



OFFICE OF THE CLERK
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 I

September 24, 2024

To:

Hon. Stephanie Rothstein
Reserve Judge

Jennifer L. Vandermeuse
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Ramiro Roman Viera 237713
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

Douglas C. McIntosh
Electronic Notice

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

2022AP1411-CRNM State of Wisconsin v. Ramiro Roman Viera (L.C. # 2018CF4179)

Before Donald, P.J., Geenen and Colón, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Ramiro Roman Viera appeals from a judgment, entered on his guilty plea, convicting him on one count of first-degree sexual assault of a child. Appellate counsel, Douglas C. McIntosh, has filed a no-merit report, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).¹ Roman Viera was advised of his right to file a response, and he has responded. Upon this court's independent review of the record, as mandated by *Anders*,

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

counsel's report, and Roman Viera's response, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

In September 2018, Roman Viera was charged with first-degree sexual assault of a child as a persistent repeater. According to the complaint, Roman Viera was friends with the father of ten-year-old D.L.E. They attended the same church and Roman Viera was teaching Spanish to D.L.E. Shortly before D.L.E.'s family left on a trip to Vietnam, D.L.E. was at Roman Viera's home playing video games, when Roman Viera commented that it was hot in the apartment and told D.L.E. to take his clothes off. D.L.E. said no, but Roman Viera said that if he did not, then Roman Viera would give him a pill. D.L.E. believed the pill was poison and that he would die if he took it. After D.L.E. took his clothes off, the defendant "played with [D.L.E.'s] private, which D.L.E. described as what he uses to pee." When he was finished, Roman Viera told D.L.E. to go into the shower, again threatening to give him a pill. Roman Viera subsequently assaulted D.L.E. with multiple instances of penis-to-anus contact or intercourse, making D.L.E. shower between assaults and continuing to threaten him with a pill. Roman Viera also threatened to "get military tanks to blow up [D.L.E.'s] house if he told anyone."

In December 2019, the State filed an amended information to add eight additional charges: child enticement as a persistent repeater; causing a child to expose genitals; child sex offender working with children; and five counts of possession of child pornography. In January

2020, Roman Viera entered a plea to first-degree sexual assault without the persistent repeater modifier;² the remaining charges were dismissed and read in.

Sentencing was adjourned, first so that Roman Viera could obtain a private presentencing report and later when Roman Viera sought to discharge his third appointed attorney. After a fourth attorney was appointed, that attorney requested that Roman Viera be given a competency examination. The first psychologist could not “rule out the possibility that he is simultaneously feigning and incompetent” and recommended an inpatient evaluation, which the circuit court ordered. The second psychologist concluded that Roman Viera “**[did] not lack** substantial mental capacity to understand the proceedings and can assist in his own defense.” Roman Viera contested the finding, so the circuit court held a hearing at which the second psychologist testified. The circuit court found Roman Viera competent. The matter proceeded to sentencing, at which the circuit court imposed the maximum sentence of forty years’ initial confinement and twenty years’ extended supervision. Roman Viera appeals.

Appellate counsel discusses three potential issues in the no-merit report. The first issue is whether there would be any arguable merit to challenging his guilty pleas. When accepting a defendant’s pleas, a circuit court must engage the defendant in a colloquy and fulfill several

² The original complaint charged Roman Viera with a violation of WIS. STAT. § 948.02(1)(b) (2017-18), which prohibits sexual intercourse with a person who has not attained the age of twelve. Pursuant to the plea agreement, the State amended the charging statute to § 948.02(1)(e), which prohibits sexual contact or sexual intercourse with a person who has not attained the age of thirteen. While both offenses are Class B felonies, only a violation of § 948.02(1)(b) requires a mandatory minimum sentence of twenty-five years’ initial confinement. WIS. STAT. § 939.616(1r) (2017-18).

In addition, striking the persistent repeater modifier, WIS. STAT. § 939.62(2m)(b)2. (2017-18), removed the threat of mandatory life imprisonment without the possibility of extended supervision under § 939.62(2m)(c).

duties set forth by WIS. STAT. § 971.08 and judicial mandates, in order to ensure that the pleas are constitutionally sound. *See State v. Howell*, 2007 WI 75, ¶26, 301 Wis. 2d 350, 734 N.W.2d 48; *see also State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986); *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Our review of the records—including the plea questionnaire and waiver of rights forms and plea hearing transcript—confirms that the circuit court generally complied with the prescribed obligations for taking guilty or no contest pleas.

We observe that there was an incomplete review of the elements of the sexual assault charge. As amended, the State alleged that Roman Viera had sexual contact, not intercourse, with D.L.E. When a crime is alleged to have happened through sexual contact, as opposed to sexual intercourse, one element of the crime is that the alleged contact must have been for the purpose of degrading or humiliating the victim, or with the intent for the perpetrator to become sexually aroused or gratified. *See State v. Jipson*, 2003 WI App 222, ¶¶9, 13, 267 Wis. 2d 467, 671 N.W.2d 18. The circuit court did not review the meaning of sexual contact with Roman Viera, nor did trial counsel include the applicable jury instructions.

One of the circuit court's obligations when accepting a guilty plea is to ensure the defendant understands the nature of the charge against him. WIS. STAT. § 971.08(1)(a). To understand the nature of the charge, the defendant must be aware of all the essential elements of the crime. *State v. Nicholson*, 220 Wis. 2d 214, 218, 582 N.W.2d 460 (Ct. App. 1998). A defendant who can show the court failed to follow mandatory plea procedures, and who alleges he did not understand the omitted information, may have a basis for seeking plea withdrawal. *Howell*, 301 Wis. 2d 350, ¶27.

In the no-merit report, however, appellant counsel states that, based on his entire review of the case and discussions with Roman Viera, counsel has concluded that Roman Viera would be unable to make an arguably meritorious motion for plea withdrawal because he is unable to allege Roman Viera actually did not understand the charge against him. Roman Viera does not claim otherwise in his response, nor does the record support a claim that Roman Viera did not understand the elements of the sexual assault offense. We therefore agree that there is no arguable merit to challenging the validity of Roman Viera's guilty plea.

The second issue discussed in the no-merit report is whether there is arguable merit to challenging the circuit court's competency determination. WISCONSIN STAT. § 971.13(1) prohibits the trial of incompetent defendants. "[I]f a defendant claims to be incompetent, the court shall find him [or her] incompetent to proceed unless the [S]tate can prove by the greater weight of the credible evidence that the defendant is competent[.]" *State v. Garfoot*, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997). "A person is competent to proceed if: 1) he or she possesses sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding, and 2) he or she possesses a rational as well as factual understanding of a proceeding against him or her." *Id.* Mental illness alone does not necessarily make a person incompetent. *State v. Byrge*, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted). We review the circuit court's determination of a defendant's competency to stand trial under the clearly erroneous standard. *See Garfoot*, 207 Wis. 2d at 225.

The no-merit report appropriately analyzes this issue. The examining psychologist's report detailed how she reached her conclusion that Roman Viera was competent, including the use of a parallel assessment technique employed to combat Roman Viera's suspected malingering. At the hearing challenging the psychologist's conclusion, the psychologist testified

consistently with her report, and no other witnesses testified. As a result, there is sufficient evidence from which the State could have satisfied its evidentiary burden. We therefore agree with appellate counsel's conclusion that there is no arguable merit to a claim that the circuit court erroneously exercised its discretion in finding Roman Viera competent to proceed.

The final issue appellate counsel discusses is whether there is arguable merit to challenge the circuit court's exercise of sentencing discretion. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider additional factors. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *Id.*

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors, and it considered no improper factors. Roman Viera's sixty-year sentence does not exceed the maximum allowed by law. In light of the sentencing factors articulated by the circuit court, all of which were proper considerations, the sentence imposed would not shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, there is no arguable merit to a challenge to the circuit court's sentencing discretion.

In Roman Viera’s response to the no-merit report, he makes claims that are either conclusory or meritless. He asserts, for instance, that his attorney failed to advise him of the right to appeal, but Roman Viera’s right to an appeal has obviously been exercised. He claims that “both of my attorney was very ineffective assistance of counsel at my plea and also at my appeal,” but he identifies neither the acts constituting deficient performance nor the prejudice resulting therefrom. Roman Viera also asserts his belief “that the district attorney failed to prove the allegation.” However, by pleading guilty, Roman Viera gave up the right to make the State prove its case beyond a reasonable doubt to a trier of fact, and he acknowledged that the complaint provided a sufficient factual basis on which the circuit court could accept his plea. Accordingly, we discern no issues of arguable merit identified in Roman Viera’s response.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Douglas C. McIntosh is relieved of further representation of Roman Viera in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals