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April 16, 2013

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

2012AP2186-CRNM State of Wisconsin v. Paul Tyrone Fields (L.C. #2010CF4613)

Before Fine, Kessler and Brennan, JJ.

Paul Tyrone Fields appeals a judgment of conviction entered upon his guilty plea to one count of third-degree sexual assault. The circuit court imposed a ten-year term of imprisonment, bifurcated as five years each of initial confinement and extended supervision.

The state public defender appointed Michael S. Holzman, Esq., to represent Fields in postconviction and appellate proceedings. Holzman filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Fields filed a response. This court has considered the no-merit report and Fields's response, and we have independently

reviewed the Record. We conclude that there are no arguably meritorious issues for appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Fields engaged in one act of penis-to-vagina intercourse with D.O.T., a twelve-year-old child in his household. The sexual contact ended when the child's mother entered the room. The criminal complaint also alleged that, on two earlier occasions, he had sexual contact with D.O.T. by touching her vaginal area with his hand. The State charged him with three counts of first-degree sexual assault of a child. Fields disputed the charges for some time, but on the day set for trial he decided to accept a plea bargain.

We first consider whether Fields could mount an arguably meritorious challenge to his guilty plea. We conclude that he could not do so.

At the outset of the plea proceeding, the State described the terms of the plea bargain on the Record. Fields would plead guilty to an amended charge of third-degree sexual assault, and the State would move to dismiss the remaining two counts. Additionally, the State would not make a sentencing recommendation, although the victim and her family remained free to do so. Fields told the circuit court that he understood the terms of the plea bargain. The circuit court explained that it was not bound by the terms of the plea bargain or by any recommendations, and the circuit court told Fields that it could impose the statutory maximum penalties of ten years of imprisonment, a $25,000 fine, or both. Fields said that he understood.

A signed guilty plea questionnaire and waiver of rights form and an attached addendum are in the Record. Fields said that he reviewed the form and addendum with his lawyer. The form includes a handwritten disclosure of the maximum statutory penalties for third-degree sexual assault. Fields told the circuit court that when he reviewed the form, he was "confused

about the time" that he faced, and the circuit court again explained that it could impose a ten-year term of imprisonment. Fields said that he understood. The circuit court asked Fields if he understood everything else on the form and addendum, and Fields replied, "yes." The circuit court explained to Fields that, by pleading guilty, he would give up the constitutional rights listed on the form, and the circuit court reviewed each right. Fields said that he understood. Fields also confirmed his understanding that by pleading guilty he would give up his rights to raise defenses to the charge and to pursue motions.

The circuit court described the elements of third-degree sexual assault, namely, that the defendant had sexual intercourse with another person who did not consent to the sexual intercourse. *See* WIS. STAT. § 940.225(3); *see also* WIS JI—CRIMINAL 1218A. Fields told the circuit court that he understood the elements of the crime. Fields confirmed that he had not been threatened or promised anything to induce his guilty plea and that he was pleading guilty to third-degree sexual assault because he was guilty of the offense.

A guilty plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crime charged. *See* WIS. STAT. § 971.08(1)(b). Here, Fields's trial lawyer agreed that the circuit court could use the criminal complaint as a factual basis for the plea. "'[A] factual basis is established when counsel stipulate on the [R]ecord to facts in the criminal complaint.'" ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 138, 624 N.W.2d 363, 369 (citation omitted). Moreover, Fields told the circuit court that he had reviewed the criminal complaint with his lawyer, that he understood it, and that the complaint accurately stated that he had sexual intercourse with D.O.T. The circuit court found a factual basis for the guilty plea.

The plea colloquy shows that the circuit court complied with the requirements of WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 267–272, 389 N.W.2d 12, 23–25 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 180, 765 N.W.2d 794, 803 (a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). Fields could not mount an arguably meritorious challenge to the validity of his guilty plea.

Nonetheless, Fields indicates in his response to the no-merit report that he wants to withdraw his guilty plea. We cannot agree that Fields shows an arguably meritorious basis to pursue such a claim.

"When a defendant moves to withdraw a plea after sentencing, the defendant 'carries the heavy burden of establishing, by clear and convincing evidence, that the [circuit] court should permit the defendant to withdraw the plea to correct a manifest injustice.'" ***State v. Cain***, 2012 WI 68, ¶25, 342 Wis. 2d 1, 15, 816 N.W.2d 177, 184 (citation and one set of quotation marks omitted). Here, Fields complains that the transcripts reveal "no evidence of any kind ... that proves that [he] had sex with [D.O.T.]. [N]o physical or me[dic]al or D.N.A. of any kind was found in the case, and the me[dic]al exam[in]er didn't find any bruis[]ing or bleeding of any sort." He adds: "all I need is a chance to prove that I didn't have any type of sexual interco[u]rse with [D.O.T.]."

