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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 III/II

September 19, 2018

To:

Hon. J. Michael Bitney
Circuit Court Judge
Barron County Justice Center
1420 State Hwy 25 North, Room 2602
Barron, WI 54812

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
1420 State Hwy 25 North, Room 2201
Barron, WI 54812-3004

Charlotte Gibson
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

John M. O'Boyle
Interim District Attorney
1420 State Hwy 25 North
Barron, WI 54812

Richard L. Yonko
Yonko Law Firm, LLC
P.O. Box 15
Menomonie, WI 54751

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

Joseph David Shepherd, #441259
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

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

2016AP1085-CRNM	State of Wisconsin v. Joseph David Shepherd (L.C. #2015CM172)
2016AP1086-CRNM	State of Wisconsin v. Joseph David Shepherd (L.C. #2015CF245)

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).

Joseph David Shepherd appeals from judgments of conviction for exposing genitals to a child and misdemeanors of fourth-degree sexual assault and failing to maintain sex offender registration. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE

809.32 (2015-16),¹ and *Anders v. California*, 386 U.S. 738 (1967). Shepherd received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the records, the judgments are summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Shepherd was a passenger in a vehicle driven by N. on which a traffic stop was made. It was discovered that Shepherd had two outstanding warrants and was a registered sex offender. N. was sixteen-years-old at the time. Shepherd's cell phone was taken from him when he was arrested on the warrants. Shepherd gave police an address at which he no longer lived, and further investigation revealed he had no permanent address. A search warrant was obtained to search Shepherd's cell phone after N. revealed that she had sexual intercourse with Shepherd on numerous occasions. Multiple pornographic images of N. were found on Shepherd's phone.

Shepherd was charged with failing to maintain sex offender registration, three counts of possession of child pornography, and exposing genitals to a child. Pretrial motions were filed to suppress evidence obtained from Shepherd's cell phone on the grounds that the search warrant affidavit was inadequate and contained deliberately false statements, to suppress Shepherd's statements to police when he was arrested, and to return the cell phone to Shepherd.² The

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

² A pretrial motion to dismiss the exposure charge was also filed. The motion argued that the crime of exposing genitals contrary to WIS. STAT. § 948.10 is constitutionally overbroad as applied to the facts and unconstitutional on its face because it lacks an element of scienter as to the age of the child. Without conceding Shepherd's argument, the exposing genitals charge was dismissed by the prosecution at the motion hearing. Later, as part of the plea agreement, Shepherd agreed to revive the exposing genitals to a child charge. By his agreement to revive the charge, he forfeited his motion to dismiss it.

motion to suppress cell phone evidence was denied. The prosecution stipulated that Shepherd's statements to police were not admissible except for impeachment purposes. The motion to return the cell phone was denied as the phone contained illegal pornography. Under a plea agreement, Shepherd entered a guilty plea to the sex offender registration charge, exposing genitals to a child, and to fourth-degree sexual assault (an amended charge from possession of child pornography). Two counts of possession of child pornography were dismissed as read-ins at sentencing.³ Shepherd was sentenced to eighteen months' initial confinement and eighteen months' extended supervision on the exposure conviction, a consecutive nine-month jail term on the sexual assault conviction, and a concurrent six-month jail term on the sex offender registration conviction.⁴

With respect to the pleas, with one exception, the circuit court fulfilled its duties during the plea colloquy under 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. The court also referred to and used the plea questionnaire in an appropriate manner to ascertain Shepherd's understanding and knowledge at the time the pleas were taken. *State v. Hoppe*, 2009

³ Three uncharged bail jumping charges were also considered resolved by the plea agreement and treated as uncharged read-ins at sentencing.

⁴ Shepherd's plea to multiple counts also resulted in the assessment of multiple mandatory DNA surcharges totaling \$650, and that potential financial obligation was not addressed during the plea colloquy. 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 his plea that multiple mandatory DNA surcharges would be assessed. The *Odom* appeal was voluntarily dismissed before oral argument in the supreme court. These cases were then held awaiting a decision in *State v. Freiboth*, 2018 WI App 46, ___ Wis. 2d ___, ___ N.W.2d ___ (No. 2015AP2535-CR). *Freiboth* holds that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. *Id.*, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. However, the deportation warning required by § 971.08(1)(c), was not given. The presentence investigation report lists Shepherd's birthplace as Texas. The failure to give the warning is not grounds for relief because there is no suggestion that Shepherd could show that his pleas are likely to result in deportation. *See State v. Douangmala*, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1, *overruled on other grounds by State v. Fuerte*, 2017 WI 104, ¶36, 378 Wis. 2d 504, 904 N.W.2d 773. The criminal complaints were used as a factual basis for the convictions. Notably, even though one count of possession of child pornography was amended down to fourth-degree sexual assault, the complaint provided a factual basis for the amended charge because it recited N.'s admission that she had sexual intercourse with Shepherd on five or six occasions. Further, even though N. indicated that she consented to sexual intercourse, a factual basis for fourth-degree sexual assault existed because there was a factual basis for the related and more serious felony charge of possession of child pornography. *See State v. Harrell*, 182 Wis. 2d 408, 419, 513 N.W.2d 676 (Ct. App. 1994) (in a plea bargain context, the factual basis requirement is met if the circuit court satisfied itself that the plea is voluntarily and understandingly made and a factual basis exists for either the offense to which the plea is offered or to a more serious charge reasonably related to that offense).

The no-merit report concludes that there is no issue of arguable merit on which to challenge Shepherd's pleas. We agree. We also agree with the no-merit report's conclusion that the sentences were a proper exercise of discretion, that they were not harsh or excessive, and that no issue of arguable merit exists to challenge the sentences.

The other potential issue raised and discussed by the no-merit report is whether Shepherd received ineffective assistance of trial counsel. While the absence of a hearing in the circuit

court on a claim of ineffective assistance of trial counsel precludes review by this court, *State v. Krieger*, 163 Wis. 2d 241, 253, 471 N.W.2d 599 (Ct. App. 1991), the current state of the record gives no suggestion that trial counsel failed to fulfill the duty of representation with respect to the negotiated pleas and sentencing. The report lists what Shepherd thinks constitutes ineffective trial counsel:

- Trial attorney did not request more bond reduction hearings.
- Trial attorney did not read portions of trial attorney's motion into record.
- Trial attorney did not provide copy of search warrant before plea hearing.
- Trial attorney did not subpoena witnesses at either the preliminary hearing or motion hearing.
- Trial attorney did not request a change of venue.
- Trial attorney did not ask for psychological evaluation following the plea hearing but prior to sentencing.
- Trial attorney did not file motion to reconsider sentencing.
- Trial attorney did not retrieve Shepherd's Last Will and Testament in the possession of law enforcement.

Even if counsel's performance on these points was, as Shepherd believes, lacking, there is no suggestion in this record that Shepherd was prejudiced. None of the points link to entry of Shepherd's pleas. Further, Shepherd acknowledged during the plea colloquy that he was satisfied with his attorney's representation.

The no-merit report fails to discuss the circuit court's ruling on the motion to suppress evidence found on Shepherd's cell phone. Although a defendant forfeits the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights, by a guilty plea, *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53, under WIS.

STAT. § 971.31(10), a challenge to the denial of a motion to suppress evidence or a statement of a defendant can still be pursued on appeal. The circuit court's determination that the search warrant affidavit was sufficient to support issuance of the warrant even without the paragraph which the defense called materially false withstands appellate scrutiny. No issue of arguable merit exists that the evidence from Shepherd's cell phone should have been suppressed.

Had Shepherd pursued his motion to dismiss the exposure charge, the ruling on the motion would have been ripe for appellate review despite Shepherd's plea. *See State v. Trochinski*, 2002 WI 56, 253 Wis. 2d 38, 644 N.W.2d 891; *State ex rel. Skinkis v. Treffert*, 90 Wis. 2d 528, 538-39, 280 N.W.2d 316 (Ct. App. 1979). Although Shepherd stipulated to reviving that charge and consequently forfeited his motion to dismiss, we have considered whether there would be arguable merit to a claim that trial counsel was ineffective with respect to the revival of that charge in light of the undecided motion to dismiss. Regardless of the merits of the motion,⁵ Shepherd was not prejudiced by revival of the charge in a negotiated plea which reduced his exposure on three possession of child pornography charges.

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

Upon the foregoing reasons,

⁵ The motion argued that the exposure statute, WIS. STAT. § 948.10, is unconstitutional on its face because it lacks an element of scienter as to the age of the child and that it is unconstitutional as applied to Shepherd.

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

IT IS FURTHER ORDERED that Attorney Richard L. Yonko is relieved from further representing Joseph David Shepherd in these appeals. *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