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April 17, 2013

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

2012AP1027-CRNM State of Wisconsin v. Steven M. Stathas, Jr. (L.C. # 2010CF27)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Steven M. Stathas, Jr. appeals from a judgment of conviction for child enticement and sex with a child over sixteen years old. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Stathas has filed a response to the no-merit report and counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of

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

the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* RULE 809.21.

When Stathas was on probation for a conviction of sex with a child over sixteen years old and living in a half-way house, he took a sixteen-year-old girl to his room and had sexual intercourse with her without her consent. He was charged with second-degree sexual assault, child enticement with the intent to expose a sex organ to a child, exposing genitals to a child, and sexual intercourse with a child over sixteen years old. Pursuant to a plea agreement, Stathas entered a guilty plea to the two charges of which he is convicted and the other two charges were dismissed as read-ins at sentencing. A misdemeanor charge in another case was dismissed outright as part of the agreement. The prosecution agreed that its sentencing recommendation would be consistent with the presentence investigation report (PSI) recommendation. Stathas was sentenced to five years' initial confinement and five years' extended supervision on the enticement conviction and a concurrent nine-month jail term on the misdemeanor sex with a child conviction.

The no-merit report first addresses the potential issue of whether Stathas's plea was freely, voluntarily and knowingly entered. As the report explains, the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by 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, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Contrary to Stathas's statement in his no-merit response that there was no factual basis for accepting his guilty plea, the trial court's reliance on the criminal complaint established a factual basis for the plea.

In his response to the no-merit report, Stathas explains that he entered his plea with the understanding that the PSI would recommend that he be placed in a sex offender treatment program and simply jailed until such time that he could be placed in the program.[2] His claim is based on negotiations his attorney engaged in with his probation agent regarding an alternative to revocation on Stathas's prior conviction. It appears that the parties anticipated that based on the probation agent's recommendation, the PSI would recommend that Stathas be sentenced in a way that would keep him in jail until the sex offender treatment placement was available.[3] However, the PSI did not make that recommendation because Stathas's probation agent never made the referral for treatment placement and his agent was not the PSI author.

Stathas's potential claims that his plea was rendered either unknowing or involuntary, that the plea agreement was breached, or that his trial counsel was ineffective with regard to the plea agreement are forfeited. After entry of his plea and completion of the PSI, Stathas was aware that the recommendation did not match his expectation or promise. Indeed Stathas's attorney represented to the trial court that Stathas had decided to challenge the PSI and conform it to the promised recommendation. Counsel moved to withdraw on the ground that he would be a factual witness at an evidentiary hearing on a motion to enforce the PSI promise. Counsel's

[2] Stathas also claims he did not understand the consequences of the read-in charges and that the trial court failed to advise him that he would be deemed to have admitted those charges. The trial court never considered the read-in charges to have been deemed admitted for sentencing or any other purpose. The read-in charges were not mentioned at sentencing. The trial court was not required to give any advisement about the read-in charges under the circumstances. *See* ***State v. Straszkowski***, 2008 WI 65, ¶¶46-47, 51, 56, 310 Wis. 2d 259, 750 N.W.2d 835.

[3] The PSI reflects that Stathas's probation on his prior conviction was revoked March 30, 2010. That predated entry of his guilty plea on August 16, 2010. After revocation, it was no longer possible to link the plea agreement with an alternative to revocation. Other than the prosecution's agreement to follow the PSI recommendation, the record does not establish that the prosecution was part of the agreement between Stathas and his probation agent.

motion was granted and new counsel was appointed for Stathas. However, Stathas did not make a motion to withdraw his plea or modify the PSI. On two occasions Stathas's new attorney told the trial court that Stathas did not want to withdraw his plea. Stathas proceeded to sentencing. When a defendant is aware of grounds for objecting to the plea or PSI, he is not permitted to proceed to sentencing thereby testing that path and then pursue the alternate path of challenging the plea or PSI when he is dissatisfied with the sentence. ***Farrar v. State***, 52 Wis. 2d 651, 661-62, 191 N.W.2d 214 (1971).

