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DISTRICT III

October 31, 2023

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

2021AP1060-CRNM State of Wisconsin v. Eric J. Tower (L. C. No. 2019CF60)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Eric Tower has filed a no-merit report concluding that no grounds exist to challenge Tower's conviction for possession of child pornography, contrary to WIS. STAT. § 948.12(1m) (2021-22).[1] Tower has filed a response challenging his sentence and claiming that his trial counsel was ineffective at the sentencing hearing. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no

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

arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Tower with four counts of possession of child pornography. The complaint alleged that the National Center for Missing and Exploited Children reported to law enforcement that a Skype user with the username of "etower56" had uploaded a child pornography image. During a subsequent interview with law enforcement, Tower acknowledged that he had a Skype account and that the email used to create the account was "etower56@yahoo.com." Tower also acknowledged that he had come across child pornography images online when searching for "young kids" and "cute babies," though he maintained that he did not look at any of these images "from a sexual standpoint."

During the execution of a search warrant at Tower's residence, law enforcement located a flash drive plugged into a laptop that was found in Tower's bedroom. The complaint described four of the images found on the flash drive, alleging the images met the definition of child pornography.

Pursuant to a plea agreement, Tower entered a no-contest plea to one count of possession of child pornography, which carries a mandatory minimum term of three years of initial confinement pursuant to WIS. STAT. § 939.617(1). In exchange for his no-contest plea, the State recommended that the circuit court dismiss and read in the remaining three counts. The parties remained free to argue at sentencing. Out of a maximum possible twenty-five-year sentence, the court imposed a sixteen-year term, consisting of six years of initial confinement followed by ten years of extended supervision, to run consecutively to a sentence Tower was serving in another case.

The no-merit report addresses whether Tower knowingly, intelligently, and voluntarily entered his no-contest plea and whether the circuit court properly exercised its sentencing discretion. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that any challenge to Tower's plea or sentence would lack arguable merit.

In his response to the no-merit report, Tower asserts that the circuit court's consideration of uncharged offenses, pending charges, and acquitted charges violated his due process rights. "The [circuit] court considers a variety of factors because it has a responsibility to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." ***State v. Salas Gayton***, 2016 WI 58, ¶23, 370 Wis. 2d 264, 882 N.W.2d 459 (citation omitted). Therefore, the "scope of the information that a court may consider includes 'not only uncharged and unproven offenses' but also 'facts related to offenses for which the defendant has been acquitted.'" ***Id.*** (citation omitted). Ultimately, the record provides no basis for us to conclude that consideration of this information, in the proper exercise of the court's sentencing discretion, violated Tower's due process rights. This challenge to Tower's sentence therefore lacks arguable merit.

Tower also contends that because uncharged offenses and pending charges may serve to increase a defendant's sentence up to the maximum allowed for the defendant's crime, any subsequent conviction for the uncharged offenses or pending counts would violate double jeopardy protections. The double jeopardy clause protects in three areas: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense. *See* ***State v. Nommensen***, 2007 WI App 224, ¶5, 305 Wis. 2d 695, 741 N.W.2d 481. Because the circuit court's consideration of uncharged offenses and

pending charges as part of its sentencing discretion does not implicate any of these areas of protection, Tower's double jeopardy argument lacks arguable merit.

Next, Tower argues that because the presentence investigation report (PSI) author was also his supervising agent, the author was biased against him. To the extent Tower claims the PSI author should not have included references to "uncharged/acquitted offenses," those are proper considerations, as noted above. *See* ***Salas Gayton***, 370 Wis. 2d 264, ¶23. Neither Tower's response nor this court's review of the record supports his claim that the PSI author was biased. Tower had the opportunity to correct errors in the PSI and his trial counsel made several corrections, thus mitigating any bias. Even if the record had suggested some bias on the part of the PSI author, the circuit court was not bound to follow the PSI author's sentencing recommendation, *see* ***State v. Bizzle***, 222 Wis. 2d 100, 105 n.2, 585 N.W.2d 899 (Ct. App. 1998), and our review of the record shows that the court made its own independent determination of an appropriate sentence.

Tower also suggests that his trial counsel was ineffective at sentencing. To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if the defendant makes an inadequate showing on one of them. ***Id.*** at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for his or her counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

Relevant to Tower's claim, the PSI noted that approximately seventy digital videos and approximately 8,155 images were found on Tower's electronic devices. At the outset of the sentencing hearing, Tower's trial counsel noted that although the PSI referenced 8,155 images, those images were analyzed, but most of them did not meet the legal definition of child pornography. Tower contends that rather than challenging the number of images, his counsel should have challenged the PSI's inclusion of any reference to the number of videos and images. Tower asserts that "[a]t no point was information regarding how many images there were, entered into the court record, but it was in the [p]rosecutor's discovery." According to Tower, the PSI author should not have included any reference to the total number of images because he "was forced into giving the initial statements which lead [sic] the PSI writer to further investigate the lead, allowing for the discovery of the document referencing the 'number' of images."

Citing ***State v. Alexander***, 2015 WI 6, 360 Wis. 2d 292, 858 N.W.2d 662, Tower asserts that "[c]ompelled, incriminating statements are an improper factor in determining a defendant's sentence because their use would violate the defendant's Fifth Amendment right against self-incrimination." ***Id.***, ¶30. Further, "[t]he Constitution bars the use of compelled, incriminating testimonial statements and their fruits in a subsequent criminal prosecution." ***State v. Spaeth***, 2012 WI 95, ¶67, 343 Wis. 2d 220, 819 N.W.2d 769. However, "[i]f a statement to a probation agent is not compelled, incriminating, or testimonial it is not covered by the Fifth Amendment privilege, may be shared with law enforcement, and may be used in a criminal prosecution." ***Id.*** "Probationers do not receive immunity for information 'volunteered during a routine interview with a probation officer.'" ***Id.*** (citation omitted).

Here, Tower does not explain what he said to the PSI author in her capacity as his probation agent that led her to discover the document in the prosecutor's file that referenced the

number of images. Therefore, it is unclear whether his statements were compelled, incriminating, or testimonial. In any event, Tower is not claiming that his purported statements to the PSI author led to the discovery of evidence but, rather, to a document that chronicled evidence that had already been discovered by law enforcement in the present matter. Further, there is no indication that the PSI author would not have otherwise looked at the prosecutor's file as part of her overall assessment, as a sentencing court should be provided with all relevant information. *See* ***State v. Sulla***, 2016 WI 46, ¶32, 369 Wis. 2d 225, 880 N.W.2d 659. Ultimately, we are not persuaded that Tower's counsel was deficient by failing to object to the PSI's reference to the number of images and videos found. Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[2] hearing.

In addition to the issues discussed by counsel, we note that Tower waived the right to personally appear at the plea hearing and instead appeared by videoconference in order to avoid delays caused by COVID restrictions, which were then in effect. *See* ***State v. Soto***, 2012 WI 93, ¶46, 343 Wis. 2d 43, 817 N.W.2d 848. Further, with some exceptions not relevant here, Tower's valid no-contest plea waived all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶¶18 & n.11, 34, 294 Wis. 2d 62, 716 N.W.2d 886.

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

Therefore,

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

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

IT IS FURTHER ORDERED that Attorneys Ellen Krahn and Joseph Ehmann are relieved of their obligation to further represent Eric Tower 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