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**DISTRICT IV**

July 21, 2022

To:

Hon. John D. Hyland  
Circuit Court Judge  
Electronic Notice

Carlo Esqueda  
Clerk of Circuit Court  
Dane County Courthouse  
Electronic Notice

Frances Reynolds Colbert  
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Prakash Biswa 686353  
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P.O. Box 2000  
New Lisbon, WI 53950-2000

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

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2020AP1969-CRNM      State of Wisconsin v. Prakash Biswa (L.C. # 2018CF676)

Before Blanchard, P.J., Kloppenburg, and Fitzpatrick, 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 Frances Reynolds Colbert, appointed counsel for Prakash Biswa, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Biswa was sent a copy of the report and has filed a response and a supplemental response.<sup>2</sup> Upon consideration of the report, the

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

<sup>2</sup> This court accepted Biswa's supplemental response for filing on June 8, 2022.

responses, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

The State initially charged Biswa with one count of first-degree sexual assault of a child under the age of sixteen by use of threat of force or violence and one count of strangulation and suffocation. According to the complaint, Biswa forced the fourteen-year-old victim to engage in sexual intercourse. The victim alleged that, during the assault, Biswa grabbed her hands and would not let them go and that Biswa also slapped her twice. The victim further alleged that Biswa put one of his hands on her throat and applied pressure to the point that she was coughing and choking because she was having difficulty breathing. The victim reported the assault after discovering she was pregnant. It was later established that Biswa was the father of the child the victim bore.

Pursuant to a plea agreement, Biswa agreed to plead guilty to a lesser charge of second-degree sexual assault of a child under the age of sixteen, and the State agreed to dismiss the strangulation and suffocation charge outright. The State also agreed to recommend no more than sixteen years of initial confinement, nine years less than the maximum twenty-five years of initial confinement. *See* WIS. STAT. §§ 948.02(2), 939.50(3)(c), 973.01(2)(b)3. (2015-16). The circuit court accepted Biswa's plea and imposed a bifurcated prison term consisting of eight years of initial confinement and five years of extended supervision.

The no-merit report first addresses whether Biswa's guilty plea was knowing, intelligent, and voluntary. We agree with counsel that there is no arguable merit to this issue. The circuit court's plea colloquy, including the court's references to the plea questionnaire and waiver of rights form, complied with the requirements of WIS. STAT. § 971.08 and *State v. Brown*, 2006

WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, relating to the nature of the charge, the constitutional rights Biswa was waiving, and all other matters. We see no other ground on which Biswa might challenge his plea.

In his supplemental response, Biswa contends that he did not understand the constitutional rights he was waiving. Biswa immigrated to the United States from Nepal in 2010, and he alleges that he did not understand these rights due to his lack of a Western education and his insufficient knowledge of the English language. He further alleges that neither the circuit court nor his attorney explained his constitutional rights. These allegations raise the question of whether Biswa could bring a non-frivolous postconviction motion pursuant to *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996), and related case law, seeking plea withdrawal because his plea was not knowing and voluntary. Under *Bentley*, a defendant is not entitled to a hearing on this type of motion if the defendant “fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief.” *Bentley*, 201 Wis. 2d at 309-10 (quoted source omitted); *see also State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433.

We conclude that Biswa’s allegations would not support a non-frivolous postconviction motion for plea withdrawal for two reasons. First, the allegations are conclusory insofar as Biswa does not specifically allege which constitutional right or rights he did not understand or how or why a proper understanding would have affected his decision to plead guilty. *See Allen*, 274 Wis. 2d 568, ¶23 (“[P]ostconviction motions sufficient to meet the *Bentley* standard allege the five ‘w’s’ and one ‘h’; that is, who, what, where, when, why, and how.” (footnote omitted)).

Second, and at least as importantly, Biswa's allegations are contradicted by the plea hearing record in key respects. The transcript of the plea hearing shows that Biswa was provided with an interpreter at the plea proceedings and, as noted above, the circuit court conducted a plea colloquy with Biswa in which the court informed Biswa of his constitutional rights. The court separately reviewed each of Biswa's constitutional rights, and in each instance Biswa stated that he understood that he was waiving that right. Biswa also agreed that he had reviewed all of the information on the plea questionnaire and waiver form with his attorney, and the form listed each of the constitutional rights that he was waiving. Additionally, Biswa stated that he had no questions for the court or his attorney. Finally, when the circuit court found that Biswa had entered his plea voluntarily and intelligently, the court expressly stated that it based that finding not only on the substance of the court's dialogue with Biswa but also on the court's own observations of Biswa during the hearing.

We turn to sentencing. Appellate counsel concludes in the no-merit report that there is no arguable basis to challenge the circuit court's exercise of its sentencing discretion. We agree. The circuit court considered the required sentencing factors along with other relevant factors, and the court did not rely on any inappropriate factors. *See State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. Biswa's sentence was well within the maximum, and it would be frivolous to argue that the sentence was unduly harsh or so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no other arguable basis for Biswa to challenge his sentence.

In his response to the no-merit report, Biswa sets forth allegations that raise the issue of whether he received ineffective assistance of counsel at sentencing. For the reasons we now explain, we conclude that there is no arguable merit to this issue.

To show ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To establish 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." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Biswa first contends that trial counsel was ineffective by failing to introduce evidence at sentencing that the victim misrepresented her age as twenty-one on Facebook. According to Biswa, he believed that the victim was an adult, and evidence of the victim's misrepresentation would have been a mitigating factor at sentencing. We conclude that, regardless of whether counsel performed deficiently in this respect, Biswa could not plausibly argue that he was prejudiced. The sentencing record shows that the circuit court was aware that Biswa claimed that he believed that the victim was an adult and that Biswa claimed that the victim misrepresented her age on Facebook. There is nothing in the circuit court's sentencing remarks indicating that the court might have imposed a different sentence if counsel had introduced evidence to support these claims.

Biswa next contends that trial counsel was ineffective by failing to introduce evidence at sentencing that would have cast doubt on the victim's credibility, including evidence that would have contradicted the victim's allegations that Biswa forced her to have sex and evidence that would have established that the victim lied about the extent of her relationship with Biswa. We conclude that, regardless of whether counsel performed deficiently in this respect, Biswa again

could not plausibly argue that he was prejudiced. The circuit court's sentencing remarks establish that evidence of this nature would not have had any effect on sentencing. The court made abundantly clear that it was sentencing Biswa based on the reduced charge to which he pled guilty and the undisputed facts, namely, that Biswa had sexual intercourse with a fourteen-year-old girl, and his conduct resulted in the victim becoming pregnant and bearing his child, with all the attendant consequences for the victim and her family. The court did not sentence Biswa based on disputed facts relating to whether the sexual intercourse was forcible or relating to other factors that depended on the victim's credibility.

Our review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Frances Reynolds Colbert is relieved of any further representation of Prakash Biswa in this matter. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*