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DISTRICT II

October 11, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Walworth County Courthouse
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Mark Daniel Madsen, #413961
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You are hereby notified that the Court has entered the following opinion and order:

2021AP553-CRNM State of Wisconsin v. Mark Daniel Madsen (L.C. #2018CF568)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Mark Daniel Madsen appeals his judgment of conviction for four counts of capturing an intimate representation without consent. His appellate counsel, Hans P. Koesser, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2020-21).[1] Madsen has filed a response and a supplemental response to counsel's report, and counsel has filed a supplemental report. Upon this court's independent review of the

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

record as mandated by ***Anders***, counsel's reports, and Madsen's responses, we conclude that there are no issues of arguable merit that could be pursued on appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

In November 2018, Madsen was charged with nine counts of capturing an intimate representation without consent after his wife, A.R.B., reported that she had found videos on Madsen's cell phone of both her and her sister, J.C.M.B., while they were showering. These incidents occurred between April 2017 and July 2018. The parties subsequently agreed to amend the complaint to combine those charges with charges from another case: disorderly conduct with a domestic abuse assessment; two counts of misdemeanor bail jumping; possession of THC as a second or subsequent offense; and possession of drug paraphernalia. The amended complaint also added three additional charges of capturing an intimate representation without consent for additional incidents that occurred in April 2018.

Madsen elected to resolve this matter with a plea. Pursuant to the plea agreement, Madsen pled guilty to four counts of capturing an intimate representation without consent; one count of misdemeanor bail jumping; one count of disorderly conduct with the domestic abuse assessment; and one count of possession of drug paraphernalia.[2] The remaining counts were dismissed but read in at sentencing.

The circuit court accepted Madsen's pleas in July 2019. The court imposed the maximum sentences for each count: one and one-half years of initial confinement followed by two years of extended supervision for each of the charges for capturing an intimate

[2] Madsen does not appeal his convictions for these other counts, which were all misdemeanors.

representation, to run consecutively; and the maximum amount of jail time for each of the other charges, to run concurrently with the other sentences. This no-merit appeal follows.

In the no-merit report, appellate counsel first addresses whether there would be arguable merit to appealing the validity of Madsen's pleas. The record reflects that the plea colloquy by the circuit court complied with the requirements set forth in WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Additionally, the court confirmed that Madsen signed and understood the plea questionnaire and waiver of rights form, which further demonstrates that his pleas were knowingly, voluntarily, and intelligently entered. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827, 416 N.W.2d 627 (Ct. App. 1987). Furthermore, in Madsen's supplemental response, he concedes that his pleas were entered knowingly, intelligently, and voluntarily. We therefore agree with counsel's analysis that there would be no arguable merit to an appeal of that issue.

The other issue addressed by appellate counsel in the no-merit report is whether there would be arguable merit to a claim that the circuit court erroneously exercised its discretion in sentencing Madsen. The record reflects that the circuit court considered relevant sentencing objectives and factors, including a presentence investigation report (PSI). *See* ***State v. Ziegler***, 2006 WI App 49, ¶¶23-24, 289 Wis. 2d 594, 712 N.W.2d 76. In fact, the court described the PSI as "one of the most thorough presentences [it had] ever seen."

Madsen's responses allege several issues with his sentencing. First, Madsen asserts that the circuit court relied on inaccurate information. "[W]hether the circuit court 'actually relied' on the inaccurate information at sentencing … turns on whether the circuit court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate

information 'formed part of the basis for the sentence.'" ***State v. Travis***, 2013 WI 38, ¶28, 347 Wis. 2d 142, 832 N.W.2d 491 (citation omitted).

Specifically, Madsen points to the circuit court's reference to his probation being revoked in two cases. The court, referencing the PSI, stated that Madsen had "been on probation twice and apparently it was revoked on both occasions." Appellate counsel acknowledges that a "more accurate way" to describe this history is that Madsen was placed on probation in three separate cases; that his probation in two cases for offenses that occurred in 1999 and 2000 was revoked in a single revocation proceeding, based on the same violations; and that he successfully completed his most recent probation term, for an offense that occurred in 2012.

Madsen also asserts that information in the PSI regarding a "citation for sexual assault" issued by the St. Francis Police Department in 1999 was inaccurate information. The circuit court mentioned this citation during the sentencing hearing, noting that it "[didn't] know how you get cited for a sexual assault." Appellate counsel advises that he was unable to confirm whether a citation was ever issued, but that it appears the matter was forwarded to the Milwaukee County District Attorney's Office, although there is no corresponding charge listed in Madsen's criminal history. Madsen contends that he was only questioned in this matter.

The circuit court's misstatement about Madsen's probation revocations and its reference to the unsupported sexual assault citation were made in the context of the court's review of Madsen's criminal history, based on the information gathered for the PSI. The court described this history as "disturbing and lengthy," observing that it reflected "undesirable behavior patterns." The court noted the "[m]any times" Madsen had been charged in connection with "voyeurism, peeping, whatever words you want to use," along with other offenses such as theft,

burglary, criminal trespass, possession of drug paraphernalia, and disorderly conduct. In particular, the court referenced a charge of battery of a law enforcement officer, which occurred after the officer discovered Madsen looking in a window at the officer's sixteen-year-old daughter.

Furthermore, when imposing a sentence, the circuit court "may consider uncharged and unproven offenses" in addition to the defendant's criminal record. ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. In fact, a sentencing court is "obliged to acquire the 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.'" ***Id.*** (citation omitted).

Moreover, in explaining its reasoning for Madsen's sentences, the circuit court stated that confinement, as opposed to probation, was necessary to "protect the public" from Madsen and to provide him with the opportunity to get "correctional treatment." Therefore, given the full context of the court's remarks, the record does not support a claim that the court gave "explicit attention" or "specific consideration" to inaccurate information such that it "formed part of the basis for [his] sentence[s]." *See* ***Travis***, 347 Wis. 2d 142, ¶28.

Additionally, Madsen asserts that his sentence was unduly harsh when compared to sentences imposed on other defendants convicted in unrelated incidents, for purportedly similar offenses. To demonstrate that a sentence is unduly harsh or unconscionable, a defendant "must show an 'unreasonable or unjustifiable basis in the record for the sentence,'" which would indicate the circuit court had erroneously exercised its discretion. ***State v. Scaccio***, 2000 WI App 265, ¶17, 240 Wis. 2d 95, 622 N.W.2d 449 (citation omitted).

The record here reflects that the circuit court explained its reasoning for imposing the maximum sentences for the charges to which Madsen pled; primarily, the need to protect the public given his lengthy criminal history of similar offenses. Furthermore, even if it were assumed that a disparity in sentencing existed, it is "well established in Wisconsin that mere disparity in the sentences received by persons committing similar crimes does not establish a denial of due process." ***State v. Smart***, 2002 WI App 240, ¶13, 257 Wis. 2d 713, 652 N.W.2d 429. We agree with appellate counsel that there is no basis for a claim that Madsen's sentence was unduly harsh or unconscionable. *See* ***Scaccio***, 240 Wis. 2d 95, ¶17.

In short, the record demonstrates that the circuit court explained its reasoning for the sentences it imposed, which was based on proper objectives and factors. Therefore, we agree with appellate counsel's assessment that there would be no arguable merit to a challenge of Madsen's sentence for an erroneous exercise of discretion by the court. *See* ***Ziegler***, 289 Wis. 2d 594, ¶¶22-24.

Our independent 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 Madsen further in this appeal.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Hans P. Koesser is relieved of further representation of Mark Daniel Madsen 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