The Record, however, shows that Fields solemnly admitted in open court that he did, in fact, have sexual intercourse with D.O.T when she was too young to consent. Although Fields now points to aspects of the Record that, standing alone, might support an inference that he did not have sexual intercourse with D.O.T., he chose to admit committing the crime and to give up

his right to a trial. Thus, no material facts about the allegation require resolution. "This is the essence of what a defendant waives when he or she enters a guilty or no contest plea." *See* ***Black***, 2001 WI 31, ¶16, 242 Wis. 2d at 141, 624 N.W.2d at 370. Accordingly, no arguably meritorious claim exists that plea withdrawal is necessary to correct a manifest injustice.[1]

We next consider whether Fields could pursue an arguably meritorious challenge to the sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 231, 688 N.W.2d 20, 23. The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.***, 2006 WI App 49, ¶23, 289 Wis. 2d at 606–607, 712 N.W.2d at 82. The

[1] We note Fields's suggestion that the State doubted his guilt. In support of this suggestion, Fields points out that the State permitted his pretrial release from custody. The Record reflects, however, that the State acquiesced to his pretrial release from custody when the State was unable to proceed to trial on or before the statutory deadline imposed by his speedy trial demand. *See* WIS. STAT. §§ 971.10(2)(a), 971.10(4). The State explained to the circuit court that the only recourse was to "set a [personal recognizance] bond," but the State asked that the bond include "strict GPS monitoring and no contact with the victim or any children." Thus, we cannot agree that Fields's pretrial release from custody suggests that the State doubted his guilt.

circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d at 237, 688 N.W.2d at 26.

The sentencing court must also "specify the objectives of the sentence on the [R]ecord. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d at 556–557, 678 N.W.2d at 207.

The Record here reflects an appropriate exercise of sentencing discretion. The circuit court described the offense as "extremely serious." The circuit court viewed the offense as aggravated because Fields was romantically involved with the victim's mother and was a "father type figure" to the victim, "someone that she was supposed to be able to trust." Moreover, Fields committed the offense while the victim's biological father was awaiting sentencing for sexually abusing her, and the circuit court expressed profound concern that Fields had victimized a vulnerable child during a difficult time in her life. The circuit court considered Fields's fourteen prior criminal convictions described in the presentence assessment.[2] *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 449, 702 N.W.2d 56, 64 (substantial criminal record is evidence of character). The circuit court observed that much of Fields's criminal record was "drug and alcohol related" and reflected substance abuse. Turning to the need to protect the

[2] The circuit court ordered Fields to undergo a presentence assessment with the Justice 2000 AIM (Assess, Inform, and Measure) Program. *See* 2007 Wis. Act 20, § 9101(4)(a).

public, the circuit court found that Fields "need[ed] to get a handle on" his inappropriate attraction to a person under thirteen years old "so this does not repeat itself."

The circuit court took into account several factors that it deemed mitigating. The circuit court praised Fields for his positive employment history, and the circuit court recognized that, during a prior marriage, Fields had helped to raise a child who was not his. The circuit court found, however, that these mitigating factors did not outweigh the need for punishment and deterrence and concluded that "the tremendous seriousness of th[e] offense" required a maximum term of imprisonment.

The Record shows that the circuit court identified the various factors that it considered in fashioning the sentence. The factors were proper and relevant. Moreover, the sentence imposed was not unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 651, 648 N.W.2d 507, 517 (citation omitted). The offense in this case involved sexual intercourse with a child. "In our society, sexual abuse of a child ranks among the most heinous crimes a person can commit." ***Johnson v. Rogers Memorial Hospital, Inc.***, 2005 WI 114, ¶80, 283 Wis. 2d 384, 422, 700 N.W.2d 27, 45 (Prosser, J., concurring). Given the nature of Fields's crime, we cannot say that the circuit court's sentencing decision shocks the public sentiment or violates the judgment of reasonable people concerning what is right and proper.

Last, we note that Fields cannot raise an arguably meritorious challenge to the circuit court's order that he pay a deoxyribonucleic acid surcharge. The surcharge is mandatory when,

as here, the circuit court sentences a defendant for a sex crime committed in violation of WIS. STAT. § 940.225. *See* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 206, 752 N.W.2d 393, 395; *see also* WIS. STAT. § 973.046(1r).

Based on our independent review of the Record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Michael S. Holzman, Esq., is relieved of any further representation of Paul Tyrone Fields on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals