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July 26, 2022

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

2020AP260-CRNM State of Wisconsin v. Alvin Rodriguez (L.C. # 2016CF4115)

Before Donald, P.J., Dugan and White, 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).

Alvin Rodriguez appeals from a judgment, entered on his guilty plea, convicting him on one count of first-degree sexual assault of a child. He also appeals from an order denying his postconviction motion for plea withdrawal. Appellate counsel, Christopher D. Sobic, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Rodriguez has provided a response. Upon this court's independent review of

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

the record, as mandated by ***Anders***, counsel's report, and Rodriguez's response, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

A criminal complaint filed on September 10, 2016, charged Rodriguez with three offenses: first-degree sexual assault of a child by sexual contact with a person, G.G., who had not attained the age of thirteen, contrary to WIS. STAT. § 948.02(1)(e) (2015-16); first-degree sexual assault of a child by sexual intercourse with a person, L.N.G., who had not attained the age of twelve, contrary to WIS. STAT. § 948.02(1)(b) (2009-10); and sexual assault of a child, S.G., under thirteen years of age, contrary to WIS. STAT. § 948.02(1) (1989-90). According to the complaint, Rodriguez's granddaughter, ten-year-old G.G., reported that on September 1, 2016, Rodriguez picked her up from school and took her to his house. While they were watching television in the living room, Rodriguez attempted to pull up her dress, but G.G. stopped him. Then, he "touched her private area with his hand over her clothes for a few seconds" and told her not to tell her parents.

G.G. told her older sister, L.N.G., what had happened. L.N.G. told G.G. to tell their father. When G.G. disclosed the incident to their father, L.N.G. told him that Rodriguez had touched her as well. L.N.G. said that Rodriguez had "touched her privates with his hand and that he put his private in her private" during the time she was in first grade. When a detective interviewed G.G. and L.N.G.'s mother, S.G., she reported that Rodriguez "had touched her when she was a child and she never reported it." She said that when she was between nine and thirteen years old, Rodriguez, her stepfather, started with touching her and inserting his finger into her vagina, which progressed to sexual intercourse. S.G. also said that she once asked her mother what she would think if S.G. reported that Rodriguez was touching her, and her mother replied

she would not believe S.G. because Rodriguez was "a good man who provides for them and took them in when [S.G.] did not have a father."

Rodriguez steadfastly denied the allegations, but nevertheless agreed to resolve the case by pleading guilty to the first count of the complaint involving G.G. The two remaining counts would be dismissed and read in. In exchange, the State agreed that it would not recommend any specific sentence length. The circuit court accepted Rodriguez's plea and imposed a sentence of twelve years' initial confinement and thirteen years' extended supervision.

Rodriguez later filed a postconviction motion seeking to withdraw his plea. He claimed that he "was denied the effective assistance of counsel when his attorney advised him that the court would 'probably' sentence him to probation if he … pleaded guilty." He also alleged that his plea was not fully knowing because neither the circuit court nor trial counsel explained to him how read-ins work. The circuit court held a hearing pursuant to ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), at which trial counsel, Rodriguez, and Rodriguez's daughter Marielys testified. Following the hearing, the circuit court made a series of findings and denied the motion. Rodriguez appeals.

The first issue appellate counsel discusses in the no-merit report is whether Rodriguez could seek to withdraw his guilty plea as not knowingly, voluntarily, and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Rodriguez completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offense. Accompanying the questionnaire was a form entitled "Elements of the Offense" on which elements for fourteen different offenses were listed; the elements for

Rodriguez's specific charge had been circled. The plea questionnaire form correctly acknowledged the maximum term of imprisonment that Rodriguez faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262, 271. The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, 131 Wis. 2d at 266-72, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

Our review of the record and of counsel's analysis in the no-merit report satisfies us that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***Bangert***, 131 Wis. 2d at 261-62, and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy for ensuring Rodriguez's plea was knowing, intelligent, and voluntary.

The second issue appellate counsel discusses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider primary factors including the gravity of the offense, the character of the offender, and the protection of the public, and may consider other additional factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23. We will sustain a

circuit court's exercise of sentencing discretion if the sentence imposed was one that a reasonable judge might impose, even if this court or another judge might have imposed a different sentence. *See* ***Odom***, 294 Wis. 2d 844, ¶8.

Our review of the record and counsel's analysis in the no-merit report confirms that the circuit court appropriately considered relevant sentencing objectives and factors. The twenty-five-year sentence imposed is well within the sixty-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to a challenge to the court's sentencing discretion.

The final issue appellate counsel discusses is whether the circuit court properly denied Rodriguez's motion to withdraw his guilty plea. A defendant who seeks to withdraw his or her plea after sentencing must prove that the withdrawal is necessary to correct a manifest injustice. *See* ***State v. Villegas***, 2018 WI App 9, ¶18, 380 Wis. 2d 246, 908 N.W.2d 198. There are two routes available. *See* ***id.*** One is to argue that the plea was infirm because of some factor extrinsic to the plea colloquy, like ineffective assistance of trial counsel. *See* ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48; *see also* ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). The other is to show a plea was not knowingly, intelligently, and voluntarily entered, which includes making a prima facie case that the circuit court failed to comply with mandatory procedures during the plea colloquy. *See* ***Villegas***, 380 Wis. 2d 246, ¶20; *see also* ***Bangert***, 131 Wis. 2d at 274.

Rodriguez alleged that trial counsel "provided ineffective assistance of counsel when she told [him] that he would 'probably' get probation if he resolved his case under the terms of the

State's plea offer." He also alleged that his daughter Marielys would testify that trial counsel "also told her that [he] would 'likely get out on probation' if he pleaded guilty[.]" Rodriguez claimed trial counsel was deficient in her advice because the facts of the case "made probation highly unlikely and, certainly, not probable" and the "severity of the charges made probation very improbable." *See* ***State v. Cameron***, 2016 WI App 54, ¶24, 370 Wis. 2d 661, 885 N.W.2d 611 (describing the well-known ineffective assistance standard requires a showing that counsel performed deficiently and that the deficiency was prejudicial). Rodriguez claimed that this deficiency was prejudicial because absent the deficient advice, "he would not have pleaded guilty and would have insisted on going to trial."

Rodriguez further alleged that his "guilty plea was not knowing, voluntary, and intelligent because he did not understand the meaning of a read-in charge" and that trial counsel was ineffective because she "failed to explain to him the meaning of a read-in charge."[2] Rodriguez claimed that he "was unaware of the fact that a court would consider the read-in charges at sentencing" and asserted that he "would not have pleaded guilty if he knew the court would use the conduct described in the criminal complaint that related to the read-in charges … in imposing sentence."

[2] In the postconviction motion, Rodriguez characterized the circuit court's failure to discuss read-in offenses as a defect in the plea colloquy under ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). However, while circuit courts have been encouraged to advise a defendant of the consequences of read-in offenses, such discussion has not been made a mandatory component of a plea colloquy. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835 ("A circuit court *should* advise a defendant" regarding read-ins. (emphasis added.)); *but c.f.* ***State v. Hampton***, 2004 WI 107, ¶43, 274 Wis. 2d 379, 683 N.W.2d 14 ("[T]he court *must* make personal inquiry of the defendant to determine whether the defendant understands that the court is not bound by the terms of the plea agreement." (emphasis added.)).

As noted, the circuit court conducted an evidentiary hearing on Rodriguez's motion. Trial counsel testified first. She acknowledged that Rodriguez had asked her what she thought the judge might do at sentencing. She said she explained that there "was no way to know what the judge would do for sure. And that the range of possibility that the judge could do included everything from probation to the maximum possible penalty." She noted that Rodriguez and his family "frequently asked me about probation. Every time, I said probation was possible. Probation was a legal alternative. I also told him that I thought that he … had good arguments for probation" and, in fact, counsel had argued for probation at sentencing. Rodriguez testified that every time he met with counsel "she would say that it was likely that I would get probation… She didn't say that it was anything for sure, but she always said that it was likely." Rodriguez's daughter Marielys testified that trial counsel told the family "[t]here's a good possibility that he would come out on probation."

Regarding the read-in offenses, the State noted that there was a reference to read-in offenses on the plea questionnaire form. Trial counsel testified that she had discussed those charges with him and that she recalled discussing with him "what it meant to have a charge read[]in." She explained that what she usually tells people, and what she recalled telling Rodriguez, "the judge already knows about those things because they're in the criminal complaint. And the judge is going to know about them and think about them when he's giving you his sentence. But the judge can't give you separate sentences for those crimes." Counsel further testified that she "specifically … told him that his chances of getting probation were better if he pled guilty to one charge than if he went to trial and lost on all three charges." Rodriguez testified that he thought the read-in offenses had been "removed … and that they

weren't going to talk about those cases anymore." However, Rodriguez also testified that he did not recall the plea colloquy, stating he had only been in court for sentencing.

Based on the testimony, the circuit court found that trial counsel "was certainly credible based on the testimony that she gave because she had a good recollection of what occurred." It determined that she had explained it was "impossible to predict" what the court would do, that she had explained "the possibility of probation versus the probability of probation," and that she "made no promises of what the sentence would be." The trial court also found that trial counsel discussed "the read-in effect" with Rodriguez and, based on those discussions, Rodriguez "understood what those read-ins were and their effect[.]" Given those findings, the circuit court concluded there was no ineffective assistance of counsel.

"Whether a defendant received ineffective assistance of counsel presents a mixed question of law and fact." ***State v. Domke***, 2011 WI 95, ¶33, 337 Wis. 2d 268, 805 N.W.2d 364. We uphold the circuit court's findings of fact unless clearly erroneous, though we review *de novo* the ultimate conclusion of whether counsel was ineffective. *See* ***id.*** Here, the circuit court's findings of fact are not clearly erroneous. Based on those findings, there is no arguably meritorious claim that trial counsel was ineffective or that the circuit court improperly denied the postconviction motion for plea withdrawal.

In his response, Rodriguez states that he "plead out though my lack of understanding of [E]nglish and law is so limited" and asserts that "[t]he interpreter was not any help either, as I believe she did not know how to properly relay the words to me for my understanding." He also claims that "[e]very lawyer [he has] had on this case was either unwilling or incompetent to

handle my case." He additionally notes that there is "a lack of forensic evidence" and that there are "disparities" in the circuit court's decisions.

Our review of this case is constrained by the record and the submissions from appellate counsel and Rodriguez. The record reflects that Rodriguez originally had a Spanish-speaking attorney; trial counsel utilized the assistance of a Spanish-speaking investigator, and multiple interpreters appeared to assist with in-court proceedings. There is nothing in the record to suggest that there was an interpretation gap, and Rodriguez does not tell us what he failed to comprehend. The record likewise does not support arguably meritorious claims against trial counsel's performance or the circuit court rulings, and Rodriguez does not identify what other errors might have occurred. Accordingly, we discern no arguably meritorious claims of error in Rodriguez's response.

With respect to Rodriguez's claim that there is "a lack for forensic evidence," we presume that he is referring to physical evidence, such as DNA or documented injuries to the victims. He is correct that there was no physical evidence to be utilized in this case. However, it is evident from the record why there would be little to no physical evidence from the alleged incidents. In any event, physical evidence is not a prerequisite for conviction. *See* ***State v. Holt***, 128 Wis. 2d 110, 120, 382 N.W.2d 679 (Ct. App. 1985). Thus, to the extent Rodriguez is attempting to challenge the factual basis for his plea, the claim lacks arguable merit.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Christopher D. Sobic is relieved of further representation of Rodriguez 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