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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 II

August 24, 2016

To:

Hon. Gary L. Bendix
Circuit Court Judge
Manitowoc County Courthouse
1010 S. 8th St.
Manitowoc, WI 54220

Jacalyn C. LaBre
District Attorney
1010 S. Eighth St.
Manitowoc, WI 54220

Lynn Zigmunt
Clerk of Circuit Court
Manitowoc County Courthouse
1010 S. 8th St.
Manitowoc, WI 54220-5380

Criminal Appeals Unit
P.O. Box 7857
Madison, WI 53707-7857

Ellen J. Krahn
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

Matthew M. Van Rossum, #616971
Jackson Corr. Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

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

2016AP362-CRNM State of Wisconsin v. Matthew M. Van Rossum (L.C. #2013CF21)

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

Matthew M. Van Rossum appeals a judgment convicting him of second-degree sexual assault of a child and repeated sexual assault of the same child.[1] Van Rossum's appellate counsel, Attorney Ellen J. Krahn, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[2] and ***Anders v. California***, 386 U.S. 738 (1967). Van Rossum has filed a response.

[1] The second-degree sexual-assault charge arose out of an incident in Manitowoc County, the other out of multiple incidents in Marinette County. The cases were consolidated into a single information pursuant to the plea agreement.

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

Upon consideration of the no-merit report and response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that the judgment may be summarily affirmed, as there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Van Rossum and his girlfriend, Angela, engaged Angela's daughter, SMJ, in three-way sexual activity when SMJ was thirteen and fourteen. Van Rossum pleaded no contest to second-degree sexual assault of a child and repeated sexual assault of the same child.[3] The trial court sentenced him to two concurrent sentences of five years' initial confinement plus five years' extended supervision. This no-merit appeal followed.

The no-merit report first considers whether the trial court erred when it denied Van Rossum's motion to suppress his statements, in which he acknowledged having sexual intercourse with SMJ. Van Rossum challenged the voluntariness of the statements on grounds that his doctor had changed his medications the day before his arrest and that, while in the squad car, he had a panic attack and was transported to an emergency room before being taken to jail. He claimed not to recall arriving at the jail or his interview with the detective.

Van Rossum's suppression motion is not waived by his no-contest pleas. *See* WIS. STAT. § 971.31(10). In reviewing a motion to suppress, we accept the trial court's findings of fact unless they are clearly erroneous, but the correct application of constitutional principles to those

[3] Angela was convicted upon her pleas of no contest of failure to act/sexual assault of a child and repeated sexual assault of the same child. She was sentenced to concurrent sentences of four years' initial confinement plus five years' extended supervision.

facts presents a question of law, which we review de novo. ***State v. Drew***, 2007 WI App 213, ¶11, 305 Wis. 2d 641, 740 N.W.2d 404.

The trial court made numerous findings based on the interviewing detective's and Van Rossum's testimony and a recording of the interview. Van Rossum took his medication the night before the interview, which was not until 11:30 a.m. the following day; Van Rossum's condition on leaving the hospital was noted to be "stable"; he grew agitated only when the discussion turned to the charges; his mental acuity did not seem to be hindered; the interview was not of excessive length; and there were no threats of physical violence, promises made in exchange for cooperation, or relay of interrogators. These findings are not clearly erroneous. Our independent review of the record satisfies us that his statements were voluntarily made. There is no arguable merit to this issue.

The report also considers whether there exists any issue of arguable merit germane to the plea taking. A defendant seeking to withdraw a guilty or no-contest plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). When a plea is not knowingly, voluntarily and intelligently entered, a manifest injustice has occurred, and the defendant is entitled to withdraw the plea as a matter of right. ***State v. Van Camp***, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997).

The plea-hearing transcript shows that the court engaged in a personal colloquy largely satisfying the duties listed in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d

906.[4] Besides the colloquy, the court properly looked to Van Rossum's signed plea questionnaire/waiver of rights form. He expressed his understanding of the legal elements that were spelled out on attachments to the plea questionnaire, the potential penalties, and the rights he agreed to waive. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. He indicated no confusion, agreed with the court that a factual basis supported the plea, and confirmed his understanding that the court was not bound by any sentencing recommendation. *See* ***State v. Hampton***, 2004 WI 107, ¶¶20, 23, 274 Wis. 2d 379, 683 N.W.2d 14. No issue of arguable merit could arise from this point.

