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April 23, 2013

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

2011AP2342-CRNM State of Wisconsin v. Kurt S. Read (L.C. # 2010CF17)

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

Counsel for Kurt Read has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] concluding no grounds exist to challenge Read's convictions for second-degree sexual assault of a child and possession of child pornography. Read has filed responses raising numerous challenges to his convictions. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any

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

issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

A Second Amended Information charged Read with two counts of first-degree sexual assault of a child, two counts of exposing genitals and four counts of possessing child pornography. The charges arose from allegations involving the nine- and ten-year-old daughters of Read's live-in girlfriend. The girls were interviewed by police after their aunt found nude pictures of them on Read's cell phone. Each girl described instances where Read touched their breasts, laid on top of them while his "nuts" or "dick" touched their "pee pee," and one described feeling something sticky on her leg. During the execution of a search warrant, the police seized Read's computer and cell phone, which contained multiple nude images of the girls.

In exchange for Read's no contest pleas to a reduced charge of second-degree sexual assault of a child and one count of possessing child pornography, the State agreed to dismiss and read in the remaining charges. Read's presentence motion to withdraw his pleas was denied after a hearing. Out of a maximum possible sixty-five-year sentence, the court imposed consecutive sentences totaling nineteen years, and consisting of twelve years' initial confinement followed by seven years' extended supervision.

The record discloses no arguable basis for withdrawing Read's no contest pleas. The court's plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Read completed, informed Read of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering a no contest plea. The court advised Read of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c), and confirmed Read's understanding that it was not bound by the terms of the plea agreement. *See*

State v. Hampton, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. The court also confirmed that Read's blood pressure medication did not interfere with his ability to understand the proceedings. Further, the court found that a sufficient factual basis existed in the criminal complaint to support Read's pleas. The record shows the pleas were knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The no-merit report also addresses whether Read should have been allowed to withdraw his plea prior to sentencing. A defendant seeking to withdraw a plea before sentencing bears the burden of showing by a preponderance of the evidence that there is a fair and just reason for withdrawal. ***State v. Garcia***, 192 Wis. 2d 845, 862, 532 N.W.2d 111 (1995). That reason must be more than the desire to go to trial or belated misgivings about the decision to plead. ***State v. Jenkins***, 2007 WI 96, ¶¶32, 74, 303 Wis. 2d 157, 736 N.W.2d 24. The circuit court must find the defendant's reason credible. ***Id.***, ¶43. We will affirm if the court's decision was demonstrably based on the facts of record and in reliance on the applicable law. ***Id.***, ¶30.

Read's presentence motion claimed he was entitled to withdraw his pleas because: (1) the defense did not have sufficient time to assess the "ramifications" of the settlement proposal; (2) Read was not informed that his plea would lead to a lifetime prohibition from possessing a firearm; and (3) Read was not informed that the plea would lead to lifetime registration as a sex offender. The record belies Read's first two claims. During the plea colloquy, Read confirmed his understanding of the plea agreement and also confirmed that he had "enough time" to talk to his attorney about his case and his decision to enter no contest pleas. Read also acknowledged that because he was pleading to a felony it would be unlawful for him "to ever possess a firearm."

The court conceded it did not inform Read that his plea would lead to lifetime registration as a sex offender. In ***State v. Bollig***, 2000 WI 6, ¶27, 232 Wis. 2d 561, 593 N.W.2d 191, our supreme court held that sex offender registration is a collateral consequence and defendants do not have a due process right to be informed of collateral consequences prior to entering a plea. However, when a plea withdrawal request is made prior to sentencing, a lack of knowledge as to even collateral consequences of a plea can constitute a fair and just reason for withdrawal. *See* ***id.***, ¶31. "But whether such a misunderstanding actually exists is a question of fact, and the circuit court's determination depends heavily on whether the court finds the defendant's testimony or other evidence credible and persuasive." ***Jenkins***, 303 Wis. 2d 157, ¶34. Thus, "if the circuit court does not believe the defendant's asserted reasons for withdrawal of the plea, there is no fair and just reason to allow withdrawal of the plea." ***Garcia***, 192 Wis. 2d at 863.

