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April 8, 2016

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

2014AP2338-CRNM State of Wisconsin v. Marcus O. Singleton (L.C. #2013CF586)

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

Marcus Singleton appeals a judgment that convicted him of third-degree sexual assault, and an order that denied his postconviction motion for plea withdrawal. Attorney Michael Herbert has 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); ***State ex rel. 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 plea colloquy and the circuit court's exercise of its

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

sentencing discretion. Singleton was sent a copy of the report, and has filed a response alleging—as he did in a pro se postconviction motion—that his plea was manifestly unjust due to the ineffective assistance of trial counsel. 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 note that Singleton is not alleging that he misunderstood the nature of the charges or any of the constitutional rights he was waiving, and our own review of the record shows that the circuit court conducted a standard plea colloquy, inquiring into Singleton's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Singleton'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; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986).

Rather, Singleton moved to withdraw his plea based upon allegations that: (1) "Phone records show that the defendant called on the day in [q]uestion;" (2) "Discovery show[s] that the defendant['s] name and number is in the phone record as ('Kenny')"; and (3) "Order at plea stated the withdrawal of no contest would be if new evidence is found." The circuit court denied Singleton's plea withdrawal motion on the grounds that Singleton's allegations were conclusory, and did not explain the relevance of the phone records.

Singleton then filed a follow-up letter seeking reconsideration in which he provided additional explanations. He said that he had told trial counsel from the beginning that he had a prior relationship with the victim (contrary to her assertion that he was a stranger); and asserted that phone records would show that he and the victim had several phone contacts, including on the night of the incident. Counsel had told Singleton that she had found nothing in the phone records to corroborate his claim, and the lack of documentary evidence had been key to

Singleton's decision not to go to trial. However, about an hour before the sentencing hearing, counsel met with Singleton and went over the phone records with him "one last time," and Singleton was able to point out his second phone number to counsel on the logs, showing up under the name "Kenny" in the victim's phone contacts. Singleton alleged that—contrary to counsel's prior representations to him—the phone records showed that he had spoken with the victim several times, as he had claimed, and that the victim had deleted his calls from her call history. Singleton also asserted that he would have gone to trial if he had known there was documentary evidence that supported his version of events and contradicted some of the victim's account.

In his response to the no-merit report, Singleton contends that the phone records constituted newly discovered evidence, or alternatively, that counsel's failure to discover the records sooner constituted ineffective assistance of counsel, since his wife had provided counsel with his second phone number after counsel's initial failure to find a link. However, we conclude that Singleton's allegations would be insufficient to obtain a hearing for several reasons.

First, Singleton did not provide his explanation about the significance of the phone records to the circuit court in his original motion for plea withdrawal. The circuit court properly denied that motion without a hearing, and was not obligated to entertain successive motions on the same topic.

Second, even taking Singleton's reconsideration letter into account, Singleton alleged that he pointed out his phone number on the logs to counsel an hour *before* the sentencing hearing. Thus, the evidence was not newly discovered after Singleton's conviction.

Third, Singleton's allegations are insufficient to establish the deficient performance portion of a claim of ineffective assistance of counsel, because the phone number Singleton claims counsel should have identified was linked to a name other than Singleton's; Singleton and

his wife did not at first provide counsel with the second phone number; Singleton did not specify whether he provided the second number before or after the plea had been entered; and defense counsel did inform the circuit court at the sentencing hearing that she had found partial corroboration that the victim did have an account on the dating website on which the defendant had claimed to have contacted the victim.

Finally, Singleton's allegations would provide at best only limited support for the prejudice portion of an ineffective assistance claim, because the victim's claim that she had never seen Singleton before was not necessarily inconsistent with having prior phone contact with him, given the victim's cognitive disabilities and Singleton's own assertion that he obtained the victim's contact information through a dating website. Thus, it is unlikely that the phone records would have significantly undermined the victim's credibility—which was bolstered by the physical evidence of assault collected by the SANE nurse.

A challenge to Singleton'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 Singleton was afforded an opportunity to comment on the PSI, to present a character witness on his behalf, and to address the circuit court, both personally and through counsel. The court considered 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 viewed it as extremely egregious because the victim was vulnerable both due to being under age and due to developmental disabilities, and because Singleton was out on bail on a child enticement charge

when he committed the present offense. With respect to Singleton's character, the court gave him some credit for taking responsibility by entering a plea. The court concluded that a prison term was required due to the gravity of the offense, even if the protection of the public and rehabilitation of the defendant could be largely served by strict supervision.

The circuit court then sentenced Singleton to four years of initial confinement and five years of extended supervision. The court also directed Singleton to submit a DNA sample but waived the surcharge; and imposed $80 in restitution and other standard costs and conditions of supervision without objection. The court determined that Singleton was not eligible for the challenge incarceration program or the substance abuse program due to the nature of the offense, and was not entitled to sentence credit because the sentence was to be served consecutive to a sentence he was already serving.

The components of the bifurcated sentence were within the applicable penalty ranges. *See* WIS. STAT. §§ 940.225(3) (classifying third-degree sexual assault as a Class G felony); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony).

Although the sentence imposed was only one year less than the maximum available, it was not "so excessive and unusual and so disproportionate to the offense 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. That is particularly true when taking into consideration the amount of additional sentence exposure Singleton avoided on the read-in offenses.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. 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 order denying postconviction relief are 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