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May 28, 2014

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

2013AP1460-CRNM State of Wisconsin v. Shanell L. Gordon (L.C. #2011CF380)
2013AP1461-CRNM State of Wisconsin v. Shanell L. Gordon (L.C. #2011CF1202)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

In these consolidated matters, Shanell L. Gordon appeals from judgments of conviction entered upon his guilty pleas to two counts of second-degree sexual assault and one count of false imprisonment, all as a repeater pursuant to WIS. STAT. § 939.62 (2011-12).[1] Gordon's

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted. In Racine county circuit court case No. 2011CF380, which underlies appeal No. 2013AP1460-CRNM, Gordon was convicted of second-degree sexual assault and false imprisonment. In circuit court case No. 2011CF1202, which underlies appeal No. 2013AP1461-CRNM, Gordon was convicted of second-degree sexual assault.

appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Gordon received a copy of the report and filed a response. Upon consideration of the no-merit report, Gordon's response, and our independent review of the record, we conclude that the judgments may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Gordon was charged with sexually assaulting three separate women between February 25 and March 24, 2011. According to the criminal complaint in No. 2011CF1202, on February 25, 2011,[2] Gordon sexually assaulted NG, a high-school student, while she was returning home from school. Gordon grabbed NG from behind, moved her to a secluded location, and after threatening to kill her, engaged in forcible vaginal intercourse. NG reported the attack and Gordon was positively identified as the perpetrator through DNA evidence. Gordon was charged with one count each of second-degree sexual assault and false imprisonment, both as a repeater.

In No. 2011CF380, the complaint alleges that on March 9, 2011, Gordon followed MC into a laundromat bathroom where he touched her breasts and attempted to take her pants off. MC was able to run out of the bathroom to a store across the street, where she called police. The incident was captured on the laundromat's security camera. On March 24, 2011, Gordon followed SMV on the city bus from a local mall to her home. Eventually, Gordon pushed his way inside SMV's apartment where he twice forced her to engage in vaginal intercourse and ejaculated on her body. During the assault, Gordon threatened to kill SMV. When he left,

[2] It appears that the judgment entered in connection with 2011CF1202 misstates the offense date as March 24, 2011. The record indicates that the offense occurred on February 25, 2011. We suggest that the trial court direct the clerk's office to enter a corrected judgment of conviction.

Gordon took SMV's cell phone, and SMV ran out of her apartment and called the police. SMV's neighbor witnessed part of the assault. Gordon was charged with seven counts relating to the assaults of MC and SMV.[3]

During the proceedings, trial counsel questioned Gordon's competency to proceed and the trial court ordered a competency evaluation. The evaluator reported that Gordon suffered from "significant cognitive limitations [and] measured at the upper-end of the range of Mild Mental Retardation to low within the Borderline range of intelligence." She noted that Gordon had undergone prior competency evaluations in 2005, 2007, and 2008, in connection with earlier criminal cases, and had consistently been found competent despite his cognitive limitations. Based on her interview with Gordon, she determined that he was legally competent to proceed. At a hearing in February 2012, Gordon informed the trial court that he did not wish to challenge the report's findings and conclusions, and the trial court determined that he was competent.

On May 21, 2012, pursuant to a plea agreement encompassing both cases, Gordon pled guilty to two counts of second-degree sexual assault as a repeater and one count of false imprisonment as a repeater. The State agreed to recommend a global aggregate bifurcated sentence totaling sixty years, with forty years of initial confinement and twenty years of extended supervision. After engaging Gordon in an extensive plea colloquy, the trial court accepted his pleas, found him guilty, and granted the State's motion to dismiss and read in the

[3] The information filed in 2011CF380 charges Gordon as a repeater with three counts of second-degree sexual assault, two counts of false imprisonment, one count of burglary, and one count of theft.

remaining charges. The trial court ordered a presentence investigation report (PSI) and scheduled the case for sentencing.[4]

At the August 24, 2012 sentencing hearing, the trial court pointed out that though Gordon pled guilty to three offenses, it appeared from the PSI that he had denied committing all of the offenses to the PSI writer. The trial court asked trial counsel if he had discussed this with Gordon and whether Gordon was contemplating a plea withdrawal motion. Trial counsel informed the court that he had discussed this issue with Gordon, who told him "he was not trying to withdraw his plea and that he stood on his admission." Trial counsel confirmed that he had discussed with Gordon that it would be more difficult to withdraw his plea after sentencing. The trial court then addressed Gordon directly:

> Now, Mr. Gordon, I know that [trial counsel] has discussed this with you and I'm sure he's discussed it with you accurately and fully, but I would like it to be reflected on the record here in court. In reading the statements that you made to the presentence investigator here, things that you said would seem to be denials that you had committed one or more of these offenses. And you did, in fact, plead guilty to all of these offenses. And if you are now denying them, obviously consideration has to be given as to whether you may wish to try to withdraw your guilty pleas and proceed to trial.
>
> Now, as I know, [trial counsel] has explained to you there is a very significant difference in both the burden of proof and also the grounds that have to be shown in order to withdraw a plea before sentencing as opposed to after sentencing.