Here, the court questioned the veracity of Read's claim that he was unaware of the lifetime sex offender registration requirement and ultimately made a credibility determination, concluding: "I think what is happening here is that Mr. Read just changed his mind about entering a plea and there really isn't a just and fair reason for doing it." Because the court did not believe Read's asserted reason for plea withdrawal, there was no fair and just reason to grant the motion. Any challenge to the denial of Read's presentence plea withdrawal motion would, therefore, lack arguable merit.

Read's numerous responses proclaim his innocence and purport to raise several defenses to the charges, including claims that he did not take the pornographic photos found on his telephone; there is no medical evidence of assault; the girls fabricated the abuse to get Read out of the house; the girls gave some inconsistent statements about the assaults; the girls are not "acting traumatized"; and the girls sexually assaulted him by pulling down his pants and hitting

him "in the nuts." Read's valid no contest pleas, however, waived all nonjurisdictional defects and defenses. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Read also claims the judge was "unfair" and should have recused herself because she "knew too much" about the case. Specifically, Read alleges that the judge presided over a case against the girls' mother, as well as proceedings alleging that the children were in need of protection or services. The judge, however, would have been required to disqualify herself only if she determined that, for any reason, she could not, or it appeared she could not, act in an impartial manner. *See* WIS. STAT. § 757.19(2)(g). There is nothing in the record to suggest judicial bias against Read.

Any challenge to the effectiveness of trial counsel lacks arguable merit. To establish ineffective assistance of counsel, Read must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance possibly affected the outcome of the trial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Further, to prove prejudice, Read must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

Read contends his attorney "scared" him into the plea agreement. The record belies this claim. During the plea colloquy, Read confirmed that he was entering no contest pleas of his "own free will," acknowledging that he understood the plea agreement, had sufficient time to discuss his case with counsel, and had no questions about the proceedings. Read also appears to argue that counsel should have moved to dismiss the sexual assault charges because the girls did not claim he had intercourse with them. Second-degree sexual assault, however, is committed by

one who has sexual contact *or* sexual intercourse with a person who has not attained the age of sixteen years.

Next, Read appears to claim counsel should have challenged irregularities when he was "booked in" on the underlying charges. Read was initially arrested on suspicion of physical child abuse. During further investigation over the next two days, the police gathered additional information to support the additional charges. Because Read had already been arrested and was in jail on suspicion of physical child abuse, the police report indicates that the officer went to the jail and "booked" Read in on the new charges, then sent a request for charges to the district attorney's office.

Read states: "[W]hen they booked me in for them new charges my rights [were] not read to me on that day just booked me in all the cop did is come in and tell the jailer to book me in on 2 counts of this and 2 counts of that and left fast out the back." To the extent Read is claiming that his ***Miranda***[2] rights were violated, the remedy for a ***Miranda*** violation is the suppression of statements illegally obtained. Nothing in the record, however, shows that Read made any inculpatory statements when he was "booked in" on the additional charges. In fact, Read concedes the officer "left fast out the back."

Read also appears to challenge trial counsel's failure to move to suppress the child pornography evidence found on his cell phone. Here, the girls' aunt and mother asked to meet with police regarding new information they had about Read. During their meeting, the aunt

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

recounted that she looked at Read's cell phone and found disturbing pictures. The aunt showed the officer some of the pictures and the officer subsequently obtained a search warrant.

Read complains that the girls' aunt had no right to look at his phone and further complains that the investigating officer looked at some photos before obtaining a warrant. It is well settled, however, that the Fourth Amendment protects individuals against unlawful intrusions made by the government, not against those made by private parties. ***Burdeau v. McDowell***, 256 U.S. 465, 475 (1921). Therefore, the Fourth Amendment is not implicated when articles discovered in a private search are voluntarily turned over to the government. ***Coolidge v. New Hampshire***, 403 U.S. 443, 488–89 (1971) (if a private party presents law enforcement personnel with evidence obtained in the course of a private search it is "not incumbent on the police to stop [the individual] or avert their eyes."). Ultimately, Read cannot establish that he was prejudiced by any of trial counsel's claimed deficiencies. Our review of the record and Read's responses to the no-merit report discloses no arguable basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[3] hearing.

Finally, the record discloses no arguable basis for challenging the sentence imposed. After considering the seriousness of the offenses, Read's character, the need to protect the public, and the mitigating factors Read raised, the court imposed a sentence authorized by law. *See* ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Read's sentence is so excessive as to shock

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Our independent review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Susan E. Alesia is relieved of further representing Read in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals