



OFFICE OF THE CLERK
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 IV

September 24, 2020

To:

Hon. Raymond S. Huber
Circuit Court Judge
Waupaca County Courthouse
811 Harding St.
Waupaca, WI 54981

Terrie J. Tews
Clerk of Circuit Court
Waupaca County Courthouse
811 Harding St.
Waupaca, WI 54981

Philip J. Brehm
23 W. Milwaukee St., Ste. 200
Janesville, WI 53548

Veronica Fay Isherwood
District Attorney
811 Harding St.
Waupaca, WI 54981-2012

Bruce D. Bestul
2603 North Richmond St., #14
Appleton, WI 54911

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

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

2019AP1050-CRNM State of Wisconsin v. Bruce D. Bestul (L.C. # 2015CF322)

Before Fitzpatrick, P.J., Blanchard, and Kloppenburg, 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 Philip Brehm, appointed counsel for Bruce Bestul, 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 there would be

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

arguable merit to a challenge to Bestul's plea, the circuit court decision denying Bestul's postconviction motion to withdraw his plea, or sentencing, or a claim of ineffective assistance of counsel based on assertions of error by Bestul. Bestul was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Bestul was charged with child enticement; sexual exploitation of a child; possession of child pornography; causing a child to expose intimate parts; exposing a child to harmful material; and felony intimidation of a witness. Pursuant to a plea agreement, Bestul pled no-contest to child enticement, causing a child to expose intimate parts, causing a child to view harmful material, and an amended charge of misdemeanor intimidation of a witness. The remaining charges were dismissed and read in for sentencing, and the State limited its sentencing recommendation to three years of initial confinement. On the parties' joint sentencing recommendation, Bestul was sentenced to a total of twenty-one months in jail, plus four years of probation with concurrent imposed and stayed sentences totaling two years of initial confinement and two years of extended supervision.² Bestul then moved to withdraw his plea on grounds that his trial counsel was ineffective by failing to investigate potential witnesses, and that his plea

² The judgment of conviction for counts one and four indicates that the imposed and stayed sentences are consecutive to each other. However, at the postconviction motion hearing, the circuit court clarified that the imposed and stayed sentences were intended to be concurrent. Because this appears to be a clerical error, upon remittitur, the court shall enter an amended judgment of conviction indicating the imposed and stayed sentences are concurrent.

was not knowing due to his mental state at the plea hearing.³ After an evidentiary hearing, the court denied the motion.

The no-merit report addresses whether there would be arguable merit to a challenge to Bestul's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Bestul signed, satisfied the court's mandatory duties to personally address Bestul and determine information such as Bestul's understanding of the nature of the charges 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. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Bestul's plea would lack arguable merit. A valid guilty plea constitutes a waiver of all nonjurisdictional defects and defenses. *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

The no-merit report also addresses whether there would be arguable merit to a challenge to the circuit court's decision denying Bestul's postconviction motion to withdraw his plea. Bestul argued in the postconviction motion that he was entitled to plea withdrawal because: (1) his trial counsel was ineffective by failing to contact potential witnesses and therefore being unprepared for the scheduled jury trial; and (2) Bestul was emotionally distressed at the time he

³ Bestul also moved for additional sentence credit. However, Bestul subsequently withdrew that argument. We discern no arguable merit to further proceedings related to sentence credit.

entered his plea due to recent deaths of three individuals close to him and a pending complaint he had filed against a detective. We agree with counsel that this issue lacks arguable merit.

A circuit court's decision on a motion for plea withdrawal is discretionary and will not be disturbed unless the circuit court erroneously exercised its discretion. *State v. Spears*, 147 Wis. 2d 429, 434, 433 N.W.2d 595 (Ct. App. 1988). In a postconviction motion for plea withdrawal, the defendant carries the heavy burden of establishing, by clear and convincing evidence, that plea withdrawal is necessary to correct a manifest injustice. See *State v. Thomas*, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. A claim for plea withdrawal based on ineffective assistance of counsel "must show that counsel's performance was deficient" in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." *State v. Love*, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."” *Id.* (quoted sources omitted). Whether counsel's performance was deficient and whether the deficiency was prejudicial are questions of law that we review de novo. *State v. Johnson*, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). However, findings of fact made by the circuit court will be upheld unless they are clearly erroneous. *Id.* at 127.

At a postconviction motion hearing, Bestul testified that he asked his trial counsel to contact four potential witnesses and several police departments. Bestul explained that the

witnesses would have testified that the individual who first reported Bestul's crimes against the minor victim was lying and would have provided positive character evidence for Bestul. He explained that the police departments would have provided further negative character information as to the reporting individual that would have supported Bestul's theory that the reporting individual was lying when she reported Bestul to the police. Bestul also testified that he was emotionally impacted by the recent deaths of three individuals close to him and his pending complaint against a detective at the time he entered his plea. He testified that the emotional impact of the deaths and the pending complaint affected his ability to make a decision to enter a plea.

Bestul's trial counsel testified that he had a statement from one of the potential witnesses that was not relevant to the charges, and another potential witness had passed away. He testified that he did not contact the other potential witnesses because the information from Bestul was that they would have been character witnesses, not that they had any information relevant to the charges. He testified that he believed he was ready for the scheduled trial.

The circuit court found that Bestul's trial counsel was not ineffective and that Bestul's plea was voluntarily entered. Accordingly, the court denied Bestul's motion for plea withdrawal. We agree with counsel's assessment that a challenge to the circuit court's decision would lack arguable merit. The testimony at the postconviction motion hearing did not support Bestul's claim that his counsel was ineffective by failing to contact potential witnesses. Rather, the evidence at the hearing was that the potential witnesses would have provided positive character evidence for Bestul or negative character evidence regarding the individual who reported Bestul to the police, but would not have offered anything to support a defense as to the minor victim's claims against Bestul. Counsel explained that he was prepared for trial based on the defense

Bestul would have asserted at trial. The circuit court also found that Bestul had not established a basis to withdraw his plea based on his emotional state at the time he entered his plea. It found that Bestul had not expressed any problem at the plea hearing or in the three months in between the plea and sentencing, and that Bestul had voluntarily entered his plea. We discern no arguable merit to a challenge to the circuit court's decision.

The no-merit report also addresses whether there would be arguable merit to a challenge to Bestul's sentence. We agree with counsel that this issue lacks arguable merit. Because Bestul received the sentence that he affirmatively approved, he is barred from challenging the sentence on appeal. See *State v. Scherreiks*, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989). We discern no other basis to challenge the sentence imposed by the circuit court.

The no-merit report concludes that there would be no arguable merit to a claim of ineffective assistance of counsel based on Bestul's assertions to no-merit counsel that his trial counsel should have contacted additional witnesses or that there was an insufficient factual basis for the possession of child pornography charge. As current counsel points out, the issue of trial counsel failing to contact witnesses was already addressed at the postconviction motion hearing, and Bestul was not convicted of possession of child pornography. We discern no arguable merit to further proceedings based on these issues.

Finally, the no-merit report concludes that there would be no arguable merit to further proceedings based on other issues Bestul has raised with counsel, specifically, claims that law enforcement altered a witness statement, that the victim admitted that nothing had occurred between Bestul and the victim, and that the district attorney informed a judge that the victim had admitted nothing happened. The no-merit report states that no evidence is available to support

any of those claims. We agree that none of these claims would support non-frivolous further proceedings.

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 modified to conform to the oral sentencing pronouncement by indicating that the imposed and stayed sentences in counts one and four are concurrent; the judgment is summarily affirmed as modified; and the cause remanded for entry of a corrected judgment of conviction. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Philip Brehm is relieved of any further representation of Bruce Bestul in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals