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 II

April 6, 2022

To:

Hon. Mark Rohrer
Circuit Court Judge
Electronic Notice

Lynn Zigmunt
Clerk of Circuit Court
Manitowoc County Courthouse
Electronic Notice

Winn S. Collins
Electronic Notice

Andrew Hinkel
Electronic Notice

Jacalyn C. LaBre
Electronic Notice

Scott B. Sanders, #643586
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2018AP1903-CRNM State of Wisconsin v. Scott B. Sanders (L.C. #2014CF37)

Before Gundrum, P.J., Neubauer and Kornblum, 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).

Scott B. Sanders appeals from a judgment of conviction entered upon his ***Alford***[1] pleas to sixty-two sexually related felonies. Sanders's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)[2] and ***Anders v. California***, 386 U.S. 738 (1967).

[1] An ***Alford*** plea is a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. ***State ex rel. Jacobus v. State***, 208 Wis. 2d 39, 54, 559 N.W.2d 900 (1997); *see also* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

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

Sanders received a copy of the report and filed a response. Appellate counsel filed a letter stating that he would not be filing a supplemental no-merit report unless ordered to by this court. Upon consideration of the no-merit report, Sanders's response, and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The third amended information in this case charged Sanders with the following: Thirty-three counts of possessing child pornography, contrary to WIS. STAT. § 948.12(1m) (counts 1-4, 6-10, 26-32, 51-57, 59-64, 66-67, 69, 71); sixteen counts of sexual exploitation of a child by filming, contrary to § 948.05(1)(b) (counts 11-14, 16-20, 34-40); seven counts of sexual exploitation of a child by distributing recordings of a child engaged in sexually explicit conduct, contrary to § 948.05(1)(m) (counts 22, 41-46); one count of sexual exploitation of a child by possessing with intent to distribute recordings of a child engaged in sexually explicit conduct, contrary to § 948.05(1)(m) (count 23); four counts of first-degree sexual assault by contact with a child under thirteen years of age, contrary to § 948.02(1)(e) (counts 24, 47-49); and one count of first-degree sexual assault by intercourse with a child under twelve years of age, contrary to § 948.02(1)(b) (count 50).[3] The offenses were based upon digital images found on a camera and computer during a warranted search of Sanders's house, and emails sent from an address associated with Sanders. Some of the images appeared to have been produced in Sanders's bathroom and depicted sexual assaults of an eight-year-old girl.

[3] Appellate counsel's no-merit report slightly misstates the number and nature of the charges in the third amended information, which formed the basis for Sanders's pleas and convictions. Because we are a high volume court, we expect counsel to be more accurate when setting forth basic facts. Similarly, though the no-merit report purports to refer to the "third amended information" in this case, it cites to record No. 99, which is the State's one-page "Motion to Amend Second Information."

Sanders filed motions to suppress the fruits of the search warrant. The State filed responses. The circuit court heard and denied all of Sanders's suppression motions.

Sanders waived his right to a jury trial, and a court trial commenced. After two days, Sanders entered ***Alford*** pleas to all charges contained in the third amended information.

At sentencing, the circuit court imposed the following: On count 50 (first-degree sexual assault of a child under twelve), thirty years of initial confinement followed by twenty years of extended supervision; on counts 24 and 47-49 (first-degree sexual assault of a child under thirteen), fifteen years of initial confinement followed by twenty years of extended supervision, to run concurrent with each other but consecutive to count 50; on count 23 (child exploitation—possession with intent to distribute), five years of initial confinement followed by five years of extended supervision, to run consecutive to all others; on counts 1-4, 6-10, 26-32, 51-57, 59-64, 66-67, 69 and 71 (possessing child pornography), five years of initial confinement followed by five years of extended supervision, to run concurrent with each other but consecutive to all others; on counts 11-14, 16-20 and 34-40 (child exploitation—filming), five years of initial confinement followed by five years of extended supervision, to run concurrent with each other but consecutive to all others; and on counts 22 and 41-46 (child exploitation—distributing), five years of initial confinement followed by five years of extended supervision, to run concurrent with each other but consecutive to all others. Thus, Sanders received a total sentence of 125

years, bifurcated into sixty-five years of initial confinement followed by sixty years of extended supervision. [4]

By order of May 9, 2018, we rejected appellate counsel's prior no-merit report, citing the surcharges imposed by the sentencing court. *See* ***State v. Sanders***, No. 2017AP19-CRNM, unpublished slip op. and order (WI App May 9, 2018). Specifically, the judgment reflected a "fine" of $15,500, and DNA surcharges totaling $15,500. It appeared that the "fine" represented child pornography surcharges ordered by the sentencing court in connection with thirty-two of the thirty-three convictions. As for the DNA surcharges, we observed that the sentencing court never actually ordered any DNA surcharge and that under the case law then in effect, some of the multiple DNA surcharges imposed on the judgment apparently constituted impermissible ex post facto violations. *See* ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758. Additionally, we observed that the plea-taking court did not advise Sanders that he faced multiple mandatory DNA surcharges, and that the question of whether this could support plea withdrawal was pending in a certification before the Wisconsin Supreme Court in ***State v. Freiboth***, No. 2015AP2535-CR. We dismissed the appeal and extended the time for Sanders to file a postconviction motion.

Appellate counsel did not file a postconviction motion but instead filed the instant no-merit report on September 28, 2018, explaining that the potential claims identified by this court subsequently "were foreclosed by [the following] binding appellate decisions. ***State v. Muldrow***, 2018 WI 52, 381 Wis. 2d 492, 912 N.W.2d 74; ***State v. Williams***, 2018 WI 59, 381 Wis. 2d 661,

[4] Here again, appellate counsel's no-merit report contained minor mistakes which we discovered and corrected by independently sifting through the record.

912 N.W.2d 373; ***State v. Freiboth***, 2018 WI App 46, [383 Wis. 2d 733,] 916 N.W.2d 643." We continued to hold our review to allow for the disposition of ***State v. Schmidt***, No. 2020AP616-CR, which was expected to address the plea-taking court's duties and the sentencing court's authority in the context of multiple mandatory child pornography surcharges. The Wisconsin Supreme Court has now clarified that, as with DNA surcharges, a child pornography surcharge is not punitive and a plea-taking court need not inform a defendant of the surcharge during the plea colloquy. ***State v. Schmidt***, 2021 WI 65, ¶61, 397 Wis. 2d 758, 960 N.W.2d 888.

We conclude that, regardless of the dates Sanders committed his crimes, no issue of arguable merit arises from the sentencing court's imposition of multiple DNA and child pornography surcharges. *See* ***Williams***, 381 Wis. 2d 661, ¶¶29, 43 (overruling ***Radaj*** and holding that the sentencing court can impose a DNA surcharge for every felony conviction, regardless of the date of commission). We further conclude that no arguably meritorious issue arises from the plea-taking court's failure to advise Sanders that he faced multiple mandatory DNA surcharges. *See* ***Freiboth***, 383 Wis. 2d 733, ¶12 ("plea hearing courts do not have a duty to inform defendants about the mandatory DNA surcharge, because the surcharge is not punishment and therefore not a direct consequence of a plea.").

Appellate counsel's no-merit report next addresses whether there exists an arguably meritorious challenge to the circuit court's orders denying Sanders's motions to suppress evidence seized pursuant to a search warrant. Sanders challenged the search of his house in two ways. First, he challenged the warrant's validity, claiming that the supporting affidavit failed to

set forth the requisite probable cause, or alternatively, that under ***Franks/Mann***,[5] law enforcement recklessly or intentionally omitted facts from the affidavit that would have defeated the magistrate's probable cause determination. As to the latter, Sanders complains that the affidavit did not associate the email used to send child pornography with a specific IP address.

We agree with appellate counsel's analysis concluding that these challenges lack arguable merit. As explained in the circuit court's rulings, the totality of the information provided in Detective Lecher's warrant application provides ample probable cause to believe that evidence of a crime (possessing child pornography) was located on Sanders's premises. This includes but is not limited to Lecher's averments explaining: his training and experience in the investigation of computer facilitated sex crimes against children; that a user profile associated with Sanders's home address had posted images of a young female on a website often used to trade child pornography; that an email account liked to that website user had transmitted child pornography to an undercover officer, who then provided the images to Lecher; and that email accounts associated with Sanders were linked to that user profile.[6] Further, we agree with the circuit court's analysis and appellate counsel's conclusion that Sanders's complaint concerning the absence of a specific IP address is wholly frivolous. Sanders did not minimally establish a cognizable claim under ***Franks/Mann***.

[5] *See* ***Franks v. Delaware***, 438 U.S. 154 (1978), and ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985). A ***Franks*** violation occurs when an averment in an affidavit submitted in support of a search warrant is either intentionally false or made with reckless disregard for the truth. *See* ***Franks***, 438 U.S. at 155-56. It is also a violation to intentionally, or with reckless disregard for the truth, omit material information from an affidavit. *See* ***Mann***, 123 Wis. 2d at 385-86. Following a common convention, we collectively refer to both types of violations as "***Franks/Mann*** violations."

[6] The circuit court's thorough decision is located at R.230:10-18.

Sanders's second challenge to the search warrant concerned the scope of items seized, particularly a CPAP machine used for treating sleep apnea and some of his professional or educational certificates. We agree with appellate counsel's discussion in the no-merit report analyzing this claim as without any arguable merit and will not discuss it further.

Next, appellate counsel's no-merit report addresses whether Sanders's ***Alford*** pleas were knowingly, intelligently, and voluntarily entered. The record shows that the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. *See also* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Additionally, the circuit court properly relied upon Sanders's signed plea questionnaire. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). We agree with appellate counsel that any challenge to the entry of Sanders's ***Alford*** pleas would lack arguable merit.

Finally, appellate counsel's no-merit report addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing 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 considered the seriousness of the offense, which it found to be "on the top end of any type of" sexually assaultive or exploitive behavior it had ever seen; the mitigating and aggravating aspects of Sanders's character; and the need to protect the public from what it considered to be "a very dangerous man," likening Sanders to a wolf in sheep's clothing. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances, it cannot reasonably be argued that Sanders'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 Sanders's sentence would lack arguable merit.

Sanders has filed a response raising numerous claims. Most relate to the issuance and execution of the search warrant and, as we previously discussed, lack any arguable merit. We will not further address claims relating to the search of Sanders's residence.

During the pendency of his case, Sanders had four different attorneys appointed to represent him. Sanders raises vague and conclusory claims that they provided ineffective assistance by failing to adequately investigate or research issues. With regard to his final attorney, Charles Wingrove, Sanders asserts that he argued against Sanders's interests and was engaged in a contentious dispute with the State Public Defender over a request to hire an expert. What Sanders neglects to mention is that at least one (and likely two) experts were retained to assist with his defense, and that Sanders was fully aware of Wingrove's conflict with the SPD and affirmatively told the circuit court on several occasions that he wanted Wingrove to stay on as his attorney.

Sanders claims that the prosecutor acted vindictively to ensure that he was not released on bail and remained in custody. The record does not remotely support this claim. Further, this claim was forfeited when Sanders entered his ***Alford*** pleas. *See* ***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).

Sanders's response raises claims about the fact that the judge presiding over his case also authorized the underlying search warrant. This is not in any way improper. Further, Sanders was informed of his right of substitution and explicitly declined to make such a request.[7]

Our 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 Sanders in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Andrew Hinkel is relieved from further representing Scott B. Sanders 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

[7] Sanders raises claims regarding the child victim that are too frivolous to warrant discussion. To the extent we have not expressly addressed any claims in Sanders's response, they are deemed to lack arguable merit. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").