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October 2, 2014

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

2014AP1295-CRNM State of Wisconsin v. Shane S. Besaw (L.C. #2012CF1494)

Before Curley, P.J., Kessler and Brennan, JJ.

Shane S. Besaw appeals a judgment convicting him of one count of first-degree sexual assault, sexual contact with a child under the age of thirteen. Attorney Daniel Goggin, II, filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Besaw was informed of his right to file a response, but he has not done so. After considering the no-merit report and

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

conducting an independent review of the record, we conclude that there are no issues of arguable merit that Besaw could raise on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether Besaw's no-contest plea was knowingly, voluntarily and intelligently entered. In order to ensure that a defendant is knowingly, voluntarily and intelligently waiving the right to trial by entering a plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which he is pleading no contest, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Although "not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding of the particular information contained therein," the circuit court may refer to a plea colloquy and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the trial court and the defendant." ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

During the plea hearing, the prosecutor stated the plea agreement on the record. The circuit court informed Besaw that it was not bound by the plea agreement and Besaw said that he understood. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court informed Besaw that it would treat his no-contest plea just like a guilty plea. Besaw said that he understood. The circuit court informed Besaw of the potential maximum prison term. The circuit court asked Besaw whether he had read and understood the information on the plea questionnaire and waiver-of-rights form, and whether he had signed the form, which

included the constitutional rights Besaw was waiving by entering a plea, the penalties for the crime and the elements of the crime in an addendum. The circuit court also reviewed the constitutional rights that Besaw was waiving with him and the elements of the crime. Besaw told the circuit court that he understood all of this information. Besaw agreed that the complaint provided a factual basis for the plea. Based on the circuit court's thorough plea colloquy and the plea questionnaire and waiver-of-rights form, there would be no arguable merit to an appellate challenge to the plea.

The no-merit report addresses whether there would be arguable merit to a claim that the circuit court misused its discretion when it sentenced Besaw to twelve years of imprisonment, with six years of initial confinement and six years of extended supervision. The circuit court considered both aggravating and mitigating circumstances, noting that Besaw had fairly minimal contact with the criminal justice system, but that his crime was horrific. With protection of the victim its primary concern, the circuit court exceeded the joint sentencing recommendation of the parties. The circuit court explained its application of the various sentencing considerations in depth in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197, and its decision was a reasonable exercise of discretion in light of the circumstances presented. Besaw contends that the sentence is too harsh, and that the circuit court should have sentenced him to a reduced term consistent with what the parties jointly recommended pursuant to the plea agreement, which was three years of initial confinement and four years of extended supervision. The six-year term of initial confinement and six-year term of extended supervision is not too harsh given the seriousness of the crime Besaw committed. Besaw was explicitly informed during the plea colloquy that the circuit court was not bound to

follow the parties' sentencing recommendation. Therefore, there would be no arguable merit to a challenge to the sentence on appeal.

Finally, the no-merit report addresses whether Besaw could successfully raise a defense or other claim on appeal that he did not initially raise. We agree with the no-merit report's conclusion that Besaw could not raise any defenses or other claims he did not initially raise because a valid no-contest plea waives defects and defenses that are not jurisdictional. *See* ***State v. Dietzen***, 164 Wis. 2d 205, 210, 474 N.W.2d 753 (Ct. App. 1991). Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney Daniel Goggin, II, of further representation of Besaw.

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

IT IS FURTHER ORDERED that Attorney Daniel Goggin, II, is relieved of any further representation of Besaw in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals