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September 26, 2018

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

2015AP2468-CRNM State of Wisconsin v. Daryl A. Prater (L.C. #2014CF288)

Before Neubauer, C.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).

Daryl A. Prater pled no contest to using a computer to facilitate a child sex crime and to second-degree sexual assault of a child and now appeals from the judgment of conviction. His

appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Prater was advised of his right to file a response but has not done so. After reviewing the no-merit report and the record, we conclude there are no issues with arguable merit for appeal and therefore summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Prater, then twenty-eight, communicated online with a fifteen-year-old girl, arranged to meet her, took her to his apartment, engaged in sexual intercourse, and took naked photographs of her. He was charged with using a computer to facilitate a child sex crime, child enticement, sexual exploitation of a child by filming, and two counts of second-degree sexual assault of a child. He pled no contest to using a computer to facilitate a child sex crime and to one count of second-degree sexual assault of a child; the remaining charges were dismissed and read in. He was sentenced to three years' initial confinement and four years' extended supervision. This no-merit appeal followed.

The no-merit report addresses three potential issues: whether there existed an adequate factual basis to convict him; whether his plea was knowingly, voluntarily, and intelligently entered; and whether he was sentenced too harshly. We agree with counsel's conclusion that none of these issues have arguable appellate merit.

The record independently establishes the court's conclusion that an adequate factual basis existed for the plea. The victim told police that she met Prater through a MeetMe.com account she had created, that she told him she was fifteen, that they arranged to meet in a park, and that

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

he then drove her to his apartment, where they engaged in several sexual acts, including intercourse. No argument could be made that the facts are insufficient to prove the charges.

The no-merit report next addresses whether Prater's no-contest pleas were knowingly, voluntarily, and intelligently entered. Our review of the record confirms that the circuit court engaged in a proper colloquy with Prater that satisfied the applicable requirements of WIS. STAT. § 971.08(1)(a), and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), to ensure a knowing, voluntary, and intelligent plea. Signed plea questionnaire and waiver-of-rights forms also were entered into the record. Prater would not have a basis to withdraw his plea because of a manifest injustice. *See* ***State v. Rock***, 92 Wis. 2d 554, 558-59, 285 N.W.2d 739 (1979). Any challenge to the entry of his no-contest pleas would lack arguable merit.

The sentencing reflected a proper exercise of discretion. The record reveals that the court's decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court considered the seriousness of the offense, Prater's character, and the need to protect the public. ***State v. Davis***, 2005 WI App 98, ¶13, 281 Wis. 2d 118, 698 N.W.2d 823. The court recognized his education and military service and nearly blemish-free criminal history but found particularly concerning the age gap between him and the victim and his blaming of her. His seven-year sentence is substantially less than the eighty years in prison and $200,000 fine he faced and does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to the sentencing decision would lack arguable merit.

In our review of the record, we noted that Prater's initial appearance was on May 27, 2014; his preliminary examination, which Prater waived, was held thirteen days later, on June 9. Absent a finding of good cause, the preliminary examination must be held or waived within ten days if the defendant is in custody, as it appears Prater was. WIS. STAT. § 970.03(2). A cause finding was not made on the record. "[T]he failure to hold the preliminary examination within the time provided by statute results in the loss of personal jurisdiction over the defendant." ***Armstrong v. State***, 55 Wis. 2d 282, 285, 198 N.W.2d 357 (1972). Prater did not object, however, and went on to plead no contest. "A defense based on lack of personal jurisdiction is waived by pleading to the information." ***Id.*** There thus is no arguable merit to this point.

Our review of the record discloses no other potential issues for appeal.[2] Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ralph Sczygelski is relieved of further representing Prater in this matter.

[2] Two mandatory DNA surcharges were assessed on the judgment of conviction. Because of the multiple DNA surcharges, we put this appeal on hold pending the Wisconsin Supreme Court's decision in ***State v. Odom***, No. 2015AP2525-CR. ***Odom*** was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his or her plea that multiple mandatory DNA surcharges would be assessed, but the ***Odom*** appeal was voluntarily dismissed before oral argument. This case then was held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, 916 N.W.2d 643. ***Freiboth*** holds that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge, as the surcharge is neither punishment nor 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.

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

Sheila T. Reiff
Clerk of Court of Appeals