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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 IV

October 26, 2015

To:

Hon. Rhonda L. Lanford
Circuit Court Judge
215 South Hamilton, Br. 16, Rm. 6105
Madison, WI 53703

Hon. Rebecca Rapp St. John
Circuit Court Judge
215 South Hamilton, Br. 16, Rm. 6105
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 South Hamilton, Room 1000
Madison, WI 53703

Michael P. Finley
Assistant District Attorney
215 South Hamilton, Rm. 3000
Madison, WI 53703

Steven D. Grunder
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

Scott M. Wollschlager
6917 Mill Bluff Drive
Madison, WI 53718

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

2014AP368-CRNM State of Wisconsin v. Scott M. Wollschlager (L.C. #2011CF598)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Scott Wollschlager appeals a judgment convicting him of possession of child pornography and an order denying his motion for postconviction relief. Attorney Tristan Breedlove filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel.***

[1] All further references in this order to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

McCoy v. Wisconsin Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of Wollschlager's plea and sentence. Wollschlager was sent a copy of the report, and filed a response seeking modification of the sex offender registration component of his sentence. Attorney Steven Grunder has subsequently replaced Breedlove as counsel, and has not withdrawn the no-merit report. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Wollschlager entered a no-contest plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Wollschlager's plea, the State agreed to dismiss two other child pornography charges, and to make a recommendation for a downward deviation from the presumptive minimum sentence.

The circuit court conducted a standard plea colloquy, inquiring into Wollschlager's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Wollschlager's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT.

§ 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Wollschlager understood that it could impose up to the maximum sentence and would not be bound by any sentencing recommendations. In addition, Wollschlager provided the court with a signed plea questionnaire. Wollschlager indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint and acknowledged by Wollschlager to be accurate—namely, that Wollschlager's former employer had turned over to police flash drives upon which pornographic images of children had been found following Wollschlager's termination—provided a sufficient factual basis for the plea. We see nothing in the record to suggest that counsel's performance was in any way deficient. Wollschlager has not alleged any other facts that would give rise to a manifest injustice with respect to the plea. Therefore, Wollschlager's plea was valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Wollschlager's sentence would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record shows that Wollschlager was afforded an opportunity to present a psychological examination report, and to address the court, both personally and through counsel.

The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court noted that it involved "horrific, horrific images of kids being victimized in the very, very worst way" and Wollschlager's viewing of the images revictimized those children. With respect to Wollschlager's character, the court noted that Wollschlager had "pretty much ruined" his life with alcohol. The court identified the primary goal of the sentencing in this case as substance abuse treatment, and therefore accepted the parties' joint recommendation for ten years of probation with one year of conditional jail time. The court further ordered that Wollschlager would be eligible for a Treatment Alternative Program (TAP) after five months, and that the remaining portion of his conditional jail time would be stayed if he successfully completed that program. The court stated that it would not order sex offender registration.

The terms of probation complied with applicable statutory requirements. *See* WIS. STAT. §§ 973.09 (setting term of probation for a felony at not less than one year and not more than the greater of three years or the initial period of confinement); 948.12(3)(a) (classifying possession of child pornography as a Class D felony); and 973.01(2)(b)4. (providing maximum terms of fifteen years of initial confinement for a Class D felony). They were certainly not unduly harsh, given that they were imposed pursuant to a joint recommendation of the parties and represented a downward departure from the presumptive minimum. *See* WIS. STAT. § 939.617(2); *see also* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507; ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved).

Wollschlager filed a postconviction motion for sentence modification complaining that he had been rejected for placement in TAP because he did not provide either a certificate of completion of a sex offender treatment program or the assessment of a qualified therapist that no sexual offender treatment was required. He alleged that neither the parties nor the court had been aware of that precondition at the sentencing hearing, and that he had since enrolled in sex offender treatment. The court granted the motion, and modified Wollschlager's sentence to allow him a conditional stay of the month or so that was remaining on his conditional jail time while he was participating in treatment. Although Wollschlager considers it unfair that he had to serve more conditional jail time than was anticipated, he states that he is not seeking any further relief from the conditional jail time component of his sentence.

Rather, Wollschlager's complaint on this appeal centers upon the sex offender registration requirements. He contends that being on the registration list for twenty-five years "creates an undue burden on the possibility of returning to [his] career and being a productive tax-paying citizen that can positively contribute to the community." He also argues that placement on the sex offender registry should be made on a case by case basis. However, Wollschlager was not placed on the sex offender registry by order of the court, but rather, by operation of statute.

WISCONSIN STAT. § 301.45(1g)(a) requires anyone who has been convicted of a sex offense in this State on or after December 25, 1993, to comply with the reporting requirements of Wisconsin's sex offender registration statute. The registration statute defines a violation of WIS. STAT. § 948.12, *i.e.* possession of child pornography, as a sex offense. WIS. STAT. § 301.45(1d)(b). The statute further provides that registration is to begin upon being placed on probation, and shall continue until fifteen years after discharge from probation or, if probation is

revoked and a bifurcated sentence is imposed, upon discharge from extended supervision. WIS. STAT. §§ 301.45(3)(a)1. and 301.45(5)(a)1. and 2. Neither the circuit court nor this court has the power to change these statutory requirements. Because Wollschlager's placement on the sex offender registry, and the length of that placement, are based upon statutory requirements imposed by the legislature rather than judicial determinations, his complaints do not provide any arguably meritorious basis for sentence modification.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction or postconviction order. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven Grunder is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals