COURT OF APPEALS
DECISION
DATED AND FILED

June 17, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 98-2193-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

SAMUEL H. WARP,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Adams County: DUANE H. POLIVKA, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Samuel H. Warp appeals from a judgment of conviction in which: (1) he pleaded guilty to first-degree sexual assault of a minor, as a habitual offender, contrary to §§ 948.02(1) and 939.62, STATS.; and (2) the trial court rejected his claim that he was not guilty by reason of mental disease or defect (NGI). Warp also appeals from an order denying his motion for postconviction

relief. The state public defender appointed Sandra J. Zenor to represent Warp on appeal. Attorney Zenor has filed a no merit report with this court, pursuant to RULE 809.32, STATS., and ***Anders v. California***, 386 U.S. 738 (1967), and states that she sent a copy of the report to Warp. In compliance with ***Anders***, both Attorney Zenor and this court informed Warp that he could respond to the report, but he has not done so. After an independent review of the record, we conclude that any further proceedings in this matter would be wholly frivolous and without arguable merit. Warp's conviction is therefore affirmed, and we grant Attorney Zenor's motion to withdraw from further representation before this court.

Warp was accused of sexually assaulting his four-year-old granddaughter. He pleaded guilty of the charge, but also entered an NGI plea. At the plea hearing in the non-NGI phase of the proceedings, Warp's counsel explained to him, on the record, that by pleading guilty, Warp was giving up his right to be found guilty by a jury of the substantive charge, and that the only issue remaining was whether he was not guilty by reason of mental disease or defect, which he would have the burden of proving. Counsel also indicated that as a consequence of pleading guilty, Warp faced a sentence of up to fifty years in prison, and that even if he prevailed on his NGI plea, he would face possible confinement in a mental institution for up to fifty years. Counsel also made clear that Warp would be subject to the sexual predator laws under ch. 980, STATS., and that this conviction would amount to a second strike under a three-strikes analysis. Warp indicated that he understood these consequences.

The court entered into a colloquy with Warp to be sure he understood the consequences of his plea, and to determine whether his plea was knowing, intelligent and voluntary. The court accepted the plea after determining that the complaint, as well as evidence adduced at the preliminary hearing, constituted

sufficient evidence to sustain the charge. The court was satisfied that Warp understood the consequences of his plea.

After his guilty plea was accepted, Warp stipulated that the court should determine the NGI phase at a bench trial. The court heard from two psychologists. The first, appointed by the court, opined that Warp was not suffering from mental disease or defect. The second, hired by defendant, opined to the contrary. However, both experts agreed that Warp knew at the time he committed his crime, that what he had done was wrong. The court found the court-appointed psychologist to be more credible. It therefore rejected Warp's NGI claim, and imposed an indeterminate forty-year sentence.

Thereafter, Warp's first appointed appellate counsel filed a no merit appeal. Warp argued that he received ineffective assistance of trial counsel because his attorney had not informed him that the parole board could deny him presumptive mandatory release under § 302.11(19)(b), STATS. The no merit report was withdrawn, and Warp filed a postconviction motion. The circuit court granted the State's motion to dismiss the postconviction motion. Warp's successor appellate counsel then filed this no merit appeal.

The no merit report addresses whether Warp's plea was knowing, intelligent and voluntary. We conclude that there would be no merit to an argument on this issue. Warp's defense counsel and the court exhaustively explained to Warp, on the record, the consequences of his plea. Warp indicated that he was capable of understanding, and that he understood the explanations. Thereafter, Warp was affirmatively found to be legally responsible for his behavior. In addition, Warp signed a plea agreement, specially modified with marginal notations to reflect his dual-stage proceedings. The plea colloquy meets the requirements of ***State v.***

Bangert, 131 Wis.2d 246, 389 N.W.2d 12 (1986), and the completed plea questionnaire is competent evidence of a knowing and voluntary guilty plea. *Cf.* ***State v. Moederndorfer***, 141 Wis.2d 823, 827-28, 416 N.W.2d 627, 629-30 (Ct. App. 1987).

The no merit report also addresses whether the circuit court erroneously refused to grant Warp a hearing on his postconviction motion to withdraw his plea and to have a new trial.[1] A defendant must be given an evidentiary hearing on a motion to withdraw a plea when he alleges facts that, if true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis.2d 303, 309-10, 548 N.W.2d 50, 53 (1996). Facts sufficient to warrant a plea withdrawal include evidence that: (1) the defendant was afforded ineffective assistance of counsel; (2) that his plea was involuntary or unsupported by a factual basis; (3) that the prosecutor failed to fulfill the plea agreement; or (4) that some other manifest injustice occurred. *See* ***State v. Krieger***, 163 Wis.2d 241, 250-51, 471 N.W.2d 599, 602 (Ct. App. 1991). However, no hearing is required when the defendant only presents conclusory allegations, or the record conclusively demonstrates that he is not entitled to relief. *See* ***Nelson v. State***, 54 Wis.2d 489, 497-98, 195 N.W.2d 629, 633 (1972).

Warp's postconviction motion alleged that trial counsel had ineffectively failed to advise him that he could be denied presumptive parole, and that he would not have pleaded guilty if he had been aware of that fact. The trial court correctly determined, however, that trial counsel's performance could not be

[1] The motion for a "new" trial may have been somewhat inappropriately titled in light of the fact that Warp pleaded guilty to the underlying charge and only tried the mental status issue to the court. However, a court is not bound by the title given to a document, and the substance of the motion indicates that Warp sought to withdraw his plea.

deemed deficient based on Warp's allegations, because there is no requirement that an attorney must advise his client of the parole implications of his plea. Furthermore, we note that Warp failed to set forth any factual assertions that would show why he would have placed any special emphasis on his parole eligibility when making his plea. *See* ***Bentley***, 201 Wis.2d at 313, 548 N.W.2d at 54-55. His conclusory allegations were simply insufficient to warrant a hearing. Because Warp's plea was valid, it operated to waive all other non-jurisdictional objections to his conviction. *See* ***Racine County v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984).

A challenge to Warp's sentence would also be without arguable merit. Warp personally addressed the court at the sentencing hearing, and acknowledged several times that he should not be allowed back into society, and that "the District Attorney is completely right in him saying throw away the key for my pasts actions." The court then proceeded to properly exercise its sentencing discretion by considering the gravity of the offense (which it considered severe because Warp had abused his position of authority over his granddaughter to prey upon her), the character of the offender (which it considered disturbing due to Warp's history of past offenses, minimization of his behavior and a lack of remorse) and the need to protect the public (which it considered high in light of the real threat that Warp would reoffend if given the opportunity), in accordance with the factors set forth in ***State v. Harris***, 119 Wis.2d 612, 623, 350 N.W.2d 633, 639 (1984). The forty-year indeterminate sentence did not exceed the maximum penalty proscribed by statute and is not so excessive as to shock the conscience.

Based on our independent review of the record, we conclude that any further appellate proceedings would be without arguable merit, and would be wholly

frivolous, within the meaning of ***Anders***, as well as RULE 809.32, STATS. Accordingly, the judgment of conviction and order are affirmed, and Attorney Zenor is relieved from further representing Samuel H. Warp in this appeal.

By the Court.—Judgment and order affirmed.