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June 24, 2019

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

2018AP1172-CRNM State of Wisconsin v. Antonio M. Gardner (L.C. # 2016CF2976)

Before Blanchard, 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).

Attorney Carly M. Cusack, appointed counsel for Antonio M. Gardner, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

there would be arguable merit to a challenge to Gardner's plea or sentencing. Gardner was sent a copy of the report, and he has filed a response. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel that there are no issues of arguable merit. We affirm.

In July 2016, Gardner was charged with first-degree sexual assault of a child. Pursuant to a plea agreement, Gardner pled no-contest to an amended charge of second-degree sexual assault of a child, another case was dismissed and read-in, and the State recommended a sentence of four years of initial confinement and ten years of extended supervision. The court sentenced Gardner to seven years of initial confinement and ten years of extended supervision.

The no-merit report addresses whether there would be arguable merit to a challenge to Gardner's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel, a plea that was not knowing, intelligent, and voluntary, or lack of a factual basis to support the plea. ***State v. Krieger***, 163 Wis. 2d 241, 250–51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Gardner signed, satisfied the court's mandatory duties to personally address Gardner and determine information such as Gardner's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. The criminal complaint provided a factual basis for the plea. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Gardner's plea would lack arguable merit.

The no-merit report also addresses whether there would be arguable merit to a challenge to Gardner's sentence. We agree with counsel that this issue lacks arguable merit. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Gardner's character, the gravity of the offense, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the maximum Gardner faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'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'" (quoted source omitted)). We discern no basis to challenge the sentence imposed by the circuit court.[2]

[2] Although not mentioned in the no-merit report, we note that, at sentencing, the State at one point appeared to distance itself from its recommendation under the plea agreement. The State said that it was recommending a four-year prison sentence, and then said that "the family [of the victim], at least when we were talking to them about a resolution in this case, at least expressed that they would like more, and I can certainly understand that." This statement raises the question of whether the State breached the plea agreement by "'insinuat[ing] that [the State] was distancing itself from its recommendation' and 'cast[ing] doubt on … its own sentence recommendation.'" *See* ***State v. Sprang***, 2004 WI App 121, ¶24, 274 Wis. 2d 784, 683 N.W.2d 522 (alterations in original) (quoted sources omitted). However, the State then followed that statement by saying that "again, the State, as part of these negotiations has saved [the victim] from having to testify, to save the family from going through this, and by the defendant taking responsibility for his actions, that is why I'm recommending the four-year prison sentence." Thus, the State explained why it believed that its sentencing recommendation was appropriate despite the family's desire for a lengthier sentence. Moreover, the court informed Gardner before imposing sentence that it was inclined to exceed the State's recommendation, and offered Gardner the opportunity to withdraw his (continued)

Gardner asserts in his no-merit response that his actions with the child victim were "lessons" and did not constitute a crime. He also makes other assertions related to his interactions with the child victim and her mother. Having considered these assertions, we conclude that nothing in the no-merit response would support a non-frivolous challenge to Gardner's plea or the sentence imposed by the circuit court.

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.

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

IT IS FURTHER ORDERED that Attorney Carly M. Cusack is relieved of any further representation of Antonio M. Gardner in this matter. *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

plea on that basis. Accordingly, we discern no arguable merit to a claim for plea withdrawal based on an alleged breach of the plea agreement.