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September 17, 2013

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Milwaukee, WI 53233

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Circuit Court Judge
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Hon. Thomas P. Donegan
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You are hereby notified that the Court has entered the following opinion and order:

2013AP383-CRNM State of Wisconsin v. Jon G. Kamin (L.C. # 2010CF1038)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Jon Kamin has filed a no-merit report concluding there is no arguable basis for Kamin to challenge his conviction and sentence for second-degree sexual assault of a child or

for appealing an order denying his motion to withdraw his guilty plea.¹ Kamin filed a response claiming he was innocent and was framed by the fifteen-year-old victim because he told police about her drug problem. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

The complaint charged Kamin with four felony and two misdemeanor counts involving inappropriate sexual activity with children. Pursuant to a plea agreement, he pled guilty to count five, second-degree sexual assault of a child under the age of sixteen. The remaining counts were dismissed and read in for sentencing purposes. Before sentencing, Kamin wrote the court a letter appearing to assert his innocence. However, at the sentencing hearing, Kamin indicated he “mis-wrote” the letter, and when asked, “And you’re still maintaining that you are guilty of that offense?” Kamin replied, “Yes, I am, sir.” The court imposed a sentence of seven years’ initial confinement and eight years’ extended supervision, consecutive to any other sentence Kamin was then serving.

Kamin filed a postconviction motion alleging his plea was involuntary because he believed the State would recommend a concurrent sentence and arguing he was denied effective assistance of counsel. The court denied the motion without a hearing.

The record discloses no arguable manifest injustice upon which Kamin could withdraw his guilty plea. See *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court, aided by a plea questionnaire and waiver of rights form with an attached addendum

¹ Judge Thomas Donegan presided at the plea hearing. Judge Jeffrey Conen sentenced Kamin. Judge David Borowski denied the postconviction motion.

and jury instructions, informed Kamin of the elements of the offense, the potential penalties and the constitutional rights he waived by pleading guilty. The court established that Kamin was forty-six years old, a high school graduate and understood English. Kamin indicated he had not been treated for any mental illness and had not taken any alcohol or medication prior to the plea hearing. The court detailed the elements of second-degree sexual assault of a child including the definition of sexual contact, and Kamin indicated he understood the elements. As required by *State v. Hampton*, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, the court reminded Kamin it was not bound to follow the parties' sentence recommendations and could sentence him to forty years' imprisonment and impose a \$100,000 fine. Kamin also told the court that his guilty plea was not the product of any coercion or threats. The court followed the procedure for accepting a guilty plea set out in *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

In his postconviction motion to withdraw the plea, Kamin alleged he believed the State would be recommending a concurrent sentence, noting the plea form did not indicate whether the State's recommendation would be concurrent or consecutive. However, the transcript of the plea hearing shows the State clearly indicated its intent to request a sentence to run consecutive to a sentence Kamin was serving from a Waukesha County conviction. Kamin's trial counsel confirmed the plea agreement and noted his intent to request a concurrent sentence. The court asked Kamin whether he understood that the State would recommend a sentence "that's to follow after any sentence you may receive in a current Waukesha case," and Kamin responded that he understood. The record belies Kamin's assertion that he was not aware of the State's intention to request a consecutive sentence.

Kamin's postconviction motion also alleged ineffective assistance of counsel because his attorney did not provide him with three video recordings of the victim's statements. He did not identify what he would have discovered had he watched the videos or how the content of the videos would have affected his decision to enter a guilty plea. The court properly denied the conclusory motion for lack of factual support. See *Nelson v. State*, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972).

Kamin's postconviction motion also faulted his trial attorney for failing to pursue a meritorious defense based on cell phone messages from the victim. The motion claimed the cell phone would have contained exculpatory statements that his counsel did not investigate. These allegations were also speculative and conclusory. Kamin failed to identify specific statements within the cell phone messages he claimed were exculpatory and did not indicate what evidence additional investigation would have provided. In addition, Kamin was personally aware of the content of the messages at the time he entered the guilty plea and was informed that his guilty plea meant he was giving up his right to go to trial and put on any defense. Therefore, he personally waived his right to present that defense. See *State v. Bangert*, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986).

The record does not support any claim of ineffective assistance of trial counsel. The victim would have testified that between November 2008 and February 2009, when she was fifteen years old, Kamin grabbed her breasts on more than one occasion. Kamin had a prior conviction for sexual contact with a child and the court granted the State's motion to introduce other acts evidence to establish motive, opportunity, plan and absence of mistake or accident. Counsel negotiated a plea agreement that resulted in reducing Kamin's prison exposure by 106

years. Under these circumstances, counsel's negotiation of a favorable plea agreement appears to be a satisfactory alternative.

In his response to the no-merit report, Kamin states he "had a timecard showing [he] worked that Saturday night." Because the complaint alleged the offense took place between November 2008 and February 2009, and the victim alleged multiple assaults, an alibi for a specific Saturday night would not provide a defense.

The record discloses no arguable basis for challenging the fifteen-year sentence. The court could have imposed a sentence of forty years' imprisonment and a \$100,000 fine. The court appropriately considered the seriousness of the offenses, Kamin's character and prior record, and the need to protect the public. See *State v. Harris*, 119 Wis.2d 612, 623, 350 N.W.2d 633 (1984). The court considered no improper factors and the fifteen-year sentence is not arguably so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). In his postconviction motion, Kamin argued the circuit court erroneously exercised its discretion by imposing a sentence greater than the State's recommendation. The court is not bound by the parties' recommendations, and Kamin was informed of that fact before he entered his guilty plea. The court reasonably determined that the State's recommendation of four years' initial confinement followed by five years' extended supervision was not sufficient because Kamin received a similar sentence for the same type of conduct twenty years earlier and was not deterred as a result.

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Mark Schoenfeldt is relieved of his obligation to further represent Kamin in this matter. WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals