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DISTRICT II

September 18, 2024

To:

Hon. Robert S. Repischak
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Angela Dawn Chodak
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Daryl Prater #623735
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2023AP622-CRNM State of Wisconsin v. Daryl Prater (L.C. #2018CF1039)

Before Neubauer, Grogan and Lazar, 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).

Daryl Prater appeals from a judgment of conviction and an order denying his postconviction motion. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Prater filed a response. Counsel then filed a supplemental no-merit report. After reviewing the record, counsel's reports,

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

and Prater's response, we conclude there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

Prater was convicted following no contest pleas to attempted second-degree sexual assault of a child and fleeing/eluding an officer, both as a repeater. He was accused of using a social networking site and cellphone to make arrangements to meet and have sex with a person he thought was a fifteen-year-old girl. The person was actually an undercover officer. Prater was also accused of fleeing from police when they attempted to arrest him near the location of the planned meeting. For his actions, the circuit court imposed an aggregate sentence of six years of initial confinement and six years of extended supervision.

After sentencing, Prater filed a postconviction motion for discovery. Specifically, he sought an order requiring disclosure of cellphone records and subscriber information relating to the cellphone number used to correspond with the undercover officer.² Following a hearing on the matter, the circuit court denied the motion. The court concluded that such records/information would not create a reasonable probability of a different outcome in light of

² The phone associated with the cellphone number was never recovered. According to the prosecutor, law enforcement believed that the cellphone number was from either a prepaid account or a "spoofing" application.

the other evidence against Prater.³ It further noted that Prater could still have used the cellphone number even if it was set up under someone else's name. This no-merit appeal follows.

The no-merit reports address (1) whether Prater's pleas were knowingly, voluntarily, and intelligently made; (2) whether the circuit court properly exercised its discretion at sentencing; (3) whether the circuit court erred in denying Prater's postconviction motion; and (4) whether Prater's trial counsel was ineffective. This court is satisfied that the no-merit reports correctly analyze the issues they raise as without merit, and we will not discuss them further.⁴

As noted, Prater filed a response to counsel's no-merit report. In it, he maintains his innocence and insists that he would have gone to trial had he had the cellphone records and subscriber information discussed above. He offers various excuses for the evidence against him and faults his trial counsel for not "look[ing] into anything" and leading him to believe that the State's other acts motion concerning his prior convictions had been granted.⁵ Additionally, he asserts that his pleas were coerced.

³ The other evidence included (1) recordings of phone calls with the undercover officer that, according to Prater's trial counsel, sounded like Prater; (2) that Prater was found near the location of the planned meeting at the time of the planned meeting; (3) that Prater subsequently fled the location when seeing police; (4) that a picture of the undercover officer's persona was found on the phone recovered from Prater at the time of his arrest; and (5) that Prater engaged in strikingly similar conduct in 2014, when he used the same social networking site to make arrangements to meet and have sex with a real fifteen-year-old girl. In that case, he was convicted following no contest pleas to second-degree sexual assault of a child and using a computer to facilitate a child sex crime.

⁴ There is one exception to this. During the plea colloquy, the circuit court failed to provide the deportation warning required by WIS. STAT. § 971.08(1)(c). This failure does not present a potentially meritorious issue for appeal, as there is no indication that Prater's pleas are likely to result in his deportation, exclusion from admission to this country, or denial of naturalization.

⁵ Although the State filed an other acts motion concerning Prater's prior convictions for second-degree sexual assault of a child and using a computer to facilitate a child sex crime, the motion was never ruled on. That is because Prater entered his pleas before the circuit court could do so.

We are not persuaded that Prater's response presents an issue of arguable merit. Again, records and information about the cellphone number at issue would not have exonerated Prater or made the damning evidence against him go away. Furthermore, while the circuit court did not rule on the State's other acts motion, it surely would have granted it had Prater not entered his pleas. This is due to the motion's compliance with *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 556 N.W.2d 30 (1998) as well as the greater latitude rule. Finally, at the plea hearing, Prater expressly affirmed that he was entering his pleas freely and voluntarily, and he cannot take an inconsistent position now. See *State v. Michels*, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987).

Our review of the record discloses no other potential issues for appeal.⁶ Accordingly, this court accepts the no-merit reports, affirms the judgment and order, and discharges appellate counsel of the obligation to represent Prater further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Angela Dawn Chodak is relieved of further representation of Daryl Prater in this appeal. See WIS. STAT. RULE 809.32(3).

⁶ Prater's pleas forfeited the right to raise other nonjurisdictional defects and defenses, including claimed violations of constitutional rights. See *State v. Kelty*, 2006 WI 101, ¶18 & n. 11, 294 Wis. 2d 62, 716 N.W.2d 886; see also *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

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

Samuel A. Christensen
Clerk of Court of Appeals