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 II

April 26, 2017

To:

Hon. Jerome L. Fox
Circuit Court Judge
Manitowoc County Courthouse
1010 S. 8th Street
Manitowoc, WI 54220

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

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

Mark A. Schoenfeldt
Law Firm of Mark Schoenfeldt
230 W. Wells Street, Ste. 610
Milwaukee, WI 53203

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

Dustin A. Mills 595957
Oshkosh Corr. Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2016AP930-CRNM State of Wisconsin v. Dustin A. Mills (L.C. # 2014CF177)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Dustin A. Mills appeals from a judgment of conviction for second-degree sexual assault of a child and from an order denying his postconviction motion to withdraw his no contest plea. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Mills filed a response to the no-merit report and counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

of these submissions and an independent review of the record, we conclude that the judgment and order may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In April 2014, Mills was charged with repeated sexual assault of a child for conduct that occurred in the summer of 2005, when Mills was twelve years old. The complaint alleged that on three occasions Mills had asked a six-year-old boy to perform oral sex. The victim did not report the assaults until December 2013. When interviewed by a detective on January 21, 2014, Mills acknowledged that he and the victim had a two-week relationship involving sexual contact in the summer of 2005. Mills described the contact as the mutual showing and touching of each other's penis with their hands. He estimated contact with the victim occurred about five times during the two-week period. Mills indicated that he did not remember the specific details of the contact but denied that oral sex was involved.

Mills entered a no contest plea to the amended charge of second-degree sexual assault of a child by means of sexual contact. He was sentenced to three years' initial confinement and five years' extended supervision to be served consecutively to all other sentences.[2] Mills filed a postconviction motion to withdraw his plea alleging that there was an insufficient factual basis for the conviction because Mills denied that the sexual contact was for the purpose of sexual

[2] At the time of sentencing, Mills was serving a sixteen-year sentence in an unrelated case.

The judgment of conviction includes a $250 DNA surcharge which was mandatory when Mills committed the crime of second-degree sexual assault under WIS. STAT. § 948.02(2). *See* WIS. STAT. § 973.046(1r) (2003-04). Mills' contention that the sentencing court had discretion to impose the mandatory surcharge is without merit.

gratification.[3] The circuit court denied the motion concluding that Mills' admission to sexual contact with the victim was sufficient to establish a factual basis for the conviction.

The no-merit report addresses the potential issues of whether Mills' plea was freely, voluntarily and knowingly entered, including whether a sufficient factual basis existed, whether the sentence was the result of an erroneous exercise of discretion, and whether Mills was denied the effective assistance of counsel with respect to the entry of the plea and sentencing. We conclude that these issues have no arguable merit.

The record shows that the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the circuit court properly relied upon Mills' signed plea questionnaire to ascertain Mills' understanding and knowledge at the time the plea was taken. ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Mills acknowledged that he had gone over the questionnaire with his attorney and understood the information it contained. The record also establishes that Mills was aware that the sexual contact had to be for the purpose of degradation of the victim or for sexual gratification. The circuit court properly found a factual basis for the plea despite Mills' denial that the sexual contact involved oral sex as alleged in the complaint and his denial that the contact was for sexual gratification. A circuit court may establish a factual basis for a plea by means other than an admission in the defendant's own words. *See* ***State v. Thomas***, 2000 WI 13, ¶18, 232 Wis. 2d

[3] The postconviction motion also sought sentence credit. It was later determined that Mills had been afforded the credit he was entitled to in another case and the request for sentence credit was withdrawn.

714, 605 N.W.2d 836. "[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record and the defendant later maintains that the exculpatory inference is the correct one." ***State v. Black***, 2001 WI 31, ¶16, 242 Wis. 2d 126, 624 N.W.2d 363. It was sufficient that Mills admitted that there was hand to penis contact. From that admission the circuit court could draw the inculpatory inference that the contact was for sexual gratification. *See* WIS JI—CRIMINAL 1200A ("Intent must be found, if found at all, from the defendant's acts, words, and statements, if any, and from all the facts and circumstances bearing upon intent."). No issues of merit arise from the plea taking or the denial of Mills' postconviction motion for plea withdrawal.

As the no-merit report correctly observes, the sentence was based on appropriate facts of record and considerations. It was a demonstrably proper exercise of discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Further, we cannot conclude that the eight year sentence when measured against the maximum forty year sentence is so excessive or unusual so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We also agree with counsel's assessment that as to the plea and sentencing, Mills was not denied the effective assistance of counsel.

In his response to the no-merit report, Mills contends that because he was charged as an adult for crimes he committed as a juvenile, he was entitled to a ***Becker*** hearing—a due process hearing at which the prosecutor would have had the burden of establishing there was no

intentional delay in charging so as to avoid juvenile court jurisdiction.[4] Mills' entry of a no contest plea forfeited any objection based on the delay and his right to a ***Becker*** hearing to determine the reason for the delay. ***State v. Schroeder***, 224 Wis. 2d 706, 721-22, 593 N.W.2d 76 (Ct. App. 1999). Mills can only raise the issue as a claim of ineffective assistance of counsel. *See* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). The two-pronged test for ineffective assistance of counsel is deficient performance of counsel and prejudice to the defendant.[5] *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). It is well established that if the unfiled motion would have been unsuccessful, trial counsel is not deficient for not filing it. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994).

It may be, as the supplemental no-merit report suggests, that by focusing his claim solely on negligent delay in charging, Mills concedes that there was no intentional or manipulative delay. To the extent that Mills does not make that concession, we consider whether a ***Becker*** motion would have been successful. Mills attaches to his response a police report authored in

[4] The due process hearing is often referred to as a ***Becker*** hearing. *See* ***State v. Becker***, 74 Wis. 2d 675, 677, 247 N.W.2d 495 (1976) (requiring a "hearing to determine whether the delay in charging was in fact occasioned by a deliberate effort to avoid juvenile court jurisdiction"). Mills actually claims an entitlement to a hearing to determine if there was prosecutorial negligence in failing to promptly bring the charges while Mills was still a juvenile. He cites ***State v. Avery***, 80 Wis. 2d 305, 310-11, 259 N.W.2d 63 (1977), as requiring dismissal if there was a negligent failure to bring the charge. However, the language in ***Avery*** which may have expanded the scope of the ***Becker*** hearing to consideration of a negligent failure to promptly charge was withdrawn by the Wisconsin Supreme Court in ***State v. Montgomery***, 148 Wis. 2d 593, 603, 436 N.W.2d 303 (1989). In ***Montgomery***, the court held that "only an intentional delay by the State to avoid juvenile jurisdiction constitutes a due process violation which requires a dismissal of the criminal complaint in adult court." ***Id.*** at 595.

[5] While we normally decline to address claims of ineffective assistance of trial counsel for the first time on appeal without the preservation of trial counsel's testimony, ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), appointed counsel's no-merit report seeks counsel's discharge from the duty of representation. Therefore, we must independently determine whether the defendant's ineffective assistance claim has sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

September 2005. The officer investigated a referral to social services that Mills may have inappropriately touched the victim in this case. The report indicates that after talking with several people, including the victim and his sister who was babysitting the victim when Mills was at the house, "no touching or sexual contact can be substantiated." The report also indicated that at least two people reported that the victim's sister was trying to get Mills in trouble because of a conflict between them. The report establishes that at the time of the initial investigation there was not sufficient proof to bring charges and that no referral was made to the prosecutor. Without a doubt the police report would have been brought to the court's attention if a motion to dismiss for intentional delay had been filed. The report permits only one conclusion—there was no intentional or manipulative intent to avoid juvenile court jurisdiction in not charging Mills until he was an adult. A ***Becker*** motion would not have been successful and trial counsel was not deficient for not filing it. *See* ***Simpson***, 185 Wis. 2d at 784.

Mills' additional argument that the circuit court lacked jurisdiction because the offense was committed when Mills was a juvenile lacks merit. "The jurisdiction of the juvenile court is determined by the individual's age at the time charged, not the individual's age at the time of the alleged offense. Therefore, the juvenile court does not have jurisdiction over allegations against an *adult* defendant, regardless of the defendant's age when the alleged offense occurred." ***State v. Annala***, 168 Wis. 2d 453, 463, 484 N.W.2d 138 (1992) (citations omitted).

Mills' response also argues that his statement to police should have been suppressed as compelled by the rules of his probation supervision. He explains that after a group session on January 21, 2014, his probation agent told him to "stick around because there is a detective who wants to talk with you. You better be cooperative, it is part of your probationary rules." Mills contends the agent's words were threatening and left him with the impression that he would be

violating his probation and would be revoked for not being cooperative with law enforcement. He asserts that his agent's words made him decide to go to the police station with the detective and compelled his statement.[6] He relies on ***State v. Spaeth***, 2012 WI 95, ¶70, 343 Wis. 2d 220, 819 N.W.2d 769, as requiring suppression of his statement under these circumstances.

The supplemental no-merit report explains that ***Spaeth*** does not apply because that case examined law enforcement's use of compelled statements made to a probation agent and whether a statement to police was derived from a source wholly independent from the compelled statement to the probation agent. We agree that the circumstances of the detective's desire to speak with Mills and Mills' statement to the detective do not fall under ***Spaeth*** because the police investigation did not originate with statements Mills made to his probation agent. Here the appropriate inquiry is whether Mills' statement to the detective was involuntary because Mills felt obligated under the rules of supervision to provide the statement or face revocation. We examine the potential claim within the ineffective assistance of counsel rubric because no suppression motion was filed.

We recognize that "if the state, either expressly or by implication, asserts that invocation of the privilege [against self-incrimination] would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." ***State v. Sahs***, 2013 WI 51, ¶44, 347 Wis. 2d 641, 832 N.W.2d 80 (citation omitted). We first observe that there was no express link between Mills' interview with the detective and any

[6] Mills acknowledges that the detective told him he was not under arrest and was free to leave and that he was read his ***Miranda*** rights before signing the ***Miranda*** form and giving his statement.

probation consequences. Mills was interviewed by a detective at a location removed from his probation officer.[7] Mills claims that there was an implication that he would be revoked if he did not "cooperate" with the police. His probation agent's directive to "cooperate" was not specific enough to permit Mills' suggested inference that he would have faced revocation if he had invoked his right to remain silent.[8] Further, "the mere requirement on a probationer to appear and speak 'truthfully to his or her probation (or parole) officer is insufficient to establish compulsion.'" ***Id.***, ¶55 (quoting ***State v. Mark***, 2006 WI 78, ¶25, 292 Wis. 2d 1, 718 N.W.2d 90). Additionally, Mills was read his ***Miranda*** rights and told that his statement could be used in court. A motion to suppress Mills' statement to police would not have been successful and trial counsel was not ineffective for not filing such a motion. *See* ***Simpson***, 185 Wis. 2d at 784.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Mills further in this appeal.

Upon the foregoing reasons,

[7] In an affidavit attached to his response, Mills states, "I feared that if I were to refuse to go [to the police station], I would be in violation of my probationary rules, and I would definitely be revoked." Even accepting Mills' suggestion that his probation agent required him to go to the police station, it was a valid use of the agent's authority. *See* ***State v. Tarrell***, 74 Wis. 2d 647, 656, 247 N.W.2d 696 (1976) (court concluded that probationer's presence at the police station was obtained legally when required by the probation agent), *other language withdrawn by* ***State v. Fishnick***, 127 Wis. 2d 247, 256, 378 N.W.2d 272 (1985).

[8] Mills attaches his "Rules of Community Supervision" to his response. The rules were signed December 17, 2012. Although truthful answers must be given to questions posed by a probation agent, no rule requires Mills to waive his right to remain silent if interviewed by police or to truthfully answer questions from police.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved from further representing Dustin A Mills in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals