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January 2, 2020

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

2017AP2182-CRNM State of Wisconsin v. Rodolfo Garcia (L.C. #2016CF164)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Rodolfo Garcia appeals from a judgment convicting him of repeated (first-degree) sexual assault of the same child, a class B felony, contrary to WIS. STAT. § 948.025(1) (2005-06). Garcia's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-

18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Garcia filed a response to counsel's no-merit report, and counsel filed a supplemental no-merit report. Upon consideration of counsel's no-merit reports and Garcia's response and after an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Garcia's guilty plea was knowingly, voluntarily, and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether Garcia received the effective assistance of trial counsel.

In his response to counsel's no-merit report, Garcia lodges several ineffective assistance of trial counsel claims. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether Garcia's ineffective assistance claims have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing. *See* ***State v. Allen***, 2010 WI 89, ¶88, 328 Wis. 2d 1, 786 N.W.2d 124 (broad scope of no-merit review suggests that we "should identify issues of arguable merit even if those issues were not preserved in the circuit court, especially where the ineffective assistance of postconviction counsel was the reason those issues were not preserved for appeal").

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

Ineffective Assistance of Counsel: Vienna Convention

In his response to counsel's no-merit report, Garcia argues that his trial counsel was ineffective for failing to advise him of his rights under the Vienna Convention to consult with the Mexican Consulate (Garcia is a Mexican national without legal status in the United States). Garcia argues that had he been advised of such rights, he would have had assistance from the Consulate to locate witnesses relevant to the charge against him and as character witnesses for sentencing.

In her supplemental no-merit report, counsel states that this issue lacks arguable merit because Garcia cannot enforce in a state criminal proceeding any claimed rights arising under the Vienna Convention. *See* ***State v. Navarro***, 2003 WI App 50, ¶¶19-20, 260 Wis. 2d 861, 659 N.W.2d 487. We agree with appellate counsel that ***Navarro*** is the law in Wisconsin, and we are bound by it.[2] ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Trial counsel cannot be faulted for failing to discuss with Garcia a matter that could have no bearing on his state criminal court proceedings. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have lacked merit). All of Garcia's ineffective assistance of counsel claims premised on the Vienna Convention are rejected as lacking arguable merit for appeal.

[2] Garcia relies upon ***Osagiede v. United States***, 543 F.3d 399 (7th Cir. 2008), to support his claim that he has an individual right to enforce rights under the Vienna Convention. As ***State v. Navarro***, 2003 WI App 50, 260 Wis. 2d 861, 659 N.W.2d 487, is the law in Wisconsin, we do not address ***Osagiede*** or other Seventh Circuit cases discussing the Vienna Convention.

The Guilty Plea

With regard to the entry of his guilty plea, Garcia answered questions about the plea and his understanding of his constitutional rights during a thorough colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The plea questionnaire form Garcia signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). The record discloses that Garcia's guilty plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Garcia's guilty plea.

In his response to counsel's no-merit report, Garcia argues that the plea colloquy was defective because the circuit court did not advise him that he would have to serve every day of his sentence (i.e., he would not receive good time or parole). The law does not support Garcia's argument. In ***State v. Plank***, 2005 WI App 109, 282 Wis. 2d 522, 699 N.W.2d 235, the court held that a defendant is not entitled to withdraw his guilty plea even if the circuit court did not inform him that, under truth-in-sentencing, he is ineligible for parole or good-time credit. ***Id.***, ¶¶12-17. A circuit court is not required to inform a defendant of collateral consequences of a plea. ***Id.***, ¶13. The unavailability of good time and parole is a collateral consequence of Garcia's guilty plea. ***Id.***, ¶17. This issue lacks arguable merit.

