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

2016AP1184-CRNM State of Wisconsin v. Juan D. Robles (L.C. #2014CF1164)

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

Juan D. Robles appeals from a judgment of conviction entered upon his guilty plea to one count of repeated sexual assault of a child, contrary to WIS. STAT. § 948.025(1)(d) (2015-16).¹ His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders*

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

v. California, 386 U.S. 738 (1967), concluding that neither the entry of Robles's plea nor the sentence imposed in this case gives rise to an issue of arguable merit. Robles received a copy of the report and has filed a response. Upon consideration of the no-merit report, the response, and our independent review of the record, we conclude that the 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.

The State charged Robles with repeated acts of sexual assault of the same child based on allegations that he had sexual intercourse with the twelve-year-old victim, his cousin, ten to fifteen times between October 2013 and March 2014. Robles pled guilty to the original charge in exchange for the State's agreement to recommend six to ten years of initial confinement followed by ten years of extended supervision. The circuit court imposed a thirty-year bifurcated sentence, with twenty years of initial confinement and ten years of extended supervision.

The no-merit report first addresses whether Robles's plea was freely, voluntarily, and knowingly entered. With the assistance of an interpreter, the circuit court engaged in a thorough 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 Robles's signed plea questionnaire to establish his knowledge and understanding of the rights he was giving up by pleading guilty and the consequences of his plea. *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). We agree with appellate counsel that no issue of arguable merit arises from the plea-taking procedures in this case.

Next, the no-merit report discusses whether there is any arguably meritorious challenge to the circuit court's exercise of its discretion at sentencing. In fashioning the sentence, the court considered the seriousness of the offense, 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. Regarding offense severity, the circuit court characterized the crime as aggravated, in part because the victim was previously assaulted by her own father and Robles "knew that this child had [previously] been the victim of incest, and yet he went and had this sexual relationship with this child, a child who is involved in a familial relationship with the defendant." The court found that the crime was "a betrayal of [the] familial relationship, particularly given that the victim's mother took in the defendant and helped him." The court further determined the offense to be "very" or "extremely" serious because it was committed "against a child in a very personal and intimate way," Robles had sexual intercourse with the victim multiple times, and the emotional and psychological effect on the victim was "tremendous."

As to character, the circuit court considered to be mitigating factors that Robles had no prior criminal record and that he used a condom on at least one occasion and was taking responsibility for his conduct. The court was concerned that the fact that Robles had impregnated five women under the age of eighteen potentially reflected a "predatory preoccupation with young girls." The court considered that Robles was receiving social security (SSI) benefits and treatment for severe anxiety and depression. Ultimately, the court stated:

While the child was twelve years old when these repeated sexual assaults were going on, the defendant was twenty-nine years old, certainly more than old enough to know better, to know better than to do this to any child, much less a child with whom he has some sort of familial relationship, much less to a child who has previously been the victim of incest. Yet despite all of that, the

defendant still went ahead and conducted himself in this fashion with no regard to this child.

The circuit court found that probation would not protect the public and would unduly depreciate the seriousness of the offense and determined that a lengthy prison sentence was necessary for purposes of punishment and public safety. We agree with appellate counsel's conclusion that this constitutes a proper exercise of the circuit court's sentencing discretion. Further, we cannot conclude that the thirty-year sentence, when measured against the possible maximum of sixty 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).

In his response to the no-merit report, Robles asserts that he is entitled to plea withdrawal because (1) trial counsel did not sufficiently investigate Robles's belief that his aunt, the victim's mother, accused him of sexual assault in order to take his social security payments and (2) trial counsel should have retained an expert to "explore" a plea of not guilty by reason of mental disease or defect (NGI plea). In other words, Robles claims that factors extrinsic to the plea colloquy, namely, trial counsel's ineffectiveness, rendered his plea infirm. *See State v. Bentley*, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996).²

Where a defendant's plea is alleged to be the result of the ineffective assistance of trial counsel, the defendant must prove both that counsel's conduct was deficient, or outside the range of professionally competent assistance, and that counsel's errors were prejudicial. *Id.* at 311-12;

² To withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective and the defendant did not understand information that should have been provided, *State v. Bangert*, 131 Wis. 2d 246, 274-75, 389 N.W.2d 12 (1986), or demonstrate that under the analysis of *State v. Bentley*, 201 Wis. 2d 303, 311-12, 548 N.W.2d 50 (1996), factors extrinsic to the plea colloquy rendered his plea infirm. *See State v. Hoppe*, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794.

see also Strickland v. Washington, 466 U.S. 668, 687 (1984). Our consideration of these complaints is limited because claims of ineffective assistance of counsel must first be raised in the trial court. *See State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appellate counsel asks to be discharged from the duty of representation, we must determine whether Robles's claims have sufficient potential merit to require appointed counsel to file a supplemental no-merit report or to file a postconviction motion and request a *Machner* hearing.

Robles first complains that trial counsel failed to investigate as a possible defense that following his arrest, Robles's aunt continued to accept his SSI payments. Robles explains that his aunt was his SSI payee and that the payments were directly deposited into the aunt's account. According to Robles, the fact that his SSI payments continued after his arrest demonstrates that his aunt "was accusing him of sexually assaulting her daughter to take his social security." Robles asserts that when he suggested this issue to trial counsel, she "explained to Robles that there was no proof of what he believed and they couldn't use that as a defense."

We conclude that there is no arguably meritorious claim arising from trial counsel's failure to further investigate the aunt's receipt of Robles's SSI payments. According to Robles's response, he was aware before entering his plea that his SSI payments had not stopped. At the time of his plea hearing, he agreed to waive any defenses. As part of its plea colloquy, the circuit court ascertained that Robles had reviewed and understood the signed plea questionnaire addendum which stated that Robles understood that by entering his plea, he was giving up "any defenses." The court asked Robles if he wanted to "present some defense" and Robles answered, "No defenses. Guilty." Robles confirmed that he was pleading guilty because he was "in fact, guilty." The record conclusively demonstrates that Robles was aware of and agreed to waive

further investigation into this purported issue at the time he entered his plea.³ See *Bentley*, 201 Wis. 2d at 309-10.

Next, we conclude that no arguably meritorious claim arises from trial counsel's failure to retain an expert "to explore an NGI plea regarding Mr. Robles's mental health and abilities to function as a normal adult." As Robles's response acknowledges, trial counsel informed the court that though Robles had "an established history of mental health problems," after consulting with Robles and the defense investigator, it was determined there was no basis for an NGI plea. Robles did not disagree with trial counsel's representation. Thereafter, the circuit court ascertained from Robles that he had discussed defenses such as "insanity" with trial counsel and that he wished to waive those defenses and plead guilty.

Further, Robles's response to the no-merit report fails to account for the following plea-taking colloquy which occurred after trial counsel confirmed she had reviewed all of the discovery materials with Robles:

The Court: Mr. Robles, did you have enough time to talk with your attorney about this matter?

Defendant: Yes.

The Court: Has your attorney answered your questions to your complete understanding?

Defendant: Yes.

³ Further, Robles has not shown any potential prejudice from trial counsel's allegedly deficient performance. Robles has attached to his response documents indicating that the Social Security Administration is now attempting to recover some of Robles's SSI payments. Nothing in Robles's response tends to demonstrate that the aunt or victim fabricated their stories prior to Robles's arrest because they wanted unfettered access to his SSI payments.

The Court: Are you satisfied with the way that she is representing you?

Defendant: Yes.

To the extent Robles is asserting that his diagnosis of schizoaffective disorder should have caused trial counsel to pursue an NGI defense, we are not persuaded. Given that trial counsel was well aware of Robles's "established history of mental health problems," Robles has not minimally established how this particular diagnosis rendered his plea infirm. Similarly, Robles has not established prejudice; Robles's response does not discuss how under the facts of this case, a diagnosis of schizoaffective disorder provides the basis for an NGI plea.⁴

The final claim in Robles's response suggests that he was sentenced on inaccurate information because although the circuit court was told that Robles received SSI and had mental health issues including severe anxiety and depression, it was not informed that he also had schizoaffective disorder. According to Robles, had the circuit court known of this additional diagnosis, it would have understood that his aunt and "most of the young women in Mr. Robles's life" had "take[n] advantage of his diminished mental capacity," and realized that "prison is not the punishment he should have been handed."

A criminal defendant has a due process right to be sentenced on the basis of accurate information. *State v. Tjepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To set forth

⁴ WISCONSIN STAT. § 971.15 (3) provides: "Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence." The presence of a mental illness does not automatically excuse a defendant from the legal consequences of his or her conduct. *State v. Duychak*, 133 Wis. 2d 307, 316-17, 395 N.W.2d 795 (Ct. App. 1986). The critical inquiry is "whether, as a result of a certain mental condition, a defendant lacks substantial capacity to either appreciate the wrongfulness of the defendant's conduct or conform the defendant's conduct to the requirements of the law." *Id.* at 316.

a colorable *Tiepelman* claim, a defendant must establish by clear and convincing evidence both that inaccurate information was presented at sentencing and that the court relied on the misinformation in reaching its determination. *Id.*, ¶26. Here, Robles has not established that the sentencing court was presented with inaccurate information. *See State v. Travis*, 2013 WI 38, ¶22, 347 Wis.2d 142, 832 N.W.2d 491 (whether information is inaccurate is a threshold question). The court was informed that Robles had mental health issues so significant that he began to receive SSI in 2007 and that he had received treatment in the community and in jail. The court acknowledged that Robles suffered from “depression and severe anxiety.” That is accurate information. Further, the court’s sentence was based on the gravity of the offense, the need for punishment, and the need to protect the public. The court’s sentence was not structured around Robles’s rehabilitative needs or mental health diagnoses. Robles’s contention that the court would have considered his schizoaffective disorder as a mitigating factor demonstrating that young women had taken advantage of him is purely speculative and unsupported by the record.

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

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

IT IS FURTHER ORDERED that Attorney Jorge R. Fragoso⁵ is relieved from further representing Juan D. Robles. *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

⁵ Attorney John R. Breffeilh filed the no-merit notice of appeal, no-merit report, and letter stating that absent further court order, he would not file a supplemental no-merit report in answer to Robles's response. Breffeilh is no longer employed with the State Public Defender's Office and Attorney Fragoso was appointed as successor counsel.