The no-merit report also considers whether there is any arguable merit to challenge Van Rossum's total ten-year sentence. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court must address the primary sentencing factors—the gravity of the offense, the character of the offender, and the need to protect the public. ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999).

Here, the court considered Van Rossum's minimal criminal history, his acceptance of responsibility, his low risk to reoffend, the "situational" nature of the offenses, and Angela's significant culpability. It gave weight, however, to the seriousness of the crimes, the great harm

[4] The court failed to advise Van Rossum of a plea's potential deportation consequences, *see* WIS. STAT. § 971.08(1)(c), but nothing in the record suggests Van Rossum faces that risk. The PSI indicates he was born in Wisconsin and has registered with the Selective Service. Van Rossum also told the court that he read and understood the whole of the plea questionnaire/waiver of rights form, which gives the deportation advisement. He could not show that the plea is likely to result in his being deported. *See* ***State v. Douangmala***, 2002 WI 62, ¶23, 253 Wis. 2d 173, 646 N.W.2d 1; *see also* § 971.08(2).

they caused the victim, and the character flaw his decisions reflected. *See* ***State v. Stenzel***, 2004 WI App 181, ¶9, 276 Wis. 2d 224, 688 N.W.2d 20.

When measured against an exposure of two forty-year sentences and $100,000 fines, we cannot say that Van Rossum's sentence 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 court provided a "rational and explainable basis" for the sentence it imposed, satisfying this court that discretion in fact was exercised. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76 (citation omitted). Thus, any claim that the sentence imposed was unduly harsh or excessive, within the meaning of the legal standard, would be without arguable merit. *See* ***Stenzel***, 276 Wis. 2d 224, ¶21.

Van Rossum's response asserts that appellate counsel rendered ineffective assistance for "completely failing to address" his and Angela's "disparate sentences"—his ten years vis-à-vis Angela's nine—and the "erroneous" $500 DNA surcharge.[5] While counsel did not discuss those claims in the no-merit report or file a supplemental report, Van Rossum incorporates in his response a letter Krahn sent to him thoroughly addressing them and clearly explaining why they are without any arguable merit.

First, while "equality of treatment under the Fourteenth Amendment requires substantially the same sentence for substantially the same case histories, it does not preclude different sentences for persons convicted of the same crime based upon their individual

[5] Claims of ineffective assistance of appellate counsel must be brought in the form of a petition for a writ of habeas corpus with this court. *See* ***State v. Starks***, 2013 WI 69, ¶4, 349 Wis. 2d 274, 833 N.W.2d 146; ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992). In the interest of judicial efficiency, however, we address his claims as if they were properly brought in a ***Knight*** petition.

culpability and need for rehabilitation." ***Ocanas***, 70 Wis. 2d at 186. Van Rossum and Angela were not convicted of the same crimes, however. He was convicted of two Class C felonies, she of one Class C and one Class F felony.

Second, to constitute a denial of equal protection, the sentencing disparity either must be arbitrary or based upon considerations not pertinent to proper sentencing discretion. ***Id.*** at 187. Van Rossum raises nothing, and our independent review reveals nothing, of that ilk.

Third, a different court sentenced Angela and the court that sentenced Van Rossum was fully aware of the sentence imposed on her. By the very nature of sentencing discretion, different judges may have different opinions as to the proper sentence in a particular case based on differing circumstances with the individual defendants. ***Id.*** at 187-88. The trial court fully explained Van Rossum's sentence and the reasons behind it. Our inquiry is limited to whether discretion was exercised, not whether it could have been exercised differently. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981).

As to the DNA surcharge, Van Rossum was convicted of violations of WIS. STAT. §§ 948.02(2) and 948.025(1)(e). The trial court applied the statute in effect when he committed his crimes; the surcharges were mandatory. *See* WIS. STAT. § 973.046(1r) (2011-12). Courts "must give the legislature broad leeway to select a surcharge amount." ***State v. Radaj***, 2015 WI App 50, ¶30, 363 Wis. 2d 633, 866 N.W.2d 758. "[T]he connection between a surcharge and the costs it is intended to cover need not be perfect to be rational" and not punitive. ***Id.*** There is no merit to the ineffectiveness argument.

Our independent review of the record discloses no basis for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the

meaning of ***Anders*** and WIS. STAT. RULE 809.32. We therefore accept the no-merit report, affirm the judgment of conviction, and discharge appellate counsel of the obligation to represent Van Rossum further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ellen J. Krahn is relieved of further representing Van Rossum in this matter.

Diane M. Fremgen
Clerk of Court of Appeals