Garcia argues that had his counsel rendered effective assistance, counsel would have investigated the charge against him and located witnesses who would have been relevant to the

question of his guilt.[3] This claim lacks arguable merit. During the plea hearing, Garcia specifically admitted committing the crime, and he stated his desire to plead guilty to spare the victim's family a trial. Garcia cannot now argue that an investigation by trial counsel was necessary to show that he did not commit the crime. *See* ***State v. Michels***, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987) (a defendant may not take inconsistent positions in the circuit court and this court).

Garcia argues that he should be able to withdraw his guilty plea because his trial counsel inaccurately predicted a sentence under ten years. The circuit court sentenced Garcia to twenty-five years. In ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272, we held that trial counsel is not ineffective if counsel recommends accepting a plea agreement which results in a more severe sentence than that predicted by counsel. "Counsel's incorrect prediction concerning defendant's sentence ... is not enough to support a claim of ineffective assistance of counsel." ***Id.*** (citation omitted). Furthermore, the circuit court properly advised Garcia during the plea colloquy that it was not bound by any sentencing recommendations in the plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The manifest injustice standard for plea withdrawal cannot be met by Garcia's "disappointment in the punishment [he] received." ***State v. Manke***, 230 Wis. 2d 421, 426, 602 N.W.2d 139 (Ct. App. 1999). The manifest injustice standard "serves as a deterrent to impede defendants from testing the waters for possible punishments." ***Id.*** Garcia's plea withdrawal claim lacks arguable merit.

[3] On appeal, Garcia does not claim that he would have gone to trial had trial counsel located witnesses or investigated.

The Sentencing

With regard to the sentence, the record reveals that the sentencing court's discretionary 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 adequately discussed the facts and factors relevant to sentencing Garcia to a twenty-five-year term (fifteen years of initial confinement and ten years of extended supervision). In fashioning the sentence, the circuit court focused on the severity of the crime (repeated first-degree sexual assault of a young family member) and Garcia's character, including prior criminal convictions, an uncharged offense[4] (sexual assault of another family member), his violation of immigration laws (multiple deportations and illegal re-entries), and the need to hold Garcia accountable for his conduct. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight of the sentencing factors was within the circuit court's discretion. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The $250 DNA surcharge was appropriately imposed. WIS. STAT. § 973.046(1r) (2005-06).[5] We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

[4] The circuit court properly considered the uncharged offense. *See* ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990).

[5] The DNA surcharge appearing on the judgment of conviction was mandatory for the crime of conviction. WIS. STAT. § 973.046(1r) (2005-06). Postconviction, Garcia argued that the DNA surcharge should be vacated because he previously paid a surcharge. The circuit court denied the motion on the grounds that Garcia could not proceed pro se in the circuit court while he was represented by counsel. We conclude that the judgment of conviction properly imposed a DNA surcharge. The DNA surcharge is not a form of punishment; the surcharge is a means of funding the DNA database. ***State v. Williams***, 2018 WI 59, ¶¶22, 43, 381 Wis. 2d 661, 912 N.W.2d 373. No issue with arguable merit arises from the imposition of the DNA surcharge.

In his response, Garcia argues that he should be resentenced because the circuit court considered that he was residing in the country illegally and had returned after deportation on more than one occasion. We have already upheld the sentence as an appropriate exercise of sentencing discretion. We agree with appellate counsel that the circuit court properly considered Garcia's immigration status as showing a disregard for the law that reflected upon his character. *See* ***State v. Salas Gayton***, 2016 WI 58, ¶32, 370 Wis. 2d 264, 882 N.W.2d 459.

Garcia argues that the State breached the plea agreement in two ways: (1) by referring to his immigration status and the consequences of that status and (2) during its sentencing recommendation. Having already concluded that the circuit court did not err in considering Garcia's failure to comply with immigration law, we conclude that this issue lacks arguable merit for appeal. The State recommended what was specified in the plea agreement. As counsel notes in her supplemental no-merit report, the State does not breach the plea agreement when it refers at sentencing to the primary sentencing factors (gravity of the offense, the defendant's character, and the need to protect the public). ***State v. Naydihor***, 2004 WI 43, ¶¶26-27, 270 Wis. 2d 585, 678 N.W.2d 220. The State did so here. This issue lacks arguable merit for appeal.

