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September 6, 2018

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

2016AP1102-CRNM State of Wisconsin v. William H. Wilsey (L.C. # 2015CF2045)

Before Kessler, P.J., Brennan and Brash, 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).

William H. Wilsey appeals judgments of conviction entered upon his guilty pleas to one misdemeanor count of sexual intercourse with a child who had attained the age of sixteen years and one felony count of possessing child pornography. Appellate counsel, Attorney Michael J. Backes, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS.

STAT. RULE 809.32 (2015-16).[1] Wilsey did not file a response. Based upon our review of the no-merit report and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

On May 6, 2015, the State filed a criminal complaint against Wilsey, born November 1, 1996. The complaint alleged that in December 2014, Wilsey had sexual intercourse with T.K., a child born February 9, 1998. The complaint further alleged that on January 21, 2015, Wilsey possessed photographs of children between the ages of two and eleven engaged in sexually explicit conduct. The State charged Wilsey with one count of sexual intercourse with a child who had attained the age of sixteen and five counts of possessing child pornography. *See* WIS. STAT. §§ 948.09 (2013-14), 948.12(1m). Wilsey quickly decided to resolve the charges with a plea bargain. On August 5, 2015, he pled guilty as charged to the misdemeanor and guilty as charged to one count of possessing child pornography. The remaining charges were dismissed and read in for sentencing purposes. The matter proceeded to sentencing on September 24, 2015. The circuit court imposed six months in jail for the misdemeanor and, for the felony, a consecutive eight-year term of imprisonment bifurcated as three years of initial confinement and five years of extended supervision.[2]

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

[2] The circuit court also imposed two mandatory DNA surcharges. In light of those surcharges, we previously put these appeals on hold pending the Wisconsin Supreme Court's decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of the plea that he or she faced multiple mandatory DNA surcharges. The supreme court subsequently dismissed ***Odom*** before oral argument. We then held these appeals pending a decision in ***State v. Freiboth***, No. 2018 WI App 46, ___ Wis. 2d ___, ___ N.W.2d ___. ***Freiboth*** holds that "plea hearing courts do not have a duty to inform defendants about the mandatory DNA surcharge." *See* ***id.***, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges. Accordingly, we lift the hold and proceed to resolve this appeal.

We first consider whether Wilsey could pursue an arguably meritorious challenge to his guilty pleas. We conclude he could not.

At the outset of the plea hearing, counsel for the State described the terms of the plea bargain. Wilsey would plead guilty to sexual intercourse with a child who had attained the age of sixteen and to one count of possessing child pornography, and the State would move to dismiss and read in the other four charges. The State would recommend a global disposition, namely, an eight-year term of imprisonment bifurcated as three years of initial confinement and five years of extended supervision. The State would also recommend a finding that Wilsey possessed five images associated with the crime of possessing child pornography and would ask the court to impose five, $500 surcharges for possessing those images. *See* WIS. STAT. § 973.042(1)-(2). The circuit court then reviewed the terms of the plea bargain on the record. Wilsey said he understood the terms.

The circuit court explained to Wilsey that he faced a mandatory minimum three-year term of initial confinement for the crime of possessing child pornography if he had attained the age of eighteen years at the time of the crime. The parties then agreed on the record that Wilsey was eighteen years old when he possessed child pornography on January 21, 2015, and the circuit court told Wilsey that it was therefore required to impose a minimum of three years of initial confinement upon conviction. Wilsey said he understood.

The circuit court explained to Wilsey that the maximum penalties he faced for possessing child pornography were a $100,000 fine and a twenty-five-year term of imprisonment. *See* WIS. STAT. §§ 948.12(1m), (3)(a), 939.50(3)(d). The circuit court also told Wilsey that it was required to impose a $500 surcharge for each pornographic image he possessed in connection with the crime. *See* WIS. STAT. § 973.042(2). Wilsey said he understood. The circuit court further

explained that upon conviction for having sexual intercourse with a child who had attained the age of sixteen years, Wilsey faced maximum penalties of a $10,000 fine and nine months in jail. *See* WIS. STAT. §§ 948.09 (2013-14), 939.51(3)(a) (2013-14). Wilsey again said he understood. The circuit court explained that it was not bound by the terms of the plea bargain and that it could impose any sentences up to the maximums allowed by law. Wilsey said he understood. He told the circuit court that he had not been promised anything outside the terms of the plea bargain to induce his guilty pleas and that he had not been threatened.

The record contains a signed plea questionnaire and waiver of rights form with attachments. Wilsey confirmed that he reviewed the form and attachments with his trial counsel and that he understood them. The plea questionnaire reflects that Wilsey was eighteen years old and had a high school education. The questionnaire further reflects his understanding of the rights he waived by pleading guilty, the penalties he faced upon conviction, and the circuit court's freedom to exceed the terms of the plea bargain and impose the maximum statutory penalties for his crimes. The signed addendum to the plea questionnaire reflects Wilsey's acknowledgment that by entering guilty pleas he would give up his right to raise defenses, to challenge the sufficiency of the complaint, and to seek suppression of the evidence against him.

The circuit court told Wilsey that by entering guilty pleas, he would give up the constitutional rights listed on the plea questionnaire, and the circuit court highlighted some of those rights. Wilsey told the circuit court that he had reviewed his rights with his trial counsel and that he understood them. The circuit court explained that by entering guilty pleas, Wilsey would give up the right to bring motions and to raise defenses. Wilsey said he understood. The circuit court explained that if Wilsey was not a citizen of the United States, a guilty plea exposed

him to the risk of deportation, exclusion from admission to this country, or denial of naturalization. *See* WIS. STAT. § 971.08(1)(c).[3] Wilsey said he understood.

"[A] circuit court must establish that a defendant understands every element of the charges to which he pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may establish the defendant's requisite understanding in a variety of ways: "summarize the elements of the offenses on the record, or ask defense counsel to summarize the elements of the offenses, or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." *See* ***id.***, ¶56. Here, copies of the jury instructions describing the elements of the crimes at issue were attached to the plea questionnaire. Wilsey told the circuit court that he had initialed the jury instructions after reviewing them with his trial counsel. The circuit court then described the elements of the crimes on the record. Wilsey said he understood the elements.

A plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). Here, the circuit court reviewed the facts in the criminal complaint with Wilsey, and he told the circuit court that the facts alleged were true. Additionally, trial counsel stipulated to the facts in the criminal complaint. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363 (factual

[3] The circuit court did not caution Wilsey about the risks described in WIS. STAT. § 971.08(1)(c) using the precise words required by the statute, but minor deviations from the statutory language do not undermine the validity of a plea. *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173. Moreover, before a defendant may seek plea withdrawal based on a failure to comply with § 971.08(1)(c), the defendant must show that "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Wilsey could make such a showing.

basis established when trial counsel stipulates on the record to the facts in the criminal complaint). The circuit court properly established a factual basis for Wilsey's guilty pleas.

The record reflects that Wilsey entered his guilty pleas knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The record does not reflect any basis for an arguably meritorious challenge to the validity of the pleas.

We next consider whether Wilsey could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the

factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

We agree with appellate counsel's conclusion that the record here reflects an appropriate exercise of sentencing discretion. The circuit court identified protection of the community, punishment, and deterrence as the primary sentencing objectives, and the circuit court discussed the factors it viewed as relevant to achieving those goals. The circuit court considered both crimes serious. The circuit court determined that the gravity of possessing child pornography was aggravated because Wilsey possessed multiple pornographic images and that the offense of having sexual intercourse with a child was aggravated because Wilsey manipulated the victim by threatening to reveal the sexual activity to a third party. In considering Wilsey's character, the circuit court recognized that he was young, that he had no prior criminal record, and that he accepted responsibility for his crimes. The circuit court was concerned, however, about his efforts to minimize his culpability by claiming that he looked at child pornography only to satisfy his curiosity. The circuit court considered the need to protect the public, emphasizing the harm suffered by the child with whom Wilsey had sexual intercourse. The circuit court also noted that Wilsey's own expert indicated that Wilsey posed some risk to recidivate and would benefit from treatment.

The circuit court identified the factors that it considered in choosing sentences in this matter. The factors are proper and relevant. Moreover, the sentences are not unduly harsh. A sentence is unduly harsh "'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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted).

Here, the penalties imposed are well within the maximums allowed by law. "'[A] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Id.*** (citation omitted). Accordingly, Wilsey's sentences are not unduly harsh or excessive. We conclude that a further challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.[4]

Finally, we have considered whether Wilsey could pursue a claim for sentence modification on the ground that the circuit court had the authority to impose a term of initial confinement less than the three-year minimum required under WIS. STAT. § 939.617(2). We conclude he could not pursue such a claim. A circuit court "may depart from th[e] minimum and impose less initial confinement ... only if the defendant is not more than forty-eight months older than the child victim." *See* ***State v. Holcomb***, 2016 WI App 70, ¶15, 371 Wis. 2d 647, 886 N.W.2d 100. Wilsey stipulated to the accuracy of the facts in the criminal complaint, which included the ages of the victims depicted in the pornographic images he possessed. The oldest victim was alleged to be no older than eleven years old. Because Wilsey was eighteen years old

[4] We observe that the State, as it promised, asked the circuit court to find that Wilsey possessed five pornographic images of children in connection with the crime of possessing child pornography for which he was convicted. *See* WIS. STAT. § 973.042(2). Accordingly, the State contemporaneously recommended that the circuit court impose a total of five, $500 surcharges. *See* ***id.*** In response to a later direct inquiry from the circuit court, the State also advised that Wilsey possessed a total of "approximately 394" pornographic images of children. The circuit court accepted that advisement. Ultimately, however, the circuit court did not make a finding as to the number of pornographic images Wilsey possessed in connection with the crime for which he was convicted, and the circuit court therefore did not impose any surcharge pursuant to § 973.042(2). The absence of the finding and the surcharges benefits Wilsey and therefore does not give rise to an arguably meritorious claim for postconviction or appellate relief. *Cf.* WIS. STAT. RULE 809.10(4) (appeal places before this court rulings adverse to the appellant). Accordingly, we discuss the potential surcharges no further.

when he possessed the pornographic images, he was subject to the three-year mandatory minimum sentence upon conviction. *See* ***id.***

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the hold previously imposed in this matter is lifted.

IT IS FURTHER ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that appellate counsel, Attorney Michael J. Backes, is relieved of any further representation of William H. Wilsey on appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals