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May 5, 2014

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

2013AP2118-CRNM State of Wisconsin v. Michael W. Caron (L.C. #2012CF976)

Before Curley, P.J., Fine and Kessler, JJ.

Michael W. Caron appeals from a judgment of conviction for one count of second-degree sexual assault with use of force, contrary to WIS. STAT. § 940.225(2)(a) (2011-12), which was entered on his no-contest plea.[1] Caron's postconviction/appellate counsel, John R. Breffeilh, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Caron has not filed a response. We have independently reviewed the record and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the no-merit report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

According to the criminal complaint, which was used as the factual basis for the plea, a woman told the investigating police officer that she was sitting on her front porch when two men she did not know drove up and forced her into a car. They drove her to another home. One of the men, who was later identified as Caron, stayed at the home with the victim, while the other man left. Caron choked the woman and twisted her arm. Caron ordered her to take her shirt off and pulled her shorts and underwear down to her ankles. He then forced her to engage in penis-vagina sexual intercourse, to which she did not consent. Caron ejaculated, wiped his penis and the woman's vagina with a purple hand towel, and "then grabbed his clothes and her phone and left." The woman ran to the home of a friend and called 911.

The woman was transported to a sexual assault treatment center and underwent an examination that included using swabs to gather genetic material that was left by the perpetrator. DNA recovered from both the swabs and the purple hand towel matched the DNA profile of Caron, whose profile was already in the DNA database because he is a convicted felon.

Caron was arrested and charged with the aforementioned crime. He ultimately entered a plea agreement with the State pursuant to which he pled no contest and the State agreed to recommend six-to-seven years of initial confinement and eight-to-nine years of extended supervision. Further, the State agreed not to make a recommendation as to whether the sentence should be imposed consecutive to or concurrent with a revocation sentence that Caron was

already serving.[2] At the plea hearing, the State also told the trial court that part of the agreement was that Caron was "agreeing that the criminal complaint is true and correct and accurate." The trial court accepted Caron's plea and found him guilty.

No presentence investigation report was prepared, but Caron submitted a memorandum that was prepared by a private investigator and at sentencing, the trial court said that it had reviewed the memorandum. The trial court imposed a sentence of nine years of initial confinement and eight years of extended supervision, consecutive to any other sentence. It also ordered Caron to provide a DNA sample and pay the DNA surcharge "if you haven't already."[3]

The no-merit report addresses two primary issues: (1) whether Caron's no-contest plea was knowingly, voluntarily, and intelligently entered; and (2) whether the trial court erroneously exercised its sentencing discretion.[4] This court agrees with postconviction/appellate counsel's

[2] Caron was serving a reconfinement sentence at the time he was sentenced in this case and was scheduled to be released in about nine months.

[3] Although the trial court's statement suggests that Caron may not be required to pay the DNA surcharge, he is, in fact, required to pay it because he was convicted of violating WIS. STAT. § 940.225. *See* WIS. STAT. § 973.046(1r) ("If a court imposes a sentence or places a person on probation for a violation of s. 940.225 … the court shall impose a deoxyribonucleic acid analysis surcharge of $250."). The judgment of conviction indicates that Caron must pay the surcharge.

[4] The no-merit report also discusses the fact that Caron asked for a new attorney eighteen days before the scheduled jury trial (the date on which he ultimately pled no contest). When Caron made the request, he told the trial court that he felt there should be more communication between him and trial counsel and that he felt pressured to accept a plea. The trial court indicated that it was applying the balancing test from ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988), and it denied Caron's request after finding that the issue could be resolved with more communication before trial. The trial court also noted that a delay could negatively impact the victims or witnesses in the case. In the no-merit report, postconviction/appellate counsel concludes that there would be no merit to challenging the trial court's exercise of discretion in denying Caron's request, and he also notes that Caron went on to enter a plea agreement eighteen days after his request was denied. We agree with postconviction/appellate counsel's detailed analysis of this issue and conclude that there would be no merit to seeking relief based on the trial court's denial of Caron's request for new trial counsel.

description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In addition to agreeing with postconviction/appellate counsel's description and analysis, we will briefly discuss those issues.

We begin with the plea. There is no arguable basis to allege that Caron's no-contest plea was not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The trial court conducted a thorough plea colloquy addressing Caron's understanding of the plea agreement and the charge to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his plea. *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

The trial court confirmed that Caron had gone through the elements and penalties of the crime with trial counsel, and it also stated the three elements.[5] The trial court told Caron that it was not bound by the parties' recommendations, and it confirmed that Caron had not been coerced into pleading guilty. Both parties agreed that the trial court could "use the criminal complaint as a factual basis for the plea," and the trial court said it would rely on that criminal complaint and waive any additional testimony as to the facts. The plea questionnaire, waiver of rights form, Caron's conversations with his trial counsel, and the trial court's colloquy

[5] The applicable jury instruction was also attached to the plea questionnaire, and trial counsel handwrote the word "Explained" next to the elements section of the jury instruction.

appropriately advised Caron of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. There would be no basis to challenge Caron's no-contest plea.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial 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 it may consider several subfactors. ***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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. For instance, the trial court said that the offense was "highly assaultive and violent" and that the victim had

"emotional scars" and was "living in terror" as a result of Caron's actions.[6] The trial court recognized that Caron was on extended supervision at the time of the offense and found that confinement was "necessary to protect the community." The trial court also stated that its most important sentencing objectives in this case were punishment and deterrence. There would be no merit to challenge the trial court's compliance with ***Gallion***.

Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Caron was facing a maximum sentence of forty years. The total amount of confinement imposed—seventeen years—was less than one-half of what could have been imposed and is not excessive. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Given the violent nature of the assault—which included taking the victim to a different location, choking her, and forcing her to engage in penis-to-vagina sexual intercourse—the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Ocanas***, 70 Wis. 2d at 185. For these reasons, we conclude that there would be no arguable merit to a challenge to the trial court's sentencing discretion and the severity of the sentence.

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

Upon the foregoing, therefore,

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

[6] A statement from the victim was read at the sentencing. In addition, the State noted that the victim had suffered physical injuries from the assault, including tearing, redness, and swelling.

IT IS FURTHER ORDERED that Attorney John R. Breffeilh is relieved of further representation of Caron in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals