



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

June 26, 2013

To:

Hon. Andrew T. Gonring
Circuit Court Judge
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Hon. James G. Poulos
Circuit Court Judge
P.O. Box 1986
West Bend, WI 53095

Theresa Russell
Clerk of Circuit Court
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Mark Bensen
District Attorney
Washington County
P.O. Box 1986
West Bend, WI 53095-7986

Sara Heinemann Roemaat
D'Angelo & Jones, LLP
N14 W23755 Stone Ridge Dr., Ste. 200
Waukesha, WI 53188

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Russell D. Warchol, #223296
Kettle Moraine Corr. Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2013AP696-CRNM State of Wisconsin v. Russell D. Warchol (L.C. #2011CF349)

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

Russell D. Warchol appeals from a judgment convicting him of robbery with use of force and from an order denying his postconviction motion for resentencing. Warchol's 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). Warchol received a copy of the report but did not exercise his right to file a response. We have considered the no-merit report and independently reviewed the record as mandated by *Anders*. 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 WIS. STAT. RULE 809.21. We affirm the judgment and relieve Attorney Sara H. Roemaat of further representing Warchol in this matter.

Warchol struck a gas station employee with a heavy object and took money from the cash register drawer. He pled no contest to one count of robbery with use of force. A count of felony bail jumping and three charges from another case were dismissed and read in. The court imposed a nine-and-a-half-year sentence, bifurcated as five and a half years' initial confinement and four years' extended supervision. Postconviction, Warchol moved for resentencing on the basis that the court sentenced him in reliance on inaccurate information in the presentence investigation report (PSI), to wit, that his mother was deceased. The court denied the motion without a hearing in a thorough written decision. This no-merit appeal followed.

The no-merit report discusses only whether Warchol's postconviction motion for resentencing should have been granted. We agree with counsel's analysis of this issue and discuss it no further, with one exception. Counsel states that "Warchol did not object to the misstatement at sentencing because he did not review the PSI before the sentencing hearing." The sentencing transcript reflects, however, that Warchol confirmed that he had enough time to

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

review the PSI and that his counsel indicated to the court that Warchol pointed out no errors or corrections in the PSI.

This court has identified two other issues. The first is whether Warchol could withdraw his plea. A defendant may withdraw a plea after sentencing only if he or she can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *State v. Krieger*, 163 Wis. 2d 241, 249, 471 N.W.2d 599 (Ct. App. 1991). Examples of a manifest injustice include a plea that was involuntary or unsupported by a factual basis, failure of the prosecutor to honor a plea agreement, or ineffective assistance of counsel. *See State v. Cain*, 2012 WI 68, ¶26, 342 Wis. 2d 1, 816 N.W.2d 177.

The trial court followed the procedures under WIS. STAT. § 971.08(1)² and *State v. Bangert*, 131 Wis. 2d 246, 267-72, 389 N.W.2d 12 (1986), to establish that Warchol knowingly and voluntarily entered his plea. It ascertained that Warchol reviewed and signed a plea questionnaire and waiver-of-rights form and that he understood the proceedings, the rights he was waiving, the nature and elements of the crime to which he was pleading, and the potential punishment, including the meaning of “read-in.” Warchol agreed that a factual basis for the plea existed. There is no indication in the record that the State did not fulfill the plea agreement or that Warchol’s representation was deficient. No arguable basis exists for a plea withdrawal.

² Although the trial court did not advise Warchol of a plea’s potential deportation consequences, *see* WIS. STAT. § 971.08(1)(c), nothing in the record suggests Warchol is not a citizen of this country, and he signed the plea questionnaire which contains the deportation caution and confirmed that he “thoroughly reviewed” the form. Warchol likely could not show that the plea is likely to result in his being deported. *See State v. Douangmala*, 2002 WI 62, ¶23, 253 Wis. 2d 173, 646 N.W.2d 1; *see also* § 971.08(2). Our independent review satisfies us that Warchol could not prove by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See State v. Black*, 2001 WI 31, ¶9, 242 Wis. 2d 126, 135, 624 N.W.2d 363.

The second issue this court identified is whether Warchol's sentence reflects a proper exercise of discretion. In exercising its sentencing discretion, a trial court must consider the gravity of the offense, the character and rehabilitative needs of the defendant, and the need to protect the public. See *State v. Sarabia*, 118 Wis. 2d 655, 673, 348 N.W.2d 527 (1984). The record demonstrates that the court fully explained its consideration of each of these factors in determining the sentence. Since Warchol faced a fifteen-year sentence and/or a \$50,000 fine and had four other counts read in, we cannot conclude that the total nine and a half years imposed is so excessive or unusual as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); see also *State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We see no arguable basis to disturb the sentence.

Our review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Sara H. Roemaat is relieved of further representing Warchol in this matter.

Diane M. Fremgen
Clerk of Court of Appeals