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DISTRICT IV

March 31, 2022

To:

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

2018AP2411-CRNM State of Wisconsin v. David G. Wenzel (L.C. # 2015CF663)

Before Blanchard, P.J., 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).

David G. Wenzel appeals a judgment entered upon his guilty pleas to the following five offenses: two counts of child exploitation, contrary to WIS. STAT. § 948.05(1)(a) (2019-20);[1] and three counts of second-degree second assault as a repeater, contrary to WIS. STAT. §§ 940.225(2)(d) and 939.618(2)(a) (requiring a mandatory minimum term of initial confinement based on a prior conviction for a serious sex crime). Wenzel's appellate counsel has filed a no-

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738, 744 (1967). Wenzel filed a response and appellate counsel filed a supplemental no-merit report. Upon consideration of the original and supplemental no-merit reports, Wenzel's response, and our independent review of the record, we conclude that the judgment may be summarily affirmed because there are no arguably meritorious appellate issues. WIS. STAT. RULE 809.21.

Wenzel was charged with the following twenty-seven crimes: sexual exploitation of a child (counts one and two); possession of child pornography (counts three through ten); capturing an image of nudity without consent (counts eleven through fifteen); repeated sexual assault of the same child (count sixteen); intentionally photographing a minor without consent as a registered sex offender (counts seventeen through twenty-four); and second-degree sexual assault as a repeater (counts twenty-five through twenty-seven).

The basic facts are the following. Wenzel occasionally babysat young relatives. In March 2015, while using Wenzel's bathroom, S.G., a mother, noticed a red light coming from the vent facing the toilet. She removed the vent from the wall and discovered a video camera. She gathered her children, went home, and called law enforcement to report the hidden camera. Officers applied for and obtained a search warrant, which they executed the next day. Officers found the hidden video camera and discovered that it transmitted a live feed up to a television in the primary bedroom. A VHS recorder was linked to the setup. Officers seized numerous VHS and DVD/CD recordings from the residence. The recordings included footage from the hidden

bathroom camera as well as numerous movies of Wenzel having sexual contact with a very young girl, later identified as S.G.'s daughter.[2]

Pursuant to a plea agreement, Wenzel pled guilty to counts one, two, twenty-five, twenty-six, and twenty-seven. The remaining twenty-two counts were dismissed and read in, and the State agreed that it would not file charges based on additional computer drives that "appeared to contain a significant amount of child pornography." The State agreed to recommend "a total prison sentence of 40 years" with twenty-five years of initial confinement followed by fifteen years of extended supervision. The defense would be free to argue for any sentencing disposition, and the parties would jointly recommend that "all sentences in this case run concurrent to each other and concurrent to the federal sentence" that Wenzel was then serving. Finally, in lieu of litigating potential suppression issues in state court, the parties informed the circuit court of Wenzel's pending federal appeal of the denial of his motion to suppress and conveyed to the court the agreement that, if Wenzel prevailed in his federal appeal, so that "suppression of evidence is ordered in that Federal case, Wenzel may then vacate all of his pleas herein and thereafter litigate those same suppression challenges herein."

At sentencing, the circuit court imposed an aggregate bifurcated sentence totaling sixty-five years, with thirty-five years of initial confinement followed by thirty years of extended supervision. Specifically, on counts one and two, the court imposed concurrent twenty-five-year

[2] The numerous movies and images also gave rise to federal charges of unlawfully creating child pornography. While the state case was pending, Wenzel unsuccessfully litigated a suppression motion, challenging the validity and execution of the warrant issued as described above, in federal district court. He pled guilty in federal district court and was sentenced to twenty-five years of incarceration followed by twenty years of supervised release. He appealed the denial of his suppression motion. On April 27, 2017, the Seventh Circuit Court of Appeals affirmed the denial of Wenzel's suppression motion. ***United States v. Wenzel***, 854 F.3d 957 (7th Cir. 2017).

sentences bifurcated into ten years of initial confinement followed by fifteen years of extended supervision. On counts twenty-five through twenty-seven, the court imposed forty-year sentences bifurcated into twenty-five years of initial confinement followed by fifteen years of extended supervision, to run concurrent with each other but consecutive to counts one and two. All sentences were ordered to run concurrent with Wenzel's federal sentence.

Appellate counsel's no-merit report discusses whether Wenzel's guilty pleas were knowing, intelligent, and voluntary. The circuit court's plea-taking duties are set forth in WIS. STAT. § 971.08(1), and summarized in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the court engaged in a colloquy that, together with the plea questionnaire signed by Wenzel,[3] satisfied the court's mandatory duties. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. We agree with appellate counsel's analysis and conclusion that no issue of arguable merit arises from the entry of Wenzel's guilty pleas.[4]

[3] In particular, we observe that, although the plea-taking court correctly advised Wenzel of the maximum penalties for each count, it did not explicitly ascertain his understanding that counts one and two each carried a mandatory minimum penalty of five years' initial confinement. *See* WIS. STAT. § 939.617(1). Similarly, although the parties discussed that counts twenty-five through twenty-seven each carried a mandatory minimum term of initial confinement due to Wenzel's admission that he qualified as a WIS. STAT. § 939.618(2)(a) repeater, the length of the applicable minimum—three years and six months—was not stated on the record at the plea hearing.

However, the five-year mandatory minimum applicable to counts one and two, and the three-and-one-half-year mandatory minimum applicable to counts twenty-five through twenty-seven, are clearly set forth in the plea paperwork signed by Wenzel and filed with the circuit court. At the plea hearing, Wenzel confirmed that he had reviewed with his attorney "all the materials contained on the plea questionnaire in its entirety[,]" that he understood the material, that he "answer[ed] the questions truthfully[,]" and that he signed "on the second page[.]" Additionally, the charging documents contain notice of the applicable mandatory minimums.

[4] Though not discussed in appellate counsel's no-merit report, we independently considered whether the unusual nature of the plea bargain's suppression provision might give rise to an arguably meritorious plea-withdrawal issue. We conclude that any potential claim on this ground would be wholly frivolous for at least two reasons. First, the federal court ultimately affirmed the denial of Wenzel's (continued)

Appellate counsel's no-merit report also discusses whether the circuit court properly exercised its sentencing discretion. The record reveals that the court's sentencing decision had a "'rational and explainable basis.'" *See* ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (quoted source omitted). In fashioning its sentence, the circuit court considered the gravity of the offense, Wenzel's character and history, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court determined that probation was not appropriate given Wenzel's "history and the nature of these offenses." The court acknowledged that Wenzel "had a prosocial life for the most part" but said that his 1997 crime should have served as a "wake-up call." The court's central focus was on the gravity of Wenzel's current crimes, which it found "[b]y any stretch of the imagination … were serious." The court described Wenzel's conduct as "abhorrent" and stated:

> You are a person who should not be near children, and you've had your last chance, as far as I am concerned, victimizing people within this community. Hidden cameras, drugging children to permit you to have your way with them, and photographing them in compromising positions leads me to believe that the only way to prevent the risk to the community is to ensure that you never are back in the community. The damage to the victims and the offense severity, really overwhelm the other considerations the Court must make in these cases."

The court permissibly placed great weight on the severity of Wenzel's crimes and the need to protect the public. *See* ***State v. Taylor***, 2006 WI 22, ¶43, 289 Wis. 2d 34, 710 N.W.2d 466 (court can permissibly impose a sentence "which considers all relevant factors but which is based primarily on the gravity of the crime or the need to protect society" (citation omitted)); ***Ziegler***,

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suppression motion, rendering moot and speculative any question about the provision's enforceability. Second, Wenzel clearly received the benefit of his plea bargain, namely, a number of dismissed counts and the State's promised sentencing recommendation. *See* ***State v. Denk***, 2008 WI 130, ¶70, 315 Wis. 2d 5, 758 N.W.2d 775.

289 Wis. 2d 594, ¶23 (the weight to be given to each factor is committed to the sentencing court's discretion). Additionally, the court identified as its proper objectives Wenzel's rehabilitative needs, specific deterrence, protection of the public, and punishment. Further, under the circumstances of this case, it cannot reasonably be argued that Wenzel's sentence, which is well below the maximum, is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with appellate counsel that a challenge to Wenzel's sentence would lack arguable merit.

Wenzel has filed a lengthy response focused primarily on the warrant underlying the search of his residence. He asserts that trial counsel was ineffective for failing to file a motion challenging the search warrant on grounds that it was unsupported by probable cause and was overbroad in terms of items to be seized and places to be searched. Appellate counsel has filed a supplemental no-merit report addressing Wenzel's response.

First, we agree with the analysis in the supplemental no-merit report concluding that Wenzel has not set forth an arguably meritorious ineffective assistance of trial counsel claim supporting plea withdrawal. As explained more fully in the supplemental no-merit report, the record shows that Wenzel agreed not to litigate the legality of the search warrant in the context of his state criminal case. By entering his guilty pleas, Wenzel forfeited the ability to bring a suppression motion in state court unless he prevailed in federal court. *Cf.* ***State v. McDonald***, 50 Wis. 2d 534, 537, 184 N.W.2d 886 (1971) (deliberate abandonment of a suppression motion prior constituted waiver); *see also* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (a no-contest plea forfeits the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights). A plea-withdrawal claim premised on trial

counsel's failure to file and litigate a suppression motion in state court would lack arguable merit.[5]

Second, Wenzel's response alleges that law enforcement officers violated his "constitutional rights multiple times" and used excessive force in executing the search warrant and arresting him. None of these purported violations suggest grounds on which to suppress evidence seized pursuant to the warrant. For example, it is irrelevant that officers might have detained Wenzel in a squad car or arrested him without an arrest warrant, because Wenzel does not suggest any evidence or inculpatory statements derived from the seizure of his person.

Third, Wenzel makes numerous arguments about a variety of matters, including alleged breaks in the evidentiary chain of custody and the amount of his cash bail. These arguments were forfeited by Wenzel's guilty pleas. ***Kelty***, 294 Wis. 2d 62, ¶18 & n.11. To the extent that we have not expressly addressed any claims in Wenzel's response, they are deemed to lack arguable merit.

Our independent review of the record discloses no other potential issues for appeal. Accordingly, the court accepts the no-merit report, affirms the judgment of conviction, and discharges appellate counsel of the obligation to further represent Wenzel in this appeal. Therefore,

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

[5] Additionally, as pointed out in appellate counsel's supplemental no-merit report, based on the decision of the federal district court and the Seventh Circuit Court of Appeals, there is nothing to suggest that Wenzel would have prevailed on a suppression motion filed in state court.

IT IS FURTHER ORDERED that Attorney Angela Conrad Kachelski is relieved from further representing David G. Wenzel in this appeal. *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