Garcia claims that his trial counsel was ineffective at sentencing because counsel failed to do the following: present Garcia's family members and other witnesses who could attest to his

good character and that he supported his family financially and spent time with his children,[6] hire an investigator to locate witnesses Garcia identifies in his response, and advise Garcia to seek an independent presentence investigation report to explain that he was in the country illegally so that he could live with his family. The circuit court's clear focus at sentencing leads us to deem Garcia's complaints about counsel's assistance at sentencing as lacking arguable merit.

Any claim that the circuit court would have been swayed by additional character witnesses or an alternative presentence investigation report lacks arguable merit because Garcia cannot show prejudice arising from counsel's representation. ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885 (to establish prejudice, defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" (citation omitted)). On this record, we determine that no additional character witnesses or alternative presentence investigation report would have been reasonably likely to yield a lower sentence given the circuit court's focus on the severity of the crime, Garcia's admission that he committed the crime, and Garcia's character, including prior criminal convictions, an uncharged sexual assault offense, and Garcia's violation of immigration laws (multiple deportations and illegal re-entries).

[6] The issue of whether Garcia supported his family looms large for Garcia, but the circuit court did not place significant weight on it in its sentencing remarks. The presentence investigation report raised a question about whether Garcia supported his family. At sentencing, Garcia argued that he supported his family, but he also stated that because his wife was receiving some form of governmental support, she did not acknowledge also receiving support from Garcia. Garcia's pastor testified at sentencing and stated that Garcia was supporting his family. During argument, Garcia's trial counsel stated that Garcia supported his family. In its sentencing remarks, the circuit court briefly mentioned that Garcia has not always supported his family. As we have stated, the issue of family support was not a focus of the circuit court at sentencing.

Garcia complains that the presentence investigation report was biased and inaccurate and the presentence investigation report author did not contact his family. We reject all claims relating to the presentence investigation report. As appellate counsel notes in her supplemental no-merit report, Garcia took the opportunity at sentencing to offer corrections to the presentence investigation report.

Garcia argues that he and counsel met for only one hour to discuss his sentencing which left no time to investigate and contact character witnesses. A pastor testified at sentencing on Garcia's behalf. As previously stated, it is not reasonably probable that the circuit court's focus at sentencing would have been altered by additional character witnesses.

Garcia argues that his trial counsel was ineffective because he did not prepare him for allocution beyond saying he should speak to the court honestly. Garcia does not offer any hint of what else he might have said to the circuit court. During allocution, Garcia again admitted his guilt, claimed that he was set up for arrest, and stated that he remained in the United States illegally because his family lives here. While Garcia perceives a connection between the alleged lack of preparation for allocution and the lengthy sentence he received, the record does not demonstrate such a connection.

Garcia argues that the circuit court failed to consider sentencing guidelines.[7] There are no sentencing guidelines in Wisconsin. The information alleged that Garcia committed the crime of conviction between 2005 and 2006. Garcia admitted the conduct to a pastor in February 2015. Garcia was charged in 2016 and sentenced in 2017. A claim relating to sentencing guidelines

[7] The federal sentencing guidelines do not apply to a defendant in a Wisconsin circuit court.

lacks arguable merit for appeal. ***State v. Barfell***, 2010 WI App 61, ¶¶4, 14, 324 Wis. 2d 374, 782 N.W.2d 437 (no relief available because sentencing guidelines were repealed in 2009).

Garcia argues that his conditions of confinement are more harsh because of his immigration status. Conditions of confinement are outside the scope of this appeal from a judgment of conviction.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Roberta Heckes of further representation of Garcia in this matter.

Upon the foregoing reasons,

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 Roberta Heckes is relieved of further representation of Rodolfo Garcia in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals