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**DISTRICT III**

June 27, 2023

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

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2020AP1054-CRNM      State of Wisconsin v. Davy L. Cole (L.C. No. 2017CF1456)

Before Stark, P.J., Hruz and Gill, 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).**

Counsel for Davy Cole filed a no-merit report concluding no grounds exist to challenge Cole's convictions for two counts of possession of child pornography, with lifetime supervision as a serious sex offender. Cole filed a response to the no-merit report, in which he argued that the circuit court failed to establish a factual basis for his no-contest pleas.

By order dated May 26, 2023, we noted that the State offered the probable cause portion of the complaint as a basis for the pleas. The complaint described the two counts to which Cole

pled no contest. With respect to the “exposed breast Snapchat photo” of HS, the probable cause section of the complaint stated: “[Detective] Prock then showed HS a Snapchat photo of a female with an exposed breast. HS advised that was a picture of her and she was 14 years old at the time of the photo.” With respect to the “HS kissing KJ’s exposed breast photo,” the probable cause section stated: “The next photo [Detective] Prock showed to HS was a darker colored photo and it appeared to show HS kissing KJ’s exposed breast. HS confirmed that [it] was her and KJ in the photo.” Defense counsel stated that while Cole did not agree with all of the facts stated therein, he agreed there were sufficient facts to support the pleas.

As relevant to this case, a conviction for possession of child pornography under WIS. STAT. § 948.12(1m) (2021-22)<sup>1</sup> requires proof that the defendant possessed “a photograph ... or other recording of a child engaged in sexually explicit conduct” when the person knows he or she possesses the material. “Sexually explicit conduct,” as it relates to § 948.12(1m), requires that the material depict very specific types of acts, like intercourse, masturbation, or “[l]ewd exhibition of intimate parts.” See WIS. STAT. § 948.01(7). Based on the probable cause statement’s description of the images, it seems the only conceivable way the images showed “sexually explicit conduct” is if the minors depicted were engaged in the “[l]ewd exhibition of intimate parts.” See *id.* There is no one definition of “lewd.” *State v. Petrone*, 161 Wis. 2d 530, 561, 468 N.W.2d 676 (1991), *overruled on other grounds by State v. Greve*, 2004 WI 69, ¶31 n.7, 272 Wis. 2d 444, 681 N.W.2d 479. Concepts generally used in defining the term include a visible display of “the child’s genitals or pubic area.” *Id.* “Mere nudity,” however, is not enough. *Id.* Rather, the child must be posed as a sex object, with an “unnatural” or “unusual”

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

focus on the genitalia. *Id.* A fact finder must use common sense when determining whether an image is pornographic or innocent. *Id.* at 561-62. Further, a defendant’s generic admission of guilt is insufficient to establish a factual basis for his or her plea. See *White v. State*, 85 Wis. 2d 485, 490-91, 271 N.W.2d 97 (1978).

At the plea hearing, Cole acknowledged that he reviewed the elements of the crime as set forth in the jury instructions that were attached to his plea questionnaire form. However, the instructions included in the record do not define “sexually explicit conduct.” The factual basis requirement “protect[s] a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his [or her] conduct does not actually fall within the charge.” *State v. Thomas*, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836 (first alteration in original; citation omitted). It also does not appear, from the record before us, that the images were attached to the complaint, nor does it appear that the circuit court personally viewed the images to determine whether they satisfied the applicable legal definition.

Because it was not clear from the record that a challenge to the factual basis for Cole’s pleas would be wholly frivolous, we directed counsel to either: (1) file a supplemental no-merit report explaining why it would be wholly frivolous to pursue this potential issue; or (2) move to voluntarily dismiss this matter and to extend the time for filing a postconviction motion.<sup>2</sup> Counsel has now moved to voluntarily dismiss this no-merit appeal and to extend the time for

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<sup>2</sup> We cautioned that if Cole were ultimately successful in withdrawing his pleas, any agreements made under the plea agreement may be rescinded and the parties returned to the positions they occupied at the time they believed they had entered into a valid plea agreement. See *State v. Dielke*, 2004 WI 104, ¶26, 274 Wis. 2d 595, 682 N.W.2d 945.

seeking postconviction relief in the circuit court. We will therefore reject the no-merit report, dismiss the appeal, and extend the time for counsel to file a postconviction motion.

Upon the foregoing,

IT IS ORDERED that the no-merit report is rejected and the appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the time for filing a postconviction motion is extended to August 16, 2023.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*