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March 26, 2013

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

2012AP1868-CRNM State of Wisconsin v. Anthony G. Pulver (L.C. #2010CF353)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Anthony Pulver appeals a judgment convicting him of first-degree repeated sexual assault of the same child. Attorney Donna Hintze has filed a no-merit report seeking to withdraw as appellate counsel. *See Anders v. California*, 386 U.S. 738, 744 (1967); WIS. STAT. RULE 809.32(3) (2011-12);¹ *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity

¹ All references to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

of Pulver's plea and sentence. Pulver was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective or demonstrate some other manifest injustice such as coercion, lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); *State v. Krieger*, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The State agreed to dismiss four charges and refrain from filing additional charges in exchange for the plea. The circuit court conducted a plea colloquy exploring the defendant's understanding of the nature of the charge, the penalty range and other direct consequences of the plea, as well as the constitutional rights being waived. *See* WIS. STAT. § 971.08; *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; *Bangert*, 131 Wis. 2d at 266-72. The court also inquired about the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire with an attached jury instruction for repeated sexual assault of a child. Pulver indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint provided a sufficient factual basis for the plea. Pulver indicated that he had sufficient time to discuss his case with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Pulver has not

alleged any other facts that would give rise to a manifest injustice. We therefore conclude that Pulver's plea was valid and operated to waive all non-jurisdictional defects and defenses.² *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to the defendant's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that the defendant was afforded an opportunity to comment on the PSI and to address the court both personally and by counsel. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court noted that the crime was repetitive and resulted in serious damage not only to the victim, but to her brother as well. With respect to the defendant's character, the court was particularly troubled by Pulver's lack of insight into the impact of his behavior and his possible antisocial tendencies, and did not hold out much hope for rehabilitation. The court concluded that a prison term was necessary to punish Pulver, to impress upon him that his behavior would not be tolerated, and to protect the community.

The court then sentenced Pulver to twenty years of initial confinement and ten years of extended supervision. It also awarded 510 days of sentence credit upon the stipulation of the

² Although suppression rulings are exempt from the plea waiver rule under WIS. STAT. § 971.31(10), the record does not show that the circuit court had issued any suppression rulings in this case.

parties; imposed standard costs and conditions of supervision; directed the defendant to provide a DNA sample but did not impose the fee; and determined that the defendant was not eligible for the challenge incarceration program or the earned release/substance abuse program.

The sentence imposed was within the applicable penalty range. *See* WIS. STAT. §§ 948.025(1)(d) (classifying repeated sexual assault of a child under the age of thirteen as a Class B felony); 939.50(3)(b) (providing maximum imprisonment term of sixty years for Class B felonies); and 973.01 (explaining bifurcated sentence structure). The sentence was not “so excessive and unusual and so disproportionate to the offense committed” as to be unduly harsh. *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. The State requested a fifty-year sentence with thirty years of initial incarceration.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See State v. Allen*, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals