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March 2, 2016

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

2014AP2819-CRNM State of Wisconsin v. David Trejo Miguel (L.C. # 2013CF373)

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

David Trejo Miguel appeals from judgments of conviction entered upon his guilty pleas to one count of repeated acts of sexual assault of the same child and one count of contributing to the delinquency of a minor. Miguel's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Miguel received a copy of the report, was advised of his right to file a response, and has elected not to do

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

so. Upon consideration of the report and an independent review of the record, 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.

In a four-count complaint, Miguel was charged with (Count 1) repeated acts of sexual assault of the same child, A.K., contrary to WIS. STAT. § 948.025(1)(e); (Count 2) sexual assault of B.G., a child under sixteen years old, contrary to WIS. STAT. § 948.02(2); and (Counts 3 and 4) contributing to the delinquency of a child, contrary to WIS. STAT. § 948.40(2). According to the complaint, "after being fully advised of his constitutional rights and waiver of the same," Miguel admitted that between March 2012 and March 2013, he had sexual contact with his stepdaughter, A.K., while she was under the age of sixteen on more than three occasions. The crime came to light when A.K.'s friend, B.G., reported that on March 22 and 23, 2013, while spending the night at A.K.'s house, Miguel provided the girls with alcohol, marijuana, and controlled substances. B.G. stated that Miguel touched her breasts and vagina several times. Miguel admitted providing alcohol and marijuana to the girls and muscle relaxants to A.K. Though he denied any sexual contact with B.G., he admitted that during the charging period, he had sexual contact with A.K. on at least five occasions.

Pursuant to a plea agreement, Miguel pled guilty to Counts 1 and 3, and Counts 2 and 4 were dismissed but read in. On Count 1, the trial court imposed a forty-year bifurcated sentence, with twenty-five years of initial confinement and fifteen years of extended supervision. On Count 3, the court ordered a concurrent nine-month sentence.

The no-merit report addresses whether Miguel's pleas were freely, voluntarily and knowingly entered, whether the trial court properly exercised its sentencing discretion, and if

there is any basis to support a sentence modification motion. Having conducted an independent review of the record, we conclude that these issues have no arguable merit.

The trial court engaged in an appropriate plea colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The plea agreement left the parties free to argue the terms and length of the sentence, and the trial court ascertained Miguel's understanding that it was not bound to follow any recommendation made in the presentence investigation report (PSI) or by either party and could impose consecutive maximum sentences. The trial court explained and ensured Miguel understood the significance of the read-in charges. Additionally, the trial court ascertained that Miguel reviewed, understood and signed the completed plea questionnaire form and attachments, including the jury instructions relevant to his offenses.[2] *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken); ***State v. Moederndoerfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The court both recited the constitutional rights waived by a guilty plea and ascertained that Miguel reviewed and understood the constitutional rights portion of the

[2] Attached to the plea questionnaire were the jury instructions for the substantive crimes of contributing to the delinquency of a child, WIS JI—CRIMINAL 2171, and repeated acts of sexual assault of the same child, WIS JI—CRIMINAL 2107. Additionally, because the substantive sexual assault charge required the commission of at least three violations of WIS. STAT. § 948.02(2), sexual contact or intercourse with a child under sixteen, counsel reviewed with Miguel and attached the jury instructions for § 948.02(2), WIS JI—CRIMINAL 2104, and the instruction defining "sexual contact," WIS JI—CRIMINAL 2101A.

signed plea form. The trial court read the deportation warning required by § 971.08(1)(c) & (2). When it came to light that Miguel was not a United States citizen, the trial court engaged in a more extensive colloquy and was informed that Miguel believed these convictions would "absolutely" affect his status and presence in the United States. With the parties' consent, the court relied on the complaint and determined it established a factual basis for the convictions. Any challenge to the plea-taking procedures in this case would be without arguable merit.

In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character, and the need to protect the public**.** ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. As to gravity, the court determined that the sexual assault was aggravated by virtue of Miguel's parent-child relationship with A.K. and abuse of her trust, and his use of alcohol and drugs to render A.K. particularly vulnerable. The trial court considered that the assaults were not situational or opportunistic, but rather "a system of planning over a period of years and things done to take advantage of her and to deaden her responses." The court also considered the read-in assault of B.G. as an aggravating factor, observing that like with A.K., Miguel used alcohol and drugs to take advantage of a young girl:

> I'm satisfied I can infer from what happened in this case you knew what you were going to do, you had a plan, you can take advantage of a number of young girls at the same time[3] and get away with it, that's not a good situation, not positive, it's aggravating and that's dangerous conduct. [Footnote added.]

In terms of Miguel's character, the court considered that he had no prior criminal record and had a productive outside life in terms of employment and community involvement. The trial

[3] A third friend was present at the sleepover, but was not named as a victim in the charged conduct.

court determined that Miguel's ability to present himself as a person of trust while engaging in a secret "predatory lifestyle" made him particularly dangerous. Pointing to statements Miguel made to the PSI writer portraying A.K. as asking for or wanting the sexual contact as justification for the assaults, the court determined that his lack of empathy and distorted thought pattern demonstrated Miguel was "not of safe character." With regard to protecting the public, the court found that incarceration was necessary to incapacitate Miguel and to ensure that he received rehabilitative treatment. The court determined that the maximum sentence was necessary and appropriate given Miguel's dangerousness, the aggravated circumstances of the offense and its impact on the victims, and to send a message to the public that "this kind of horrendous sexual assault of minors by people in a position of trust will result in lengthy imprisonment, lengthy times off the street." The trial court also found that "25 years should be sufficient to render you a safe person, you will be older. I think that's a plus for the public." We conclude that the trial court properly exercised its discretion at sentencing. *See* ***id.***; ***State v. Gallion***, 2004 WI 42, ¶¶17, 40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Further, given the facts of this case and the read-in charges, we cannot conclude that the sentence 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).

The no-merit report also addresses whether grounds exist for a sentence modification. We are satisfied that the no-merit report properly analyzes this issue as without merit and will not discuss it further.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgments, and discharges appellate counsel of the obligation to represent Miguel further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas K. Voss is relieved from further representing David Trejo Miguel. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals