schmidt (L.C. # 2015CF114)

Before Lundsten, P.J., Sherman and Kloppenburg, 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 Ellen Krahn, appointed counsel for James Schmidt, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be

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

arguable merit to a challenge to Schmidt's plea or sentencing. Schmidt was sent a copy of the report, and has filed a response. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Schmidt was charged with repeated sexual assault of a child and incest with a child. Schmidt pled no-contest to both charges, and the same charges out of another county were dismissed and read-in at sentencing. The court sentenced Schmidt to twenty years of initial confinement and fifteen years of extended supervision on the sexual assault of a child conviction, and imposed a consecutive term of ten years of probation on the incest conviction.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the validity of Schmidt's plea. A 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. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Schmidt and determine information such as Schmidt's understanding of the nature of the charges and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The plea colloquy, together with the plea questionnaire that Schmidt signed, established Schmidt's understanding of the information required for a knowing, intelligent, and voluntary plea. ***Id.***, ¶¶18, 30. Although the court failed to inform Schmidt that it was not bound by the terms of the plea agreement, as required under ***State v. Hampton***, 2004 WI 107, ¶32, 274 Wis. 2d 379, 683 N.W.2d 14, Schmidt received the benefit of the plea agreement. Therefore, this defect in the colloquy does not

present a manifest injustice warranting plea withdrawal. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441.

Schmidt contends in his no-merit response that he did not understand at the time he entered his plea that he had the constitutional right to confront his accuser. However, during the plea colloquy the circuit court asked Schmidt whether he understood that he was giving up the constitutional rights listed on the plea questionnaire, and Schmidt confirmed that he did. The rights listed on the plea questionnaire include the right to confront in court the people who would testify against Schmidt and to cross-examine them, and the box listing that right is checked and the form bears Schmidt's signature. The circuit court also personally advised Schmidt during the plea colloquy that, by entering his plea, Schmidt would be giving up his right to confront in court the people who would testify against him and the right to cross-examine them, and Schmidt affirmed that he had no questions about that right. Schmidt offers no explanation as to what he did not understand about his right to confront his accuser or why he did not understand that right. Because Schmidt's assertion that he did not understand his right to confront his accuser is contradicted by the record, and nothing in the no-merit response provides any basis for Schmidt's assertion that he did not understand, we discern no arguable merit to a challenge to Schmidt's plea on this basis.

Schmidt also contends that he did not know about the Truth in Sentencing Law at the time he entered his plea. However, the record establishes that Schmidt understood the maximum penalties he faced by entering his plea, and Schmidt does not assert that he did not understand anything about his potential sentence that impacted his decision to enter his plea.

Schmidt asserts that he was not shown an arrest warrant at the time of his arrest. A warrantless arrest is lawful if supported by probable cause for the arrest. *See* ***State v. Blatterman***, 2015 WI 46, ¶34, 362 Wis. 2d 138, 864 N.W.2d 26 ("Warrantless arrests are unlawful unless they are supported by probable cause."). Here, the police report indicates that Schmidt was arrested after the child victim had informed police that Schmidt had engaged in sexual intercourse with her, and after police had recovered text messages between Schmidt and the victim from the victim's phone indicating that Schmidt and the victim had a sexual relationship. Any argument that police lacked probable cause for the arrest would be wholly frivolous.[2] *See* ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999) ("Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime.").

Schmidt also asserts that he was never shown a police report or other discovery, and that his lawyer never discussed this case in full detail with him; that the victim had an older boyfriend; that Schmidt has logbooks of where and when he was driving a semi-truck, and that Schmidt did not drive the victim through thirty-six states in his truck, contrary to what the victim told police; that Schmidt did not want to sign the presentence investigation report (PSI) because he "did not want to give up those right[s]," but that he was told he had to sign it to start the PSI

[2] Because Schmidt did not challenge the validity of his arrest in the circuit court, this issue would have to be raised by a postconviction claim that Schmidt's trial counsel was ineffective by failing to pursue a suppression motion. *See* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). (unpreserved arguments are normally pursued postconviction by means of claim of ineffective assistance of counsel). We conclude that a claim that Schmidt's trial counsel was ineffective by failing to challenge the validity of Schmidt's arrest would lack arguable merit. *See* ***State v. Allen***, 2017 WI 7, ¶46, 373 Wis. 2d 98, 890 N.W.2d 245 (counsel is not ineffective by failing to pursue meritless issue).

process and that the PSI would be "leverage"; and that he never physically harmed the victim. None of these assertions establish any basis to challenge the validity of Schmidt's plea. Schmidt's valid plea waived all non-jurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶8, 294 Wis. 2d 62, 716 N.W.2d 886.

There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Schmidt's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Schmidt'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 severity of the offense, Schmidt'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 within the maximum Schmidt faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the

circumstances") (quoted source omitted). We discern no erroneous exercise of the court's sentencing discretion.[3]

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the DNA surcharge as to the conviction for repeated sexual assault of a child is vacated; the judgment is summarily affirmed as modified, and the cause remanded for entry of a corrected judgment of conviction. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ellen Krahn is relieved of any further representation of James Schmidt 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] The court entered two judgments of conviction, one imposing a prison sentence for the repeated sexual assault of a child charge and one withholding sentence and imposing probation for the incest charge. Each judgment of conviction reflects a $250 DNA surcharge. Schmidt committed the offenses in February 2012, and was sentenced in March 2016. Because Schmidt was sentenced after January 1, 2014, he was subject to the revised DNA surcharge statute, WIS. STAT. § 973.046(1r)(a). *See* 2013 Wis. Act 20. The revised statute provides for a mandatory DNA surcharge of $250 per felony conviction. *See* ***State v. Radaj***, 2015 WI App 50, ¶1, 363 Wis. 2d 633, 866 N.W.2d 758. However, because Schmidt committed his offenses prior to the effective date of the revised DNA surcharge statute, the imposition of the multiple mandatory DNA surcharges was an ex post facto violation. *See* ***id.*** Accordingly, upon remittitur, the clerk of the circuit court shall enter an amended judgment of conviction as to the repeated sexual assault of a child conviction, vacating the DNA surcharge.