The trial court then detailed the difference between the presentencing and postsentencing plea withdrawal standards. Gordon stated that he understood and did not have any questions. The

[4] The first-filed PSI misstated the offenses of conviction and at the trial court's direction, the Department of Corrections prepared and filed a corrected PSI prior to sentencing.

trial court determined that Gordon was making a knowing and voluntary decision to leave his pleas intact and proceed to sentencing.

After hearing the parties' sentencing recommendations and arguments, the trial court imposed the following: (1) on count three in 2011CF380, second-degree sexual assault, nineteen years of initial confinement followed by eight years of extended supervision; (2) on count six in 2011CF380, false imprisonment, two years of initial confinement followed by three years of extended supervision; and (3) on count one in 2011CF1202, second-degree sexual assault, nineteen years of initial confinement followed by nine years of extended supervision. All three sentences were ordered to run consecutive to each other, for an aggregate sentence of forty years of initial confinement followed by twenty years of extended supervision.

The no-merit report addresses whether there is any basis for a challenge to the validity of Gordon's guilty pleas and whether the trial court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

The record demonstrates that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The trial court specifically ascertained Gordon's understanding of the nature of and factual basis for the charge, the constitutional rights waived by his guilty pleas, and the parties' plea agreement. The trial court correctly recited the maximum penalties for each offense with the repeater enhancer, and ascertained Gordon's understanding that the court was not bound by the parties' agreement or recommendations and could sentence Gordon to the statutory maximum on each count. The court drew Gordon's attention to the completed plea

questionnaires on file and ascertained that he had reviewed and signed the forms, and understood their contents, including their addendums and the attached jury instructions. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (a completed plea questionnaire and waiver of rights form is competent evidence of a knowing, intelligent, and voluntary plea). The forms and attachments correctly state the offense elements and the constitutional rights waived by a guilty plea. No issue of merit exists from the plea taking.

The other issue counsel addresses is whether 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. At sentencing, a 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. Here, in fashioning its sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***Ziegler,*** 289 Wis. 2d 594, ¶23. The trial court characterized Gordon's offenses as "extremely violent by their nature" and serious in that they involved random, vulnerable victims who were profoundly affected by Gordon's actions:

> It's hard to imagine what can be more frightening and terrifying to any woman, young or old, who's alone and set upon by an individual, who's threatened with death, who's forcefully subjected to penis to vagina intercourse without any form of protection.

The trial court acknowledged Gordon's own cognitive limitations but determined that they did not deprive him "of the ability to control [his] behavior." The trial court considered

Gordon's lengthy prior record, which included a conviction for a similarly violent third-degree sexual assault, and his "extremely poor record in the correctional system, both in the community and in confinement." The court observed that Gordon had numerous prior opportunities for treatment and was on supervision when he committed the present offenses. The court found Gordon's "failure to make any inroads or any progress towards the completion of necessary treatment [to be] very, very troubling and very aggravating in terms of sentencing." The trial court determined that its primary sentencing objectives were "community protection and punishment" and that Gordon's history showed him to be "an incredible threat to the community, and particularly, any woman in the community." Given its conclusion that Gordon remained "the same danger, the same time bomb of reoffending that [he had] been for a very long period of time," the trial court determined that lengthy periods of incarceration and extended supervision were necessary to achieve its sentencing objectives.

In his response to the no-merit report, Gordon emphasizes his desire to further apologize to his victims, but believes that he received too much time and would like "to try to get a little time back." On review, we afford the sentencing court a strong presumption of reasonability, and if discretion was properly exercised, we follow "a consistent and strong policy against interference" with the court's sentencing determination." ***Gallion***, 270 Wis. 2d 535, ¶18 (citation omitted). We will sustain a sentencing court's reasonable exercise of discretion even if this court or another judge might have reached a different conclusion. ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. In this case, the trial court identified proper objectives, considered relevant factors, explained its process, and reached a reasonable conclusion. It considered Gordon's culpability in light of his cognitive limitations and permissibly focused on the need to punish Gordon and protect the public. *See* ***Ziegler***, 289

Wis. 2d 594, ¶23 (the weight to be given to each factor is committed to the trial court's discretion). There is no meritorious challenge to the trial court's exercise of sentencing discretion.

Further, we cannot conclude that the sentence imposed was unduly harsh. A sentence may be considered unduly harsh or unconscionable only when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶¶31-32 (citation omitted). Here, the sixty-year bifurcated sentence was well below the maximum sentence available considering all three convictions, and is not so excessive or unusual as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgments, and discharges appellate counsel of the obligation to represent Gordon further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney John R. Breffeilh is relieved from further representing Shanell L. Gordon in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals