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DISTRICT I

October 15, 2013

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

2012AP2189-CRNM State of Wisconsin v. Andre Terrell Boyce (L.C. #2011CF1997)

Before Fine, Kessler and Brennan, JJ.

Andre Terrell Boyce appeals from a judgment of conviction, entered upon his guilty plea, for one count of first-degree sexual assault of a child. Appellate counsel, John T. Wasielewski, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Boyce 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 2011-12 version unless otherwise noted.

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

Boyce was originally charged with first-degree sexual assault of a child in 2006. He pled guilty and served approximately four years and seven months of a ten-year sentence before he was ultimately allowed to withdraw his guilty plea because of a defect in the plea colloquy. The State, unable to locate the victim at the time of the plea withdrawal, dismissed the charge but re-filed it in 2011 to commence the underlying action.

The complaint alleged that sometime between September 1, 2003, and December 1, 2003, when Boyce was fifteen or sixteen years old, Boyce had sexual contact with S.M.B. by fondling her buttocks over her clothing and then engaging her in sexual intercourse. S.M.B. was either ten or eleven years old during the specified time period.[2] The complaint further alleged that Boyce had told police that, during a power outage, he "began humping [S.M.B.] through her clothing" and was about to have intercourse with her when the lights came on. A few days later, he rubbed her vagina with his hands under her clothes for three to four minutes.

Boyce agreed to resolve this case with a guilty plea. During the colloquy, he admitted at least the facts of "humping" S.M.B.'s genital region with his through their clothes, for the purposes of arousing himself.[3] This time, the circuit court sentenced Boyce to nine years' initial

[2] Both Boyce and S.M.B. have a birthdate that falls within the charged range, hence the need for age ranges.

[3] "Whoever has sexual contact or sexual intercourse with a person who has not attained the age of 13 years is guilty of a Class B felony." WIS. STAT. § 948.02(1) (2003-04). "'Sexual contact' means … [i]ntentional touching by the … defendant, either directly or through clothing by the use of any body part or object, of the complainant's … intimate parts if that intentional touching is … for the purpose of … sexually arousing or gratifying the defendant." WIS. STAT. § 948.01(5)(a) (2003-04).

confinement and six years' extended supervision, with credit for the over four and one-half years already served.

Counsel identifies three potential issues: whether there is any basis for a challenge to the validity of Boyce's guilty plea, whether the circuit court properly exercised its sentencing discretion, and whether the circuit court's sentence in this case was vindictive. Boyce identifies several other issues that we will discuss throughout this opinion. However, we conclude that none of the potential issues possesses any arguable merit.

There is no arguable basis for challenging whether Boyce's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Boyce completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The form correctly acknowledged the maximum penalties Boyce faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262. The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08 (2007-08), ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court directly satisfied nearly all of its mandated duties, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. It did not directly inquire about Boyce's educational level or personally specify for Boyce the direct consequences of his plea. However, that information was listed on the plea questionnaire, which the circuit court may utilize in execution of its mandated duties. *See* ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794.

Boyce obliquely contends that his plea may not have been knowing, intelligent, and voluntary for two reasons. First, he highlights portions of the colloquy in which Boyce expressed that he did not understand "[t]he whole thing" that was going on. The circuit court asked questions to ascertain what specifically had confused Boyce, then answered his questions.[4] Boyce declined an opportunity for further consultation with counsel. The circuit court then asked again whether Boyce understood what was happening, and he answered affirmatively.

Second, Boyce also appears to be claiming that his plea was not knowing, intelligent, and voluntary because trial counsel failed to correct a misstatement by the circuit court. About six months before this case was recharged, Boyce had been charged in another case with six counts of second-degree sexual assault against a different victim. As part of a global settlement offer, the State had proposed that, if Boyce entered pleas in both cases, it would recommend that the circuit court consider the time Boyce had already spent in custody for the offense in this case.

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[4] When the circuit court asked Boyce what he did not understand, his first response was, "I was 15 at the time. They waited until '06 to charge me." Thus, Boyce was asking about a possible charging delay.

> "When the charging authorities have reason to believe that a child has committed an offense which, if committed by an adult, constitutes a crime, jurisdiction in a criminal court cannot be maintained on a charge brought after the child becomes eighteen, unless it is affirmatively shown that the delay was not for the purpose of manipulating the system to avoid juvenile court jurisdiction."

State v. Velez, 224 Wis. 2d 1, 9, 589 N.W.2d 9 (1999) (brackets and citation omitted).

Counsel was asked to address this issue in the first no-merit appeal, No. 2007AP624-CRNM, but concluded no issue of arguable merit existed. *See* ***Johnson v. Mielke***, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970) (court may take judicial notice of its own records, particularly when records are part of a connected case, especially where issues or parties are the same). The police report indicated that the assault was not reported to police until January 2006, at which point Boyce was already eighteen years old. Further, though reports suggested a possibility that police had known of the assault in 2003, counsel indicated that upon further investigation, the incident so suggesting actually involved Boyce and someone other than S.M.B.

The circuit court asked Boyce if he understood that, if he rejected the State's global plea offer and insisted on trial in the other case, "the fact that you served those four-and-a-half years in prison I don't have to consider them. I mean it's gone—I can. I don't know if I will or not."

It is not clear whether the State's offer meant that it would argue against sentence credit absent a global resolution of the two cases or whether it meant that, if there were a global agreement, it would argue Boyce's time served was a mitigating factor for the circuit court to consider in setting the overall sentence. To the extent that the State and circuit court meant that there would be no consideration of sentence credit, they likely would have been in error. *See* WIS. STAT. § 973.04 ("When a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement previously served.").[5] This appears to be what Boyce thinks should have been corrected. However, any error in the circuit court's admonition is harmless because the misstatement did not induce Boyce to take the global plea agreement: he went to trial in the other case.[6]

Ultimately, the plea questionnaire and waiver of rights form and addendum, along with the circuit court's colloquy, appropriately advised Boyce of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and

[5] The language of this statute is actually directed at the Department of Corrections, not the circuit court, but for purposes of this appeal, we will assume without deciding that it is equally a directive to the circuit court. *See* ***State v. Lamar***, 2011 WI 50, ¶26 n.6, 334 Wis. 2d 536, 799 N.W.2d 758.

[6] Boyce also points to language where the circuit court said, "But certainly if you plead guilty, that makes my decision a little easier." He claims this statement induced his plea, and his argument implies that the statement relates back to the sentence credit issue. A review of the transcript reveals otherwise. The State had filed an other-acts motion, seeking permission to introduce facts in this case at the trial in the other case once Boyce pled guilty. The circuit court, addressing Boyce, explained that it had not yet decided whether to grant the State's motion on other acts evidence but that a guilty plea in this case would make that decision easier. The comment had nothing to do with the sentence credit issue.

Hampton for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

The other issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a circuit 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 circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***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. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court here focused on punishment and community protection as objectives. It noted that Boyce had offended sexually at least twice—he was on juvenile probation for another sexual assault at the time he assaulted S.M.B., and he may have had a third victim, who he assaulted after he was released from prison.[7] Further, the circumstances of the assault of each of the three victims were similar. The circuit court additionally noted that Boyce had failed to take

[7] The third victim is the victim from the other case the State had attempted to resolve alongside this one. A jury acquitted Boyce of multiple charges in that case. The circuit court here noted that juries acquit for many reasons that may have little to do with guilt. It explained that, in its view—as it had presided over the trial—the victim and her mother were simply not good witnesses. While Boyce appears to be complaining that the circuit court's consideration of these events manifest judicial bias, the simple fact is that a circuit court may consider, at sentencing, even those charges for which a defendant has been acquitted. *See* ***State v. Frey***, 2012 WI 99, ¶47, 343 Wis. 2d 358, 817 N.W.2d 436.

prompt responsibility for his actions and continued to minimize his culpability. It also observed that Boyce had a terrible time in prison, racking up fifteen major conduct reports, and that he clearly needed help with a drug problem.

The maximum possible sentence Boyce could have received was sixty years' imprisonment. The sentence totaling fifteen years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.[8]

Relatedly, counsel addresses whether the circuit court's sentence was vindictive, and Boyce asserts that there "is clearly a motive of vindictiveness by the Judge." Due process prohibits a defendant from receiving a harsher sentence on resentencing because of vindictiveness for having successfully attacked his first conviction. *See* ***State v. Naydihor***, 2004 WI 43, ¶33, 270 Wis. 2d 585, 678 N.W.2d 220.

[8] Boyce appears to contend that there was judicial bias at sentencing, evidenced when the circuit court "went all out of composure" and displayed its clear "frustration and anger" at him during his "honesty in genuinely answering" the circuit court's questions.

Boyce's reference to page fourteen of the no-merit report makes no sense in the context of the complaint, but we do note that it is possible to read "frustration and anger" into the circuit court's discussion with Boyce at sentencing regarding his plea and culpability. Emotion aside, however, we discern nothing inherently improper in the circuit court commentary, which came from its impression—consistent with the presentence investigation report—that Boyce continued to minimize his guilt and the impact of his crime on the victim even while admitting the facts of the assault and even after having spent considerable time in prison. There is no arguable merit to a claim of judicial bias merely because the circuit court's comments may have been less than emotionally neutral in their delivery.

The circuit court in Boyce's original case had imposed a ten-year sentence; in this case, Boyce received a fifteen-year sentence. However, there is no arguable merit to a claim of judicial vindictiveness.[9] A presumption of judicial vindictiveness applies only if it is the same court imposing a longer sentence after a successful challenge. *See* ***id.***, ¶¶47-49. The ten-year sentence had been imposed by the Honorable Jeffrey A. Wagner; the fifteen-year sentence was imposed by the Honorable Dennis R. Cimpl. Thus, the presumption does not apply and, as a result, Boyce would have to show actual vindictiveness to secure relief, *see* ***id.***, ¶33, but the record does not support such a claim.

Moreover, even if the presumption of vindictiveness did apply here, it can be rebutted by objective evidence in the record that provides a nonvindictive justification for a new sentence. *See* ***id.***, ¶57. Here, the circuit court noted that there were allegations that Boyce had threatened S.M.B. when he was released from prison, he had incurred the additional assault charges, and, notably, he had acquired over forty various conduct reports, both minor and major, while incarcerated. These objective reasons constitute a nonvindictive justification for imposition of a greater sentence. There is no arguable merit to a claim of judicial vindictiveness.

[9] There is also no arguable merit to a claim of prosecutorial vindictiveness. "To establish a claim of prosecutorial vindictiveness, a defendant must show either a 'realistic likelihood of vindictiveness,' therefore raising a rebuttable presumption of vindictiveness, or actual vindictiveness." ***State v. Williams***, 2004 WI App 56, ¶43, 270 Wis. 2d 761, 677 N.W.2d 691 (citation omitted). "[A] presumption of vindictiveness attaches to a prosecutor who increases charges when … the state is pursuing a second conviction for the same course of conduct following a defendant's successful appeal." ***State v. Edwardsen***, 146 Wis. 2d 198, 203, 430 N.W.2d 604 (Ct. App. 1988); *see also* ***United States v. Goodwin***, 457 U.S. 368, 376 (1982). Here, there was no increase in the charge, so there is no presumption of vindictiveness, and there is nothing in the record that would support a claim of actual vindictiveness.

Our independent review of the record reveals no other potential issues of arguable merit.[10]

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 John T. Wasielewski is relieved of further representation of Boyce in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[10] We note that Boyce's no-merit response lists a handful of other issues, including double jeopardy, inaccurate sentencing information, a conflict of interest with appellate counsel, and "Manufactur [sic] evidence." First, double jeopardy is not a factor because Boyce withdrew his original plea. *See* ***State v. Schmear***, 28 Wis. 2d 126, 135, 135 N.W.2d 842 (1965). Second, the supposed inaccurate information is that "in which the Judge stated at least you have you H.S.E.D when Im at a Elementary level of comprehension." (Errors in original.) However, it was not inaccurate of the circuit court to note that Boyce had the equivalent of a high school diploma—completion of that alternative was indicated on the plea questionnaire form. In any event, the circuit court was advised that Boyce's comprehension level was around the fifth grade, but it nevertheless gave Boyce credit at sentencing for finishing the coursework. Third, the nature of any conflict with appellate counsel is not apparent from the record or the appellate filings, though we note that the mere filing of a no-merit report does not constitute a basis for claiming a conflict of interest. Finally, the claim of manufactured evidence and any other claims that might be in Boyce's response but are not expressly addressed herein are deemed to lack sufficient merit to warrant further discussion. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996).