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DISTRICT III

October 31, 2023

To:

Hon. Timothy A. Hinkfuss
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Thomas Brady Aquino
Electronic Notice

Jennifer L. Vandermeuse
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Austin James Babbitt 707012
Racine Youthful Offender Correctional
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1955-CRNM State of Wisconsin v. Austin James Babbitt
(L. C. No. 2021CF816)

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).

Austin James Babbitt appeals his judgment of conviction entered after he pled no contest to child enticement, use of a computer to facilitate a child sex crime, and first-degree sexual assault of a child under the age of thirteen. His appellate counsel, Thomas B. Aquino, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Babbitt was advised of his right to file a response, but he did not do so.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Upon this court's independent review of the record as mandated by ***Anders***, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Babbitt was charged in May 2021 with child enticement and use of a computer to facilitate a child sex crime after the victim's father found Babbitt with the victim inside a vehicle in a parking lot. The victim stated that she and Babbitt—whom she referred to as her boyfriend—had been communicating for a couple of months over Snapchat, had exchanged "inappropriate photos," and had agreed to meet in the parking lot to have sex.

Babbitt stated that his first contact with the victim was in an online chat room and that the victim had then sent him her Snapchat information. He said the victim had told him that she was fifteen years old, but the victim stated that he knew she was only twelve.

The complaint was amended a few days later after the victim disclosed in a forensic interview that she and Babbitt had sexual intercourse on two previous occasions before they "got caught" by her dad in the parking lot. The amended complaint added an additional count of child enticement, a charge of first-degree sexual assault of a child under the age of twelve, and a charge of first-degree sexual assault of a child under the age of thirteen.[2]

Babbitt chose to resolve the charges by entering no-contest pleas. He pled no contest to one charge of child enticement, the charge of use of a computer to facilitate a child sex crime, and the charge of first-degree sexual assault of a child under the age of thirteen. The other two

[2] The victim turned twelve years old between the first and second sexual assaults. Babbitt was eighteen years old at the time of the assaults.

counts were dismissed but read in for sentencing. The circuit court accepted Babbitt's pleas and imposed sentences totaling nine years of initial confinement followed by five years of extended supervision. This no-merit appeal follows.

In the no-merit report, appellate counsel addresses two issues: whether there would be arguable merit to appealing the validity of Babbitt's pleas; and whether there would be arguable merit to a claim that the circuit court erroneously exercised its discretion in sentencing Babbitt. We agree with appellate counsel's conclusion that there would be no arguable merit to an appeal of either of these issues.

With regard to Babbitt's pleas, the circuit court's plea colloquy substantially complied with the requirements set forth in WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Additionally, the court confirmed that Babbitt had signed and understood the plea questionnaire and waiver of rights form, which further demonstrates that Babbitt's pleas were knowingly, voluntarily, and intelligently entered. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627 (Ct. App. 1987).

However, we observe that during the plea colloquy, the circuit court neglected to "advise [Babbitt] personally that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court," a warning required by ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The no-merit report notes that the plea agreement "did not include any promises about the sentence recommendations," and therefore appellate counsel concluded "there was no need for the court to warn Babbitt that it was not bound by the parties' plea agreement."

We agree with this conclusion, though not necessarily the analysis. A plea agreement can encompass more than just a sentencing recommendation, and the circuit court is not obligated to accept the State's charging concessions any more than it is obligated to follow the parties' sentence recommendations. ***Id.***, ¶32.

However, while the omission of the ***Hampton*** warning does present a prima facie ***Bangert***[3] violation, no issue of arguable merit arises from the defect. To withdraw a guilty plea after sentencing, a defendant must show that withdrawal is necessary to correct a manifest injustice. ***Brown***, 293 Wis. 2d 594, ¶18. Here, the circuit court did ultimately accept the charge concessions contemplated, so Babbitt was not affected by the defect in the colloquy and he cannot show that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441; *see also* ***State v. Cross***, 2010 WI 70, ¶32, 326 Wis. 2d 492, 786 N.W.2d 64 ("[R]equiring an evidentiary hearing for every small deviation from the circuit court's duties during a plea colloquy is simply not necessary for the protection of a defendant's constitutional rights.").

Based on the foregoing, we are satisfied that the record establishes Babbitt's pleas were knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the pleas' validity.

With regard to sentencing, the record reflects that the circuit court considered relevant sentencing objectives and factors. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The

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[3] *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

court acknowledged Babbitt's age and lack of a prior criminal record, but it focused on the gravity of the offense, noting that the victim was merely "a child" and that these crimes had "devastated" her and her family. Furthermore, the sentences imposed by the court are well within the statutory maximums, and thus are presumptively not unduly harsh or unconscionable. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449; ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507.

Accordingly, there would be no arguable merit to claims challenging the validity of Babbitt's pleas or the exercise of the circuit court's discretion in imposing his sentences. Our independent review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Babbitt further in this appeal.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Thomas B. Aquino is relieved of further representation of Austin James Babbitt in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals