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July 10, 2013

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

2012AP1844-CRNM State of Wisconsin v. Steven D. Deichsel (L.C. #2008CF232)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Steven D. Deichsel appeals a judgment convicting him upon pleas of no contest to one count of third-degree sexual assault and two counts of fourth-degree sexual assault contrary to WIS. STAT. § 940.225(3), (3m) (2011-12).[1] Deichsel's appointed appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967), Deichsel filed a response, and counsel filed a supplemental no-merit report. Upon consideration

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

of the reports, the response, and our independent review of the record as mandated by ***Anders***, we conclude that the judgment may be summarily affirmed, as there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We relieve Attorney Melinda R. Alfredson of further representing Deichsel in this matter.

Fifty-three-year-old Deichsel was charged with fifteen counts of second-degree sexual assault of his mentally and physically disabled twenty-eight-year-old stepdaughter.[2] An amended complaint charged five counts and, in January 2009, Deichsel entered guilty pleas to three counts of second-degree sexual assault. The court sentenced him to three consecutive two-year prison terms followed by fifteen years' extended supervision, for a total of twenty-one years. Postconviction, Deichsel successfully moved to withdraw his pleas on the basis that he did not understand the nature of the charges and the ramifications of pleading guilty.

In June 2011, Deichsel entered no-contest pleas to one count of third-degree sexual assault and two counts of fourth-degree sexual assault. The trial court imposed the maximum sentence available: five years' initial confinement and five years' extended supervision on count one; nine months' jail time on count two, consecutive to count one, and three years' probation on count three, with nine months' jail time imposed and stayed. This no-merit appeal followed.

The no-merit report identifies three issues that counsel asserts Deichsel contends arguably might support an appeal: whether the trial court "ha[d] the right to sentence Deichsel to a more severe sentence than was ordered prior to the withdrawal of Deichsel's first plea,"

[2] The stepdaughter has a pacemaker, a permanent tracheostomy and requires mechanical respiratory assistance to breathe. She operates at the level of a twelve- to fifteen-year-old.

whether the trial court erroneously exercised its discretion in ordering the DNA surcharge and whether the trial court erroneously exercised its discretion in ordering Deichsel to register as a sex offender. In fact, Deichsel was given a lesser net sentence the second time and the DNA surcharge and compliance with the Sex Offender Registry Program requirements are statutorily mandated upon conviction for the offenses to which he pled. *See* WIS. STAT. §§ 973.046(1r), 973.048(2m). Deichsel responds that Alfredson could have answered those questions for him when she advised him about the no-merit appeal. He also complains that it appears Alfredson did not research the record on her own because she included in the no-merit report only the issues he raised. We do observe that the report does not consider any aspect of the plea taking or whether, apart from the sentencing issue mentioned above, Deichsel's sentence was a product of an improper exercise of the court's sentencing discretion.[3]

Our independent review of the record satisfies us that Deichsel's no-contest pleas were knowing, intelligent and voluntary. The same trial court judge presided over both plea hearings. At the second, the court's extensive and thorough colloquy went well beyond simply making the advisements and findings required by WIS. STAT. § 971.08(1) and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The court carefully reviewed the substance of Deischel's signed plea questionnaire, had Deichsel's counsel explain the mechanics of his review of the form with Deichsel, and asked questions requiring answers beyond "yes" or "no" to ascertain Deichsel's understanding of the elements, potential penalties, the rights he was waiving by

[3] As such, the no-merit report does not reflect the "conscientious examination" of the record ***Anders*** requires counsel to undertake before preparing a no-merit report. *See* ***State v. Tillman***, 2005 WI App 71, ¶16, 281 Wis. 2d 157, 696 N.W.2d 574 (citing ***Anders v. California***, 386 U.S. 738, 744 (1967)). We admonish counsel to take greater care with future no-merit appeals.

pleading, the distinction between direct and indirect consequences, and his exposure to WIS. STAT. ch. 980. No issue of merit could arise from the plea taking.

We next consider the circuit court's exercise of sentencing discretion. Our review is limited to determining if the circuit court's discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The trial court must consider "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, 712 N.W.2d 76. When the exercise of discretion has been demonstrated, we follow "a consistent and strong policy" against interfering with the sentencing decision made. ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The trial court stated that it had reviewed the presentence investigation report done for the first sentencing as well as its prior sentencing remarks, which it incorporated. The court noted that the "significant" impact on the victim spoke to the gravity of the offense, to the character of a person who would abuse the trust of and prey on one so vulnerable, to the need to protect the public and to punish. The court also explained that it imposed the maximum penalties and structured the sentence as it did to afford as much community protection as possible. The court has discretion to determine which factors are relevant to the imposition of sentence and to determine the weight to assign to each. ***Id.***, ¶16. The sentence imposed is not so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no arguable basis to disturb the sentence.

Deichsel's response to the no-merit identifies three potential issues. He first asserts that the complaint and information were not sufficiently definite to inform him of the charges against

him. The complaint recites a time frame of "on or between January 2006 to September 2007" for all five counts; but the information specifies January 6, 2007, for count two. Deichsel contends that the twenty-one-month span in the four counts is too broad for which to present a defense. "[W]here time of commission of a crime is not a material element of the offense charged, it need not be alleged with precision." ***State v. George***, 69 Wis. 2d 92, 96, 230 N.W.2d 253 (1975). "Time is not of the essence in sexual assault cases." ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988) (citation omitted). Furthermore, sexual assaults of certain vulnerable victims often encompass a period of time and a pattern of conduct and revelation often depends on the willingness of the victim to come forward. *See* ***id.*** at 254.

Deichsel concedes the precise date in count two is sufficiently specific but complains that he does not know where it came from. The complaint or information does not have to explain its origin. It was for him to develop an alibi defense. In any event, the Information was filed in July 2008 and he again has pled no contest. He cannot credibly claim a due process violation.

Deichsel's response also asserts that the probable cause section does not support the amended complaint, which alleged five counts of second-degree sexual assault "by threat of violence." The probable cause section alleged that Deichsel would threaten to turn off the circuit breaker or refuse to suction her "trach" if she did not have sex with him. Deichsel's failure to object to the complaint before entering his plea constitutes a waiver of that issue because a no-contest plea waives all nonjurisdictional defects and defenses. ***State v. Dietzen***, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991). Beyond that, Deichsel pled no contest to third- and fourth-degree sexual assault, neither of which requires proof that he threatened violence.

Finally, Deichsel asserts that he was deprived of the effective assistance of counsel because his attorneys variously: (1) failed to discover the above-described defects in the complaint, probable cause section or information; (2) frightened him into entering his pleas by telling him he faced 200 years' imprisonment; (3) ignored his claim of innocence—*i.e.*, he admits that he engaged in the concededly "reprehensible and inappropriate" behavior but claims it was consensual and therefore not illegal; and (4) failed to take into account an unidentified "handicap," which he asserts only the trial court recognized.[4]

Our review is limited when claims of ineffective assistance of trial counsel are not first raised in that court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). A defendant must prove both that counsel's performance was deficient and the deficient performance was prejudicial. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990).

Deichsel's conclusory claims are insufficiently specific to entitle him to a postconviction hearing. *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. We already have dispensed with Deichsel's challenges to the complaint and information. And he did face 200 years' imprisonment before he first pled: the five second-degree sexual assault charges each exposed him to forty years' imprisonment. Even so, that point is moot because he successfully withdrew that plea. His claim of innocence itself is reprehensible and inappropriate. As to his unspecified "disability," he points to no evidence to substantiate it and makes no claim that he told any of his lawyers about it. Indeed, at his most recent sentencing, the court noted that

[4] In the order granting plea withdrawal, the court found that Deichsel has "unique personality traits," presents as "an individual of low intelligence who is easily confused and has difficulty making decisions," is "emotionally weak and prone to crying," and gave testimony that at times was "bizarre, contradictory and confabulated."

Deichsel's inconsistent statements and testimony and his inability to admit his faults reflect on his character. It also hinted that the postconviction proceedings leading to the plea withdrawal may have resulted from having manipulated his attorney.

Deichsel also asserts that appellate counsel ineffectively failed to conduct a proper record review for this no-merit appeal. Claims of ineffective assistance of appellate counsel properly are raised in this court. *See* ***State v. Knight***, 168 Wis. 2d 509, 522, 484 N.W.2d 540 (1992). Even if appellate counsel's job on this appeal was so superficial as to be deficient, counsel is not ineffective unless her performance also is prejudicial. *See* ***Johnson***, 153 Wis. 2d at 127. This court independently reviewed the record, addressed newly identified issues, and is satisfied that there are no other potential issues for appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Melinda R. Alfredson is relieved of further representing Steven Deichsel in this matter.

Diane M. Fremgen
Clerk of Court of Appeals