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DISTRICT I

January 28, 2015

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

2014AP196 State of Wisconsin v. Tywon J. Moore
(L.C. #2007CF002109)

Before Kessler, Brennan, JJ., and Thomas Cane, Reserve Judge.

Tywon J. Moore, *pro se*, appeals from a trial court order that denied his WIS. STAT. § 974.06 (2011-12) postconviction motion seeking plea withdrawal but amended the judgment of conviction to accurately reflect one of the crimes to which Moore pled guilty.[1] Moore continues to seek plea withdrawal on a number of grounds related to whether he faced a twenty-five-year minimum period of initial confinement for first-degree sexual assault of a child. Upon our review of the briefs, we conclude at conference that this matter is appropriate for summary

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

disposition. *See* WIS. STAT. RULE 809.21(1). For reasons explained below, we summarily affirm the trial court's order.

In April 2007, Moore was charged with two crimes: (1) one count of second-degree sexual assault of a child—sexual intercourse with a person under the age of sixteen, with an offense date of March 24, 2007; and (2) one count of first-degree sexual assault of a child—sexual contact with a person under the age of thirteen, with an offense date "[b]etween April 12, 2007 and April 13, 2007." The maximum penalty indicated in the complaint for count one, a Class C Felony, was forty years, and the maximum penalty indicated in the complaint for count two, a Class B Felony, was sixty years. The complaint also stated that the minimum sentence for both crimes was twenty-five years of initial confinement.

At the initial appearance, the State moved to strike the reference to a minimum period of initial confinement for count one, explaining that it did not apply. The court commissioner deferred ruling on that motion. At the preliminary hearing before a different court commissioner, the State moved to strike from the complaint the minimum confinement provision listed in the complaint for both counts. The State explained that neither second-degree sexual assault nor first-degree sexual assault involving sexual *contact* was subject to a mandatory minimum period of initial confinement. The commissioner granted the motion and amended the complaint by crossing out the mandatory minimum references. The State later filed an amended complaint that did not reference a mandatory minimum sentence for either count.

At a subsequent appearance before the trial court, the parties discussed confusion caused by the simultaneous enactment of 2005 Wis. Act 430 and 2005 Wis. Act 437, both of which made changes to statutes—including WIS. STAT. § 948.02—addressing sex-related crimes against

children and the applicable penalties.[2] The trial court indicated that it believed a mandatory minimum sentence may apply, but it did not resolve the issue.[3] *See* WIS. STAT. § 939.616(1) (2005-06) ("If a person is convicted of a violation of s. 948.02(1)(b) or (c) or 948.025(1)(a), the court shall impose a bifurcated sentence under s. 973.01. The term of confinement in prison portion of the bifurcated sentence shall be at least 25 years.").

Subsequently, the case was transferred to a different judge due to judicial rotation and Moore entered a plea agreement with the State.[4] Moore agreed to plead guilty to: (1) one count of second-degree sexual assault (sexual contact), contrary to WIS. STAT. § 948.02(2) (2005-06); and (2) one count of first-degree sexual assault, contrary to WIS. STAT. § 948.02(1)(b) (2005-06).[5] In exchange, the State agreed to recommend a global sentence of twenty years of initial confinement and ten years of extended supervision.[6] The guilty plea questionnaire indicated that the maximum penalties for counts one and two were forty years and sixty years, respectively,

[2] The date of enactment for both 2005 Wis. Act 430 and 2005 Wis. Act 437 was May 22, 2006, and both took effect on June 6, 2006. The challenge presented by the enactment of both Wis. Act 430 and Wis. Act 437 was discussed at length in ***State v. Thompson***, 2012 WI 90, ¶¶27-40, 342 Wis. 2d 674, 818 N.W.2d 904.

[3] The Honorable Daniel L. Konkol presided over the case when the parties discussed the amendment of WIS. STAT. § 948.02.

[4] The Honorable M. Joseph Donald accepted Moore's plea and sentenced him.

[5] The criminal complaint did not list the applicable version of the statutes. The crime of second-degree sexual assault, which carries a Class C felony, remained the same in the 2003-04, 2005-06, and 2007-08 versions of the statutes. The crime of first-degree sexual assault was defined in different ways by 2005 Wis. Act 430 and 2005 Wis. Act 437, both of which became effective on June 6, 2006. The legislature resolved the conflict in those acts with the passage of 2007 Wis. Act 80, which took effect on March 26, 2008.

[6] As part of the plea agreement, the State recommended a term of confinement in the House of Correction for another felony—violating the sex offender registry—that was handled at the same plea hearing. That case is not before the court at this time and we will not address it, except to note that the trial court ultimately imposed a one-year concurrent sentence for that crime.

and the trial court reiterated those maximums. Neither the parties nor the trial court discussed whether there was any possibility that the first-degree sexual assault count was subject to the twenty-five-year minimum period of initial confinement outlined in WIS. STAT. § 939.616(1) (2005-06). The presentence investigation report stated the potential maximum sentences as forty and sixty years and did not reference the potential applicability of a twenty-five-year minimum period of initial confinement for the first-degree sexual assault.

At sentencing, there was once again no reference to the potential applicability of a twenty-five-year minimum period of initial confinement. The trial court adopted the State's recommendation and sentenced Moore to two concurrent terms of twenty years of initial confinement and ten years of extended supervision.

Counsel was appointed to represent Moore in postconviction proceedings and he filed a no-merit report with this court. After reviewing the no-merit report, this court directed counsel to submit a supplemental no-merit report addressing several issues related to count two (first-degree sexual assault of a child), including whether Moore was subject to a twenty-five-year mandatory minimum period of initial confinement, whether he understood his potential punishment, and "whether the State made a clerical error in charging Moore with a violation of [WIS. STAT.] § 948.02(1)(b) rather than § 948.02(1)(e)," given that § 948.02(1)(e) referred to "sexual contact" and was not subject to the mandatory minimum penalty outlined in WIS. STAT. § 939.616(1) (2005-06). *See* ***State v. Moore***, No. 2008AP3203-CRNM, unpublished order at 2-5 (WI App July 17, 2009).[7] In response, postconviction/appellate counsel filed a letter, which also

[7] This order does not appear in the appellate record, although Moore has included a copy of the order in his appendix. This court takes judicial notice of the order we issued on July 17, 2009.

bore Moore's signature, indicating that counsel had "discussed the matter with Moore and that Moore wishes to dismiss the appeal." This court dismissed the appeal, as it was required to do. *See* ***State v. Moore***, No. 2008AP3203-CRNM, unpublished order at 1 (WI App Aug. 17, 2009) (citing ***State v. Lee***, 197 Wis. 2d 959, 972, 542 N.W.2d 143 (1996)).

Neither postconviction/appellate counsel nor Moore filed any postconviction motions or appeals until December 2013, when Moore filed the *pro se* WIS. STAT. § 974.06 motion that is the subject of this appeal. In that motion, Moore moved to withdraw his plea or for resentencing before a different judge on grounds that the trial court failed to advise Moore that he was subject to a mandatory twenty-five-year term of initial confinement for the first-degree sexual assault charge. Moore also alleged that his trial counsel provided ineffective assistance by erroneously advising him that the mandatory minimum did not apply and by encouraging him to enter a guilty plea. Moore argued that his pleas were not knowingly, intelligently, and voluntarily entered because he was not aware of the mandatory minimum for count two. Underlying Moore's postconviction motion was his belief that he was, in fact, subject to a twenty-five year mandatory minimum term of initial confinement for violating WIS. STAT. § 948.02(1)(b) (2005-06). *See* WIS. STAT. § 939.616(1) (2005-06).

The trial court, applying the 2007-08 version of the statutes—which reflects the statutes as amended after the legislature in March 2008 remedied the conflict created by 2005 Wis. Act 430 and 2005 Wis. Act 437—stated that because the complaint and amended complaint alleged

sexual contact, rather than sexual intercourse, the complaint should have listed the crime as a violation of WIS. STAT. § 948.02(1)(e), rather than § 948.02(1)(b).[8] The trial court explained:

> The court notes that sec. 948.02(1)(b) formerly included both sexual intercourse and sexual contact, but in 2006, the legislature created sec. 948.02(1)(e), which referenced only sexual contact, and left sexual intercourse solely under the provisions of sec. 948.02(1)(b). Clearly, [Moore] entered his plea to sexual *contact* with a person under the age of 13 in violation of sec. 948.02(1)(e), and not (1)(b), because sexual intercourse was not an element.[9] Under the circumstances, the court will order the judgment amended to reflect that count two is a violation of sec. 948.02(1)(e), Stats….
>
> Under the circumstances, the provisions of sec. 939.616(1)(r) [2007-08] do not apply, and [Moore's] mandatory minimum sentence arguments have no relevance. Because there was no mandatory minimum confinement term, there was no duty to apprise the defendant of same. Neither the court nor trial counsel was deficient in this respect. The failure of the complaint and amended complaint to accurately reflect the crime under sec. 948.02(1)(e), Stats., is a technical defect from which no prejudice can be claimed in light of [Moore's] admission at the plea hearing of the facts as set forth in the amended complaint. Further, any claim that due process is violated by such an amendment is rejected.

(Footnote omitted.)

Moore now appeals. He presents six arguments: (1) his pleas were not knowingly, intelligently, and voluntarily entered, and the trial court did not conduct an adequate plea colloquy; (2) trial counsel provided ineffective assistance; (3) the trial court erroneously denied Moore an evidentiary hearing on his postconviction motion; (4) the trial court erroneously denied Moore's motion to withdraw his guilty pleas; (5) Moore's sentence was excessive; and

[8] The Honorable Stephanie G. Rothstein ruled on Moore's postconviction motion.

[9] Both the complaint and amended complaint alleged that Moore "did have sexual contact with … a person who had not attained the age of 13 years."

(6) Moore was denied the effective assistance of postconviction/appellate counsel because counsel filed a no-merit report. We reject Moore's sixth argument without discussion because it is raised for the first time on appeal.[10] *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495 (Court of appeals generally does not review an issue raised for the first time on appeal.).

All of Moore's remaining arguments are based on his assumptions that he was subject to a twenty-five-year maximum penalty for violating WIS. STAT. § 948.02(1)(b) and that the maximum penalty for violating WIS. STAT. § 948.02(1)(e) was thirty, rather than sixty years. We begin our analysis with the trial court's decision to amend the judgment of conviction to reflect that Moore pled guilty to WIS. STAT. § 948.02(1)(e). Defects in the judgment of conviction may be corrected at any time. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. The trial court may either correct the clerical error on the judgment or may direct the clerk's office to make such a correction. ***Id.***, ¶5. Moore is not entitled to relief unless he demonstrates that the error in the complaint, amended complaint, and judgment of conviction prejudiced him. *See* WIS. STAT. § 971.26 (judgment shall not be affected by any defect or imperfection in matters of form which do not prejudice defendant).

The trial court elected to amend the judgment of conviction to reflect the crime to which Moore actually pled guilty: having sexual contact with a person under the age of thirteen. We agree with the trial court that the charging documents tracked the language of WIS. STAT.

[10] Moore's postconviction motion baldly asserted that the ineffectiveness of his postconviction/appellate counsel was the reason why he did not previously raise his other issues on direct appeal, but the arguments he now presents concerning the no-merit report and this court's response to the no-merit report are raised for the first time on appeal.

§ 948.02(1)(e), which was identical in 2005 Wis. Act 430 and in 2007 Wis. Act 80 (the act that repealed and recreated WIS. STAT. § 948.02(1)). The crime was a Class B Felony, punishable by up to sixty years of imprisonment, *see* WIS. STAT. § 939.50(3)(b) (2005-06; 2007-08), and that was the maximum sentence Moore was informed of in the charging documents, in the guilty plea questionnaire, at the plea hearing, and at sentencing. Further, violations of § 948.02(1)(e) were not subject to the mandatory minimum sentence outlined in WIS. STAT. § 939.616(1) (2005-06) or WIS. STAT. § 948.616(1r) (2007-08).[11]

Moore challenges the trial court's decision to amend the judgment of conviction on a single ground. He asserts, without citation to authority, that a violation of WIS. STAT. § 948.02(1)(e) was subject to thirty years of imprisonment, rather than sixty years.[12] Therefore, he reasons, "a structural error still occurred" and he was denied due process because the potential penalties were different. Moore is incorrect. Both the 2005-06 and 2007-08 versions of § 948.02(1)(e) indicate that it was a Class B Felony, which was punishable by up to sixty years of imprisonment. *See* WIS. STAT. § 939.50(3)(b) (2005-06; 2007-08). Accordingly, Moore has not shown prejudice.

Further, as a result of the trial court's amendment of the judgment of conviction to reflect a conviction for WIS. STAT. § 948.02(1)(e), no argument can be made that Moore is subject to the

[11] We do not address whether Moore would have been subject to the mandatory minimum sentence of twenty-five years of initial confinement if the trial court had not amended the judgment to reflect a conviction based on WIS. STAT. § 948.02(1)(e). *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").

[12] Moore also argues that his sentence was excessive based on his erroneous conclusion that the maximum penalty for violating WIS. STAT. § 948.02(1)(e) was thirty years. Because the maximum penalty was sixty years, Moore's sentence cannot be successfully challenged on that ground.

twenty-five-year minimum term of initial confinement outlined in WIS. STAT. § 939.616(1) (2005-06) or WIS. STAT. § 948.616(1r) (2007-08).[13] Thus, Moore cannot demonstrate that he was prejudiced by the defect in the charging documents and the judgment of conviction. Similarly, Moore cannot show that he was prejudiced by the trial court's or trial counsel's alleged failure to advise him of the potential twenty-five year penalty, because it does not apply to the crime to which he pled guilty: sexual contact with a person under the age of thirteen.

In summary, we conclude that the trial court did not err when it amended the judgment of conviction and that Moore has not shown he was prejudiced by the defect in the charging documents. We further conclude that Moore was correctly advised of the maximum penalty for count two: sixty years of imprisonment. Moore has not shown that he was prejudiced by his trial counsel's performance or that a hearing on his postconviction motion was necessary. We agree with the State that now that the trial court has amended the judgment of conviction, "[t]he problem has been solved, and Moore has not established any additional grounds for relief." Accordingly, we affirm the trial court's order amending the judgment of conviction and, in all other respects, denying Moore's postconviction motion.

IT IS ORDERED that the trial court's order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals

[13] The State agrees, stating in its brief: "Now that the circuit court has amended his judgment of conviction, he faces no risk that the mandatory minimum would apply in the future."