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August 27, 2020

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

2019AP401-CRNM State of Wisconsin v. Gary J. Watenphul (L.C. # 2017CF145)

Before Blanchard, Kloppenburg, and Nashold, 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).

Gary J. Watenphul appeals a judgment convicting him of repeated sexual assault of the same child. Attorney Leonard Kachinsky has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18);[1] *see also* ***Anders v. California***, 386

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

U.S. 738, 744 (1967). The no-merit report addresses the validity of the plea and the circuit court's exercise of sentencing discretion. Watenphul was sent a copy of the report, and filed a response in which he asserts that he does not remember being read his rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966). This court ordered counsel to address that issue in a supplemental no-merit report, which has now been filed. Upon reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 272-276, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Watenphul entered a guilty plea to repeated sexual assault of a child. The circuit court conducted a standard plea colloquy, inquiring into Watenphul's ability to understand the proceedings and the voluntariness of his plea decision, and further exploring his understanding of the nature of the charge, the penalty range and other direct consequences of the plea, and the constitutional rights being waived. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Watenphul understood that it would not be bound by any sentencing recommendations. In addition, Watenphul provided the court with a signed plea questionnaire. Watenphul indicated to the court that he

understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

Watenphul's counsel stated on the record that there was a factual basis for the plea, and there is nothing in the record, the no-merit report, or the response that leads us to conclude otherwise. In addition, Watenphul indicated satisfaction with his attorney. Nothing in our independent review of the record would support a claim that trial counsel rendered ineffective assistance. Watenphul has not alleged any other facts that would give rise to a manifest injustice. Therefore, the plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

There also is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. In imposing sentence, the circuit court considered the seriousness of the offenses, Watenphul's character, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197. Watenphul had the opportunity, through his counsel, to comment on the presentence investigation report. He also had the opportunity to address the court directly, and did so prior to the court's imposition of sentence. The court imposed a sentence of twenty years of initial confinement and twelve years of extended supervision. Watenphul faced a total possible sentence of forty years of initial confinement and twenty years of extended supervision. *See* WIS. STAT. §§ 948.025(b) (classifying repeated sexual assault of the same child as a Class B felony); 973.01(2)(b)1 and (d)1 (providing maximum terms for a Class B felony). Under the circumstances, it cannot reasonably be argued that Watenphul's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Watenphul asserts in his response to counsel's no-merit report that he does "not recall" being read his rights under ***Miranda***. No suppression motion was filed prior to the entry of Watenphul's guilty plea. The admissibility of any statement Watenphul made to law enforcement is not reviewable under WIS. STAT. § 971.31(10) because review under that statute is available only where the circuit court has denied a motion to suppress evidence, and no suppression motion was filed in this case. The only context in which Watenphul potentially could raise the issue would be within the context of a claim for ineffective assistance of trial counsel, if there were sufficient facts to support the following arguments: that a ***Miranda*** violation could have been shown at a suppression hearing; that his trial counsel failed to properly advise him of the potential that he could have prevailed at a suppression hearing based on a ***Miranda*** violation; and that if he had prevailed on such a suppression motion he would not have entered his guilty plea. We asked counsel to address this issue in a supplemental no-merit report. Having reviewed the supplemental no-merit report, we agree with counsel's conclusion that the issue is without arguable merit.

In the supplemental no-merit report, counsel informs us that Watenphul made statements during two recorded interviews with law enforcement. Both interviews were conducted by police detective Kerry Kirn. Relevant portions of the interview transcripts are included in the supplemental no-merit report. The first interview took place in Kirn's squad car, in the driveway of the residence where Watenphul was staying. Watenphul sat in the passenger seat of the squad car with the door unlocked. Kirn informed Watenphul at the beginning of the interview that he was not in custody and that, when they were finished talking, Watenphul could go back into the house. Watenphul gave verbal confirmation that Kirn could ask him questions, and Kirn

proceeded to do so. The interview lasted approximately 48 minutes, and ended with Watenphul stepping out of the squad car.

According to the supplemental no-merit report, Detective Kirn again interviewed Watenphul eight days later. The interview took place at the same address as the first interview, and lasted approximately 24 minutes. Kirn began by informing Watenphul that he was not under arrest or in custody, and repeated that fact later in the interview. The interview ended after Kirn reiterated for Watenphul that he did not have to talk if he did not want to, and could stop at any time. Watenphul indicated that he wanted to stop, and Kirn left.

Counsel concludes in the supplemental report that neither of the two interviews were custodial in nature, such that ***Miranda*** warnings were not required. We agree with counsel's analysis of this issue. ***Miranda*** warnings need only be administered when an individual is subjected to custodial interrogation. ***State v. Fischer***, 2003 WI App 5, ¶22, 259 Wis. 2d 799, 656 N.W.2d 503. Whether the facts show that Watenphul was in custody is a question of law that we review independently. ***State v. Bartelt***, 2018 WI 16, ¶25, 379 Wis. 2d 588, 906 N.W.2d 684. The test is whether there was a formal arrest or a restraint on freedom of movement to a degree associated with formal arrest. ***Id.***, ¶31. We look at the totality of the circumstances to determine whether a reasonable person would not have felt free to terminate the interview and leave the scene. ***Id.***

Here, the supplemental no-merit report indicates that both interviews took place at the residence where Watenphul was residing. There is no indication that Watenphul's freedom of movement was restrained in any way. Although the first interview took place in Kirn's squad car, Watenphul sat in the passenger seat with the door unlocked in the driveway of the place

where Watenphul was staying. Kirn stated explicitly that Watenphul was not in custody, was not under arrest, and was speaking with Kirn voluntarily. In response, Watenphul told Kirn, "[Let's] ... do what we got to do" and "[a]sk your questions." During the second interview, Kirn again explicitly informed Watenphul that he was not in custody and was not under arrest. Kirn asked Watenphul if he was "ok" with talking to Kirn and Watenphul stated that he was. We agree with counsel that the facts are not sufficient to conclude that a reasonable person would not have felt free to terminate the interviews and leave. As such, the need for ***Miranda*** warnings was not triggered. Any claim that Watenphul's trial counsel was ineffective for failing to file a suppression motion alleging a ***Miranda*** violation would be without arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Attorney Leonard Kachinsky is relieved of any further representation of Gary Watenphul in this matter pursuant to 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