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September 3, 2014

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

2013AP2252-CRNM State of Wisconsin v. Thomas Thornhill (L.C. #2010CF4474)

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

Thomas Thornhill appeals from a judgment convicting him of two counts of first-degree sexual assault of a child, two counts of aggravated battery, one count of false imprisonment, and one count of second-degree sexual assault. Thornhill's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967).

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

Thornhill filed a response. Counsel then filed a supplemental no-merit report. After reviewing the record, counsel's reports, and Thornhill's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. WIS. STAT. RULE 809.21.

Thornhill was convicted following the entry of guilty pleas to two counts of first-degree sexual assault of a child, two counts of aggravated battery, one count of false imprisonment, and one count of second-degree sexual assault. The charges stemmed from two extremely violent sexual assaults in the city of Milwaukee that were linked by a DNA profile matching Thornhill's. In the first incident, Thornhill was accused of abducting a nine-year-old girl, confining her in a van, beating and raping her. In the second, he was accused of beating and raping an adult female in an alley outside her apartment. In both instances, the victims suffered significant injuries and were essentially left for dead. The circuit court sentenced Thornhill to a total of sixty-nine years of imprisonment, consisting of fifty years of initial confinement followed by nineteen years of extended supervision.

The no-merit report addresses the following appellate issues: (1) whether the circuit court properly denied Thornhill's pretrial motion to sever the charges against him; (2) whether Thornhill's guilty pleas were knowingly, intelligently, and voluntarily entered; (3) whether there was a sufficient factual basis for the pleas; (4) whether the circuit court properly exercised its discretion at sentencing; and (5) whether there is a basis for a motion for sentence modification.

With respect to Thornhill's pretrial motion to sever the charges against him, the record demonstrates that the circuit court properly denied it. Thornhill had filed a motion arguing that the joinder of all counts would prejudice his right to a fair trial. Following a hearing on the

matter, the circuit court denied the motion, concluding that (1) the charges were properly joined and (2) Thornhill would not be unfairly prejudiced by the joinder. In reaching its decision, the court explained how each incident would have been admissible at a trial of the other as other acts evidence under ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). Reviewing the court's ruling, we agree with counsel that any challenge to it would lack arguable merit.

With respect to the issues involving Thornhill's guilty pleas, the record shows that the circuit court engaged in a thorough colloquy that satisfied the applicable requirements of WIS. STAT. § 971.08(1)(a) and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. A signed plea questionnaire and waiver of rights form was entered into the record along with the relevant jury instructions. The circuit court ascertained that a factual basis existed for the pleas based on the facts in the criminal complaint. Accordingly, we agree with counsel that any challenge to the entry of Thornhill's pleas would lack arguable merit.

With respect to the sentence imposed, the record reveals that the circuit court's decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In imposing an aggregate sentence of sixty-nine years of imprisonment, the court considered the seriousness of the offenses, Thornhill's character, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by the brutal nature of the crimes,[2] the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457

[2] At sentencing, the circuit court judge described the case as "one of the two or three worst" cases that he had seen during his ten years on the bench.

(1975). We agree with counsel that a challenge to Thornhill's sentence would lack arguable merit.

Finally, with respect to the issue of sentence modification, the no-merit report explains that no new factors have been discovered which might warrant a motion to modify Thornhill's sentence. Consequently, we are satisfied that counsel properly analyzes the issue as without merit, and we will not discuss it further.

As noted, Thornhill filed a response to counsel's no-merit report. In it, he contends that the circuit court erroneously exercised its discretion in denying his requests for new counsel. He further accuses the court of being biased against him based on comments it made when denying his requests.[3]

Prior to entering his guilty pleas, Thornhill twice requested new counsel. The first time was after being represented by trial counsel for approximately fifteen months and just five days before the first scheduled trial. The second time was approximately four months later, some five weeks prior to the newly scheduled trial date, after Thornhill had filed a complaint against trial counsel with the Office of Lawyer Regulation (OLR). On both occasions the circuit court concluded that the requests were nothing more than delay tactics. In doing so, the court made the following statement, which Thornhill cites as evidence of bias:

[3] Thornhill also complains that the circuit court violated his rights by not informing him of his right to self-representation. This complaint does not present an issue of arguable merit because Thornhill never made a clear and unequivocal declaration of that right. *See* ***State v. Darby***, 2009 WI App 50, ¶1, 317 Wis. 2d 478, 766 N.W.2d 770 (the circuit court has no obligation to advise a defendant of the right to self-representation prior to a clear and unequivocal declaration).

> There is a certain segment of defendants on my calendar, I have 150 cases, and there is about a dozen or maybe 15 defendants that are difficult, that are calcitrant, misbehaving defendants who will complain about any attorney or all attorneys provided to them. It would be my guess in supposition that Mr. Thornhill falls right in that category. Mr. Thornhill could be given the late Johnnie Cochran and F. Lee Bailey in their primes and that would not be good enough for Mr. Thornhill. It is nothing less than game playing from defendants, particularly on very serious charges, homicides, child sexual assaults or in this case allegations like abuction of a child, kidnapping. For defendants to, A, make a stink, usually meritless, completely meritless, about their attorney, they are upset with their attorney because the attorney didn't get like, for instance, in this case [trial counsel] should get, what, a dismissal of [all] counts[?]… Neither [trial counsel] nor F. Lee Bailey is going to get that from the State…

Reviewing Thornhill's allegations against the circuit court, we conclude that no issue of arguable merit could arise from them. Whether to grant or deny a defendant's request for new counsel is left to the sound discretion of the circuit court. ***State v. Darby***, 2009 WI App 50, ¶28, 317 Wis. 2d 478, 766 N.W.2d 770. Here, we are satisfied that the facts of record support the court's denials.[4] As for Thornhill's claim of judicial bias, the above statement, by itself, is not enough to overcome the presumption that the court was free of bias and prejudice. *See* ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. Indeed, after denying Thornhill's second request for new counsel, the court reiterated Thornhill's presumption of innocence, observing, "The defendant's innocent until proven guilty, but we are going to trial." For these reasons, we conclude that Thornhill's issues relating to the circuit court lack arguable merit.

[4] Even if that were not the case, Thornhill forfeited the right to complain about the circuit court's denials of new counsel by pleading guilty. *See* ***State v. Kelty***, 2006 WI 101, ¶18 n.11, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Rockette***, 2005 WI App 205, ¶32, 287 N.W.2d 257, 704 N.W.2d 382.

In his response, Thornhill also contends that his trial counsel was ineffective. Specifically, he accuses counsel of (1) failing to investigate "leads," (2) failing to have him produced for court, (3) failing to communicate with him, and (4) having a conflict of interest stemming from the OLR complaint that Thornhill had filed.[5]

While we normally decline to address claims of ineffective assistance of trial counsel for the first time on appeal, ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979), appellate counsel's no-merit report seeks counsel's discharge from the duty of representation. Therefore, we must independently determine whether Thornhill's claims have sufficient merit to require appellate counsel to file a postconviction motion and request a ***Machner*** hearing.

Again, reviewing Thornhill's allegations against trial counsel, we are satisfied that no issue of arguable merit could arise from them. As noted in the supplemental no-merit report, Thornhill fails to outline what "leads" trial counsel should have investigated or how they would have impacted his case. In any event, he waived the right to explore such defenses by pleading guilty.[6] Moreover, the record confirms that Thornhill was produced for all substantive hearings[7] and that he had visited with trial counsel on at least four occasions before entering his pleas. Finally, the circuit court implicitly rejected Thornhill's alleged conflict of interest when denying

[5] Thornhill also accuses counsel of failing to file a permissive appeal based on the circuit court's denial of his motion to sever. Given our determination that a challenge to that decision would lack arguable merit, counsel was not ineffective for failing to pursue this. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have been rejected).

[6] In the addendum to the signed plea questionnaire and waiver of rights form, Thornhill expressed an understanding that by pleading he was giving up defenses such as alibi, intoxication, self-defense, and insanity.

[7] The hearings where Thornhill was not produced related to scheduling matters.

his second request for new counsel, and we are satisfied that the record supports the court's decision. Given these facts, along with Thornhill's statement at the plea hearing that he was satisfied with his trial counsel's representation,[8] we conclude that Thornhill's claims lack sufficient merit to require appellate counsel to file a postconviction motion and request a ***Machner*** hearing.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.[9] Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Scott D. Obernberger of further representation in this matter.

Upon the foregoing reasons,

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

[8] At the plea hearing, the circuit court asked Thornhill, "[A]re you satisfied with your attorney's representation on these matters?" Thornhill responded, "Yes."

[9] Thornhill did move to suppress certain inculpatory statements he made to police. However, he elected not to litigate the motion prior to entering his guilty pleas. Thus, we deem the issue abandoned and will not discuss it further. *See* ***State v. Woods***, 144 Wis. 2d 710, 716, 424 N.W.2d 730 (Ct. App. 1988) (motion made but not pursued is abandoned).

IT IS FURTHER ORDERED that Attorney Scott D. Obernberger is relieved of further representation of Thornhill in this matter.

Diane M. Fremgen
Clerk of Court of Appeals