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February 13, 2018

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

2016AP2527-CRNM State of Wisconsin v. Lydell M. Lee (L.C. # 2014CF427)

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).

Lydell Lee appeals a judgment convicting him of three counts of possession of child pornography, each as a repeat offender, and an order denying his postconviction motion for resentencing. Assistant State Public Defender Steven Phillips has filed a no-merit report seeking

to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2015-16);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses Lee's pleas and sentences. Lee was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Lee entered no contest pleas pursuant to a negotiated plea agreement that was presented in open court. In exchange for Lee's pleas, the State agreed to dismiss and read in eleven other child pornography counts, to order a PSI, and to recommend four to eight years of initial confinement and fifteen years of extended supervision, with lifetime sex offender registry. The plea agreement reduced Lee's sentence exposure by 275 years, including 165 years of potential initial confinement time, not including any penalty enhancers.

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

The circuit court conducted a standard plea colloquy, inquiring into Lee's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Lee's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Lee understood that it would not be bound by any sentencing recommendations. In addition, Lee provided the court with a signed plea questionnaire. Lee indicated to the court that he had gone over the form with his attorney and had no questions about it, and he is not now claiming to have misunderstood any of the information on that form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint and probable cause affidavit and acknowledged by Lee—namely, that multiple erotic images of children were found on Lee's phone—provided a sufficient factual basis for the pleas. Lee indicated satisfaction that he had sufficient time to go over his case with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Lee has not alleged any other facts that would give rise to a manifest injustice. Therefore, Lee's pleas were valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Lee's sentences would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record shows that Lee was afforded an opportunity to comment on the PSI and to address the circuit court, both personally and through counsel. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court emphasized the lifelong impact on the victims of knowing they had been manipulated and abused. With respect to Lee's character, the court described it as a "mixed bag." The court discussed the numerous violent offenses in Lee's criminal history, but also acknowledged Lee's military experience, education, and positive work history. The court concluded that prison and an extended period of supervision were necessary to protect the public and make sure that Lee followed through on treatment and counseling.

The circuit court then sentenced Lee to three years of initial confinement and five years of extended supervision on each of the three counts, with the sentence on the second count to be served consecutively, and the sentence on the third count to be served concurrently. The court also awarded 472 days of sentence credit; imposed a $500 surcharge for each image, and a single DNA surcharge; and imposed standard costs and conditions of supervision. The judgment of conviction reflects that Lee was found eligible for the Substance Abuse Program but not the Challenge Incarceration Program.

The components of the bifurcated sentences imposed were within the applicable penalty ranges and the total imprisonment period as structured constituted about 17% of the maximum exposure Lee faced. *See* WIS. STAT. §§ 948.12(1m) and (3)(a) (classifying possession of child pornography as a Class D felony); 973.01(2)(b)4. and (d)3. (providing maximum terms of fifteen years of initial confinement and ten years of extended supervision for a Class D felony);

939.62(1)(c) (increasing maximum term of imprisonment for offense otherwise punishable by more than ten years by six additional years for habitual criminality).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentences imposed here were not "so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. That is particularly true when taking into consideration the amount of additional sentence exposure Lee avoided on the read-in offenses, and the fact that the circuit court did not even apply the sentence enhancers.

Lee filed a postconviction motion seeking resentencing on the grounds that the circuit court had erroneously believed that it was required to impose a mandatory minimum sentence of three years of initial incarceration. However, the very argument Lee made was rejected in ***State v. Holcomb***, 2016 WI App 70, ¶¶13-15, 371 Wis. 2d 647, 886 N.W.2d 100.

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.

Accordingly,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Diane M. Fremgen
Acting Clerk of Court of Appeals