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April 4, 2013

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

2011AP2727-CRNM State of Wisconsin v. Michael A. Young (L.C. #2010CF70)

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

Michael Young appeals a judgment convicting him of third-degree sexual assault. Attorney Andrea Cornwall has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967) and ***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 of Young's plea

[1] All further references in this order to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

and sentence. Young 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, the conviction was based upon the entry of a no-contest plea, and 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, the 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 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The State agreed to reduce the charge from second to third-degree sexual assault and to follow the presentence investigation recommendation in exchange for the plea, and it followed through on that agreement. 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—including being listed on the sex offender registry—and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 266-72; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The court made sure the defendant understood that it would not be bound by any sentencing recommendations. The court also inquired into the defendant's ability to understand the proceedings and the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire, with an attached jury instruction. Young indicated to the court that he had gone over the form with his attorney, and is not now claiming that he misunderstood any information on it. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

As to the factual basis, the court adjourned the plea hearing when Young denied having had sexual intercourse with the victim. After a recess, the court clarified that the amended information was charging sexual contact, not sexual intercourse, and Young agreed that those alleged facts were accurate. Young indicated satisfaction with his attorney, and nothing in the record suggests that counsel's performance was deficient. Young has not alleged any other facts that would give rise to a manifest injustice. Therefore, Young's plea was valid and operated to waive all nonjurisdictional defects and defenses. ***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 presentence investigation report and address the court. The court proceeded to consider the standard sentencing factors and explained their application to this case. ***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 acknowledged that the victim may have had a crush on the defendant, but was concerned about the age disparity. With respect to the defendant's character, the court gave the defendant credit for over three years of sobriety. The court concluded that probation was appropriate, but also imposed and stayed a prison sentence in order to give Young incentive to stay on the right track.

The stayed sentence consisted of two years of initial confinement and one year of extended supervision, which was well within the applicable penalty range. *See* WIS. STAT.

§§ 940.225(3) (classifying third-degree sexual assault as a Class G felony); 939.50(3)(g) (providing maximum imprisonment term of ten years for Class G felonies); and 973.09 (dealing with probation). The sentence was not "'so excessive and unusual and so disproportionate to the offense committed'" as to be unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

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.

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