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June 7, 2013

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

2012AP1007-CRNM State of Wisconsin v. Victor Varell Lewis (L.C. # 2011CF658)

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

Victor Lewis appeals a judgment of conviction and sentence for first-degree sexual assault of a child. Attorney Michael Holzman has filed a no-merit report seeking to withdraw as appellate counsel. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967); WIS. STAT. RULE 809.32 (2011-12).[1] Lewis was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

Lewis was charged with child enticement and first-degree sexual assault of a child, sexual intercourse with a child under twelve years of age, based on reports by an eleven-year-old girl that Lewis had engaged in sexual intercourse with her. Pursuant to a plea agreement, Lewis pled guilty to an amended charge of first-degree sexual assault of a child, sexual contact with a person under thirteen years of age, and the child enticement charge was dismissed and read in for sentencing purposes.[2] The court sentenced Lewis to fifteen years of initial confinement and five years of extended supervision.

We agree with counsel's assessment that a challenge to Lewis's sentence would lack arguable merit. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered the standard sentencing factors and objectives, including the need for punishment and deterrence, Lewis's character, and the gravity of the offense. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. Although the sentence was greater than the prosecutor's recommendation under the plea agreement, it was within the applicable penalty range. *See* WIS. STAT. §§ 948.02(1)(e), 939.50(3)(b), and 973.01(2)(b)1. The sentence was well within the maximum Lewis faced, and therefore was not so excessive or unduly harsh as to shock the

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

[2] By order dated April 18, 2013, we stated that we were unable to conclude that there would be no arguable merit to a challenge to Lewis's plea. We explained that our review of the record revealed that, at the beginning of the sentencing hearing, Lewis had asserted that he had not committed the act charged and that he pled guilty because he felt pressured. We directed Attorney Holzman to review the issue and consult with Lewis. Holzman then informed us that Lewis does not wish to pursue plea withdrawal. Accordingly, we do not address whether a challenge to Lewis's plea would have arguable merit.

conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted Lewis 290 days of sentence credit, on counsel's stipulation. We discern no erroneous exercise of the court's sentencing discretion.

The no-merit report also addresses whether there would be arguable merit to a claim that trial counsel was ineffective by failing to investigate evidence of subsequent sexual contact by another individual with the victim and the chain of custody of DNA evidence. A claim of ineffective assistance of counsel requires a showing that counsel's performance was deficient and the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We agree with counsel's assessment that a claim of ineffective assistance of trial counsel would lack arguable merit. First, there is no basis to argue that counsel's performance was deficient by failing to obtain evidence that another individual had sexual contact with the victim after Lewis had sexual contact with the victim. At the final pretrial hearing, the State and the defense agreed that evidence that a third party had sexual contact with the victim after the sexual assault by Lewis was not relevant to Lewis's case, but that the defense would raise the issue with the court if the victim testified in a manner that opened the door to that evidence. Next, there is no basis to argue that counsel's performance was deficient by failing to investigate the chain of custody of DNA evidence establishing that the victim's DNA was on Lewis's penile shaft. As counsel here points out, there is no indication that there was any problem with the chain of custody or that the DNA was in any way mishandled.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court decision denying Lewis's motion to suppress statements he made to

police. We agree with counsel's assessment that the court's decision was supported by officer testimony that Lewis was read his ***Miranda***[3] rights at the time of arrest and voluntarily waived those rights, and that the police interview was non-coercive. We conclude that a challenge to the court's decision would lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate 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(1).

IT IS FURTHER ORDERED that Attorney Holzman is relieved of any further representation of Lewis in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

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