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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

March 14, 2016

To:

Hon. Julie Genovese
Circuit Court Judge
Br. 13, Rm. 8103
215 South Hamilton
Madison, WI 53703

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

Thomas J. Fallon
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Colleen Marion
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

Jon L. Huettner 154733
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2014AP1028-CRNM State of Wisconsin v. Jon L. Huettner (L.C. #2012CF1358)

Before Higginbotham, Sherman and Blanchard, JJ.

Jon Huettner appeals a judgment convicting him of third-degree sexual assault, four counts of child enticement by exposure of a sex organ, and one count of child enticement by sexual contact. Attorney Faun Moses 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. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90,

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

403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of the pleas, a motion to withdraw the pleas, and sentencing. Huettner was sent a copy of the report, and has filed a response arguing that the circuit court lacked competence to accept his pleas because Huettner was not competent to enter them. Assistant State Pubic Defender Colleen Marion has since substituted as counsel for Huettner, and has not withdrawn the no-merit report. Upon reviewing the entire record, as well as the no-merit report and response, 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 prior to sentencing, a defendant must show some fair and just reason for his change of heart beyond the simple desire to have a trial, and the prosecution must not have been substantially prejudiced by reliance on the plea. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995); ***State v. Shanks***, 152 Wis. 2d 284, 288-90, 448 N.W.2d 264 (Ct. App. 1989). In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective and the defendant did not understand information that he was supposed to have been provided, or demonstrate some other manifest injustice such as coercion, a genuine misunderstanding on the defendant's part, an insufficient factual basis to support the charge, ineffective assistance of counsel, or a 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). In deciding whether to allow a defendant to withdraw a plea, the circuit court may assess the credibility of the proffered explanation for the plea withdrawal request. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999); *see also* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269 (we will not overturn credibility determinations on appeal unless

the testimony upon which they are based is inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts).

Taking into account the circuit court's credibility determinations, Huettner could not satisfy the standard for plea withdrawal either before or after sentencing.

Huettner moved to withdraw his plea prior to sentencing on the grounds that he did not fully understand the consequences of his pleas, and that he felt coerced into entering the pleas—despite his actual innocence—because he had not seen his family in some time, and believed that if he entered pleas he would be able to get probation or time served because that is what he asked counsel to fight for. At the plea withdrawal hearing, Huettner testified that he was "a slow learner" and "didn't understand exactly what was what," when his attorney discussed his case with him. Huettner repeatedly stated that he really did not want to enter the pleas; that he wanted a chance to prove his innocence using statements from the victims as witnesses in his own defense; and that he only followed what counsel told him because he thought he was going to get probation and time served. However, Huettner did not identify any specific element of the charges or any constitutional right that he misunderstood or that he had been misinformed about, and counsel testified that he had explained to Huettner that, although counsel would argue for probation, the court could impose up to the maximum sentences. In addition, when the court asked Huettner what had changed since the time Huettner had entered his plea, Huettner said he just thought to himself that he did not understand why he took the plea, and that he thought he "should have just went and took it to trial."

The circuit court rejected Huettner's testimony that he believed he was innocent and did not understand what he was doing when he entered his pleas. The court emphasized that it had

adjourned an initial plea hearing in order to allow Huettner more time to think about what he wanted to do when he was ambivalent about admitting the conduct underlying the pleas, and explicitly advised Huettner that the court was not bound by any sentencing recommendations and could sentence him to the maximum. The court viewed Huettner as manipulative, and determined that the true reason Huettner was seeking to withdraw his plea was a change of heart after seeing the recommendation in the PSI for a significant prison term. Therefore, there is no legal basis to challenge the order denying Huettner's pre-sentencing motion for plea withdrawal.

Similarly, there is no basis for a post-sentence motion for plea withdrawal, because the record shows that the court conducted a proper plea colloquy, and it has already made a factual finding that Huettner did, in fact, understand his pleas. *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.

A challenge to Huettner's sentences 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 Huettner was afforded an opportunity to comment on the PSI, to present an alternative sentencing memorandum, 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. The court characterized the offenses as being "about as serious as it gets," noting that the crimes of conviction spanned ten years with multiple victims, many of whom

were in vulnerable positions. With respect to Huettner's character, the court acknowledged that he had suffered sexual abuse and bullying himself as a child. However, the court viewed Huettner's characterization of raping teenaged girls as merely making them "uncomfortable" while attempting to be a family friend as evidence that there were errors in Huettner's thinking process that made him dangerous to others. The court was not persuaded that rehabilitation was even possible, given Huettner's lack of acceptance of responsibility, and it identified the primary goal of the sentencing in this case as protection of the public—specifically, children who would be potential future victims. The court concluded that Huettner needed to be removed from society for the rest of his natural life.

The court then sentenced Huettner to consecutive terms of eight years of initial confinement and seven years of extended supervision on each of the child enticement counts and two years of initial confinement and three years of extended supervision on the sexual assault count. The court also directed Huettner to provide a DNA sample, but waived the surcharge; ordered him to register as a sex offender; imposed other standard conditions of supervision for sexual assault cases; and awarded 448 days of sentence credit. The judgment of conviction reflects that the court determined that the defendant was not eligible for the challenge incarceration program or the substance abuse program.

The components of the bifurcated sentences imposed were within the applicable penalty ranges and the total imprisonment period constituted less than 60% of the maximum exposure Huettner faced. *See* WIS. STAT. §§ 948.07(3) NOTE (2001-02) and 939.50(bc) NOTE (2001-02) (classifying child enticement with exposure of a sex organ as a Class BC felony punishable by up to thirty years for the count 5 offense that occurred in 2002); 948.07(3) (2003-04) and 939.50(3)(d) (2003-04) (classifying child enticement with exposure of a sex organ as a Class D

felony punishable for up to twenty-five years for the count 7 offense that occurred in 2004); 948.07(3) (2011-12) and 939.50(3)(d) (2011-12) (classifying child enticement with exposure of a sex organ as a Class D felony punishable by up to twenty-five years for the count 1 offense that occurred in 2012 and the count 4 that occurred in 2011); 948.07(1) (2003-04) and 939.50(3)(d) (2003-04) (classifying child enticement with sexual contact as a Class D felony punishable by up to twenty-five years for the count 8 offense that occurred in 2003); and 940.225(3) (2011-12) and 939.50(3)(g) (2011-12) (classifying third-degree sexual assault as a Class G felony punishable by up to ten years for the count 2 offense that occurred in 2012).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). That is particularly true when taking into consideration the amount of additional sentence exposure Huettner avoided on the read-in offenses, as well as additional uncharged conduct.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *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 is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that counsel 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