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February 11, 2021

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

2020AP126-CRNM State of Wisconsin v. Marc W. Nadig (L.C. # 2016CF344)

Before Fitzpatrick, P.J., Graham, 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).

Attorney Susan Alesia, appointed counsel for Marc Nadig, 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 Nadig's plea or sentencing, or the circuit court decisions denying Nadig's postconviction motions. Nadig was sent a copy of the report and has filed a response. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Nadig was charged with five counts of possession of child pornography. Pursuant to a plea agreement, Nadig pled guilty to three counts and the other two were dismissed and read-in for sentencing purposes; the parties stipulated to six images for purposes of the child pornography surcharge; and the State agreed to limit its sentencing recommendation to ten years of initial confinement and ten years of extended supervision. The court sentenced Nadig to fifteen years of initial confinement and ten years of extended supervision. Nadig filed a postconviction motion seeking sentence modification, eligibility for the substance abuse program, and an additional day of sentence credit. The circuit court granted the additional day of sentence credit and denied the remainder of the postconviction motion. Counsel then pursued a no-merit appeal on Nadig's behalf. In response to counsel's no-merit report, this court questioned whether Nadig had been sentenced on accurate information. Counsel then filed a notice of voluntary dismissal and moved to extend the time to file a postconviction motion for resentencing. Accordingly, this court rejected the no-merit report, dismissed the appeal, and extended the time to file a supplemental postconviction motion. Counsel then filed a postconviction motion seeking resentencing, and the circuit court denied the motion. This no-merit appeal follows.

The no-merit report addresses whether there would be arguable merit to a challenge to Nadig'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 Nadig signed, satisfied the court’s mandatory duties to personally address Nadig and determine information such as Nadig’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 Nadig’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 Nadig’s sentence. Our review of a sentence determination begins “with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of.” *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the severity of the offenses, Nadig’s character, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. An argument that the circuit court erroneously exercised its sentencing discretion would lack arguable merit.

The no-merit report also addresses whether there would be arguable merit to a challenge to the circuit court’s order denying Nadig’s postconviction motion for sentence modification and

eligibility for the substance abuse program. We agree with counsel's assessment that a challenge to the circuit court's order would lack arguable merit.

Nadig argued two new factors warranting sentence modification: (1) that Nadig received a substantially longer sentence than similarly situated defendants; and (2) that Nadig's use of peer-to-peer sharing networks, which the court considered an aggravating factor, was too common to be aggravating and that Nadig did not understand how his use of the networks allowed others to access images. *See State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (stating that a new factor for sentence modification purposes is a fact or set of facts that was highly relevant to the imposition of sentence and not known to the sentencing judge at the time of sentencing). However, the court determined that those facts did not warrant sentence modification. *See id.*, ¶37 (explaining that whether a new factor warrants sentence modification is discretionary).

Nadig also argued that the disparity in sentences rendered his sentence unduly harsh. *See State v. Ralph*, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990) (concluding sentence was unduly harsh due to lesser sentence of similarly situated accomplice). The court determined that the sentence was not unduly harsh based on the facts of the case. *See State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (stating 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)).

Lastly, Nadig argued that he had identified substance abuse treatment needs that warranted his eligibility for the substance abuse program. The circuit court determined that

Nadig had not provided a basis for the court to change the circuit court's decision as to eligibility for the substance abuse program, noting that the court's primary concern at sentencing was the need to protect the public and that Nadig's substance abuse treatment needs had not been a factor. *See State v. White*, 2004 WI App 237, ¶2, 277 Wis. 2d 580, 690 N.W.2d 880 (concluding that the circuit court's decision as to program eligibility is discretionary). Because the circuit court properly decided each of the issues presented in the postconviction motion, we discern no arguable merit to a challenge to the circuit court's decision.

Finally, the no-merit report concludes that there would be no arguable merit to a challenge to the circuit court's order denying Nadig's postconviction motion for resentencing. We agree that this issue would lack arguable merit. Nadig argued that he was sentenced based on inaccurate information because the circuit court stated at sentencing that there were three counts, "each involving a relatively large number of victims." *See State v. Tiepelman*, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1 (holding that to establish a due process violation at sentencing, the defendant must establish that the circuit court actually relied on inaccurate information at sentencing). Nadig argued that there was only one image of a single victim per count, and that the court relied on the inaccurate information that there were multiple victims per count in deciding the sentence to impose. The circuit court denied the motion, explaining that while there was only one victim per count of conviction, the probable cause section of the criminal complaint described twenty-three images of child pornography, that approximately sixteen victim impact statements were received by the court, and that about 200 images were recovered during the investigation of this case, 136 of which depicted prepubescent children. The court explained that it relied on the totality of the evidence in this case to determine that there was a relatively large number of victims, and that it had mistakenly connected the number

of victims to the counts of conviction, but that the mistake made no difference to the court's sentencing decision. We conclude that further proceedings on this issue would be wholly frivolous.

Nadig has filed a response asserting that he believes his sentence was too long. Nadig points out that he is young and has positive qualities; that he was struggling with isolation and depression before the current offenses; that he now realizes the harm child pornography causes to its victims and regrets his actions; and that he pursued counseling while released on bond that was helping him understand his behaviors. However, nothing in Nadig's response provides a non-frivolous basis to challenge the sentence imposed by the circuit court. The circuit court considered Nadig's positive qualities at sentencing, including his age, remorse, and desire to reintegrate into society, as well as the psychiatric evaluation submitted by the defense. The court determined that, even considering that information, fifteen years of initial confinement was the minimum necessary to achieve the court's sentencing objectives. As explained above, any challenge to the court's sentencing decision would lack arguable merit.

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 and orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Susan Alesia is relieved of any further representation of Marc Nadig 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