The no-merit report also discusses whether the sentence was the result of an erroneous exercise of discretion. The court indicated that the need to protect the public was of greatest concern in fashioning the sentence. The court also considered Stathas's need for confinement over a period of time sufficient to change his thinking pattern. Probation was rejected as an option because it would unduly depreciate the seriousness of the offense. The sentence was a demonstrably proper exercise of discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Further, we cannot conclude that the ten-year sentence when measured against the maximum twenty-five-year sentence is so excessive or unusual so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The no-merit report does not discuss imposition of the DNA surcharge. Where, as here, the trial court has discretion under WIS. STAT. § 973.046(1g), to impose the DNA surcharge

when a sample is ordered,[4] "in exercising [its] discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can." ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393. Here the trial court gave no reason for imposing the DNA surcharge.[5] Although the trial court erroneously exercises discretion when it fails to delineate the factors that influenced its determination, "'regardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion.'" ***State v. Payano***, 2009 WI 86, ¶51, 320 Wis. 2d 348, 768 N.W.2d 832 (quoting ***State v. Shillcutt***, 116 Wis. 2d 227, 238, 341 N.W.2d 716 (Ct. App. 1983), *aff'd.*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984)). This court has rejected the notion that the trial court must explicitly describe its reasons for imposing a DNA surcharge or otherwise use "magic words." ***State v. Ziller***, 2011 WI App 164, ¶¶12, 13, 338 Wis. 2d 151, 807 N.W.2d 241. The court's entire sentencing rationale may be examined to determine if imposition of the DNA surcharge is a proper exercise of discretion. *See* ***id.***, ¶¶11-13.

For arguable merit to exist to a claim that the trial court erroneously exercised its discretion in imposing the DNA surcharge, Stathas would have to show that imposition of the surcharge is unreasonable. ***Id.***, ¶12. At one point during its sentencing remarks the trial court

[4] Stathas was convicted of child enticement contrary to WIS. STAT. § 948.07(3), and sex with a child over sixteen years old contrary to § 948.09. Imposition of the $250 DNA surcharge is mandatory when a defendant is convicted of a violation of WIS. STAT. §§ 940.225, 948.02(1) or (2), 948.025, or 948.085. WIS. STAT. § 973.046(1r). Stathas was not convicted of violating any one of those statutes and imposition of the surcharge was discretionary.

[5] At the conclusion of its sentencing remarks, the trial court merely stated, "further conditions are that he submit a DNA sample, pay the DNA surcharge, and if there's a request for restitution order that he pay that."

recognized the conviction as Stathas's first felony conviction. Thus, it was the first time Stathas was required to provide a DNA sample. That certain costs are incurred in obtaining the sample is one of the reasons we recognized in ***Cherry*** for imposing the surcharge. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12. The facts here satisfy one of the approved reasons for imposing the surcharge. ***Id.***, ¶¶8-9. That Stathas had previously engaged in criminally sexual behavior also supports imposition of the surcharge. "What is obvious need not be repeated." ***Ziller***, 338 Wis. 2d 151, ¶13. There is no arguable merit to a claim that it was unreasonable to impose the DNA surcharge at sentencing.

The no-merit report indicates that Stathas suggested that he had been sentenced on the basis of inaccurate information. Stathas disputes the prosecutor's statement that Stathas had met a girl (not the victim) outside a middle school who said she was on her way to school and yet Stathas believed the girl to be twenty-four years old. Regardless of the inaccuracy of that information, Stathas would have to show that the trial court actually relied on the inaccurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. The trial court never mentioned Stathas's contact with the girl or that it impacted the court's assessment of Stathas's behavior pattern. There is no merit to a claim that Stathas was sentenced on the basis of inaccurate information.

Stathas asserts in his no-merit response that his sentencing counsel was ineffective for not requesting sentence credit for each day of the thirteen months Stathas sat in jail before sentencing. There is no merit to such a claim. Stathas was originally jailed on a probation hold for his previous conviction. Sentence credit was specifically discussed at the conclusion of sentencing and Stathas was awarded credit for days he was jailed following the expiration of his previous nine-month jail sentence. He was not entitled to dual credit. ***State v. Beets***, 124

Wis. 2d 372, 378-79, 369 N.W.2d 382 (1985); ***State v. Amos***, 153 Wis. 2d 257, 280-81, 450 N.W.2d 503 (Ct. App. 1989).

Our 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 Stathas further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Alvin R. Ugent is relieved from further representing Steven M. Stathas, Jr. in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals