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DISTRICT II

April 3, 2013

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

2012AP2518-CRNM State of Wisconsin v. Spencer E. Potts (L.C. #2010CF849)

Before Brown, C.J., Reilly and Gundrum, JJ.

Spencer E. Potts appeals from a judgment convicting him of two counts of second-degree sexual assault, as a party to a crime and as a repeater. Potts' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)¹ and *Anders v. California*, 386 U.S. 738 (1967). Potts received a copy of the report, was advised of his right to file a response, and has elected not to do so. After reviewing the record and counsel's report, we conclude that there are

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses the following appellate issues: (1) whether Potts' guilty pleas were knowingly, intelligently, and voluntarily entered; (2) whether Potts should have been allowed to withdraw his guilty pleas prior to sentencing; and (3) whether the circuit court erroneously exercised its discretion at sentencing.

With respect to the issues involving Potts' guilty pleas, the record shows that the circuit court engaged in a colloquy with Potts that satisfied the requirements of WIS. STAT. § 971.08(1)(a), *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and *State v. Hampton*, 2004 WI 107, ¶¶33, 38, 274 Wis. 2d 379, 683 N.W.2d 14.² In addition, a signed plea questionnaire and waiver of rights form was entered into the record. Although Potts did attempt to withdraw his pleas before sentencing, it was within the circuit court's discretion to deny the request. *State v. Jenkins*, 2007 WI 96, ¶29, 303 Wis. 2d 157, 736 N.W.2d 24. Here, the record demonstrates a proper exercise of discretion in doing so.³ As a result, we agree with counsel that any challenge to the entry of Potts' guilty pleas or the court's denial of his request to withdraw them would lack arguable merit.

² There is one exception to this. The circuit court failed to provide the deportation warning required by WIS. STAT. § 971.08(1)(c). This failure does not present a potentially meritorious issue for appeal, however, as there is no indication that Potts' pleas are likely to result in his deportation, exclusion from admission to this country, or denial of naturalization. Sec. 971.08(2).

³ Potts claimed that he felt rushed to enter his pleas, that he did not review the plea agreement with the State, and that he thought he was pleading to only one count instead of two. The circuit court found this account incredible, noting, "There is a mountain of both evidence in the record along with [Potts'] signature indicating he clearly was aware that he was pleading to two charges." The record supports the court's credibility determination.

With respect to the sentence imposed, the record reveals that the circuit court's sentencing decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In imposing a sentence of thirty-five years of imprisonment, the court considered the seriousness of the offense, Potts' character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by the brutal nature of the crimes and Potts' criminal history, the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, we agree with counsel that a challenge to Potts' sentence would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney David J. Lang of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney David J. Lang is relieved of further representation of Potts in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

