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March 11, 2015

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

2014AP2237-CRNM State of Wisconsin v. Shawn D. Murphy (L.C. #2000CF156)

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

Appointed appellate counsel for Shawn D. Murphy has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] concluding there is no basis for challenging the sentence imposed after the revocation of Murphy's probation. Murphy has filed a response. *See* RULE

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

809.32(1)(e). Counsel has not filed a supplemental no-merit report and has not addressed any of the points raised in Murphy's response. *See* RULE 809.32(1)(f). Upon consideration of these submissions and an independent review of the record, we conclude that the judgment 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.

In 2000, Murphy was convicted of first-degree sexual assault of a child after entering a guilty plea to the allegation that he had sexual contact with his stepdaughter. At sentencing, Murphy was placed on probation for twenty-five years. In 2013, Murphy's probation was revoked. He was sentenced to twelve years' initial confinement and eight years' extended supervision with 1543 days of sentence credit.

As the no-merit correctly notes, an appeal from a sentencing after revocation is limited to issues raised by the events of the resentencing hearing and the judgment entered as a result of that sentencing hearing; the appeal does not bring the original judgment of conviction before this court. ***State v. Scaccio***, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449. The no-merit report discusses the sentencing court's exercise of discretion. We agree with the report's conclusion that there is no arguable merit to a claim that the court erroneously exercised its discretion at sentencing or imposed a sentence that was excessive.

One point made in Murphy's response is that the revocation summary provided to the sentencing court listed eight alleged violations of the conditions of probation, but at the revocation hearing the administrative law judge found three of the allegations unfounded. Murphy questions why the unfounded allegations were included in information provided to the court. No issue of arguable merit arises from including the unproven probation violations in the

revocation summary. First, Murphy's attorney informed the court that the three allegations were not proven at the revocation hearing. The court had accurate information about the violations which formed the basis for the revocation of Murphy's probation. Second, just as the sentencing court may consider unproven offenses at sentencing, ***State v. Johnson***, 158 Wis. 2d 458, 469, 463 N.W.2d 352 (Ct. App. 1990), *abrogated on other grounds by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, it may consider unproven allegations of probation violations. The rules of evidence do not apply at sentencing, and the court may consider hearsay. ***State v. Scherreiks***, 153 Wis. 2d 510, 521-22, 451 N.W.2d 759 (Ct. App. 1989).

Murphy's response also attempts to raise a claim of ineffective assistance of counsel—that his sentencing counsel was ineffective for not objecting to information in the revocation summary that was given during sex offender treatment group or to his agent as part of his sex offender treatment requirements. He believes that under ***State v. Peebles***, 2010 WI App 156, ¶20-21, 330 Wis. 2d 243, 792 N.W.2d 212 (incriminating statements made in sex offender counseling and under supervision rules requiring the probationer to cooperate with treatment and be truthful are compelled for purposes of the Fifth Amendment and the statements should be excluded at a subsequent sentencing proceeding), the sentencing court could not rely on information provided in sex offender treatment. Murphy does not identify what statements he made in sex offender treatment that were repeated in the revocation summary. The only information in the revocation summary that comes close to relating statements by Murphy was that Murphy had discussed with his treatment provider "deviant fantasies and masturbations" and

the treatment provider stated it was a treatment issue and would be addressed in group.[2] It was not inculpatory information that would be protected by the Fifth Amendment's prohibition of self-incrimination or the ***Peebles*** holding.

Murphy's principal concern in response to the no-merit report is his belief that he was sentenced upon inaccurate information about the nature of the offense. The criminal complaint was based on the child's statement that Murphy rubbed his penis against the child's vagina for approximately four minutes and then started to push his penis "onto" the child's "private" causing her pain. The complaint recited Murphy's statement to police that he rubbed his penis against the child's vagina but that he was not trying to penetrate her vagina with his penis. The revocation summary described the offense as follows: "The offender removed his penis from his underwear and began to rub his penis against her vagina for approximately four minutes. He began to push his penis *into* her vagina, which caused her pain…." (Emphasis added). Murphy's concern is over the disparity between the criminal complaint's allegation that he pushed "onto" the child's vagina and the revocation summary's description that he attempted to push "into" her vagina.

At the sentencing after revocation hearing, the sentencing court first asked if there were any corrections to be made to the revocation summary. No attention was drawn to the "into" characterization of the offense in the revocation summary. The prosecutor described the offense as including an attempt to have penetration, but that penetration did not take place. The court

[2] At two places the revocation summary repeats information provided in sex offender program reports completed as part of Murphy's discharge from sex offender treatment for noncompliance. The snformation does not repeat statements Murphy made in treatment.

indicated that it would take into consideration its prior knowledge of the case, including the presentence investigation report (PSI) filed in 2000 and other information reviewed at the time of the original sentencing,[3] the revocation summary, the arguments of counsel, and the statement by Murphy's ex-wife made in court that day. In assessing the severity of the offense, the court stated that what it knew of the crime came from the information provided in the criminal complaint and the PSI which was, in large part, taken from the victim's statement. The court described the victim's report that Murphy rubbed his "'front private' against her 'front private' for about four minutes and that you then started to push your private *into* her private causing her pain." (Emphasis added.) The court acknowledged that Murphy admitted the allegation but that Murphy said he was not trying to penetrate her vagina. It went on to assess the nature of the crime as loathsome, repugnant, shocking, and vile. However, it placed emphasis of Murphy's relationship with the child, the fact that the child called him "Daddy," and Murphy's violation of "that bond of trust."

A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To establish a due process violation, the defendant must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***Id.***, ¶26.

There is no merit to Murphy's contention that the sentencing court relied on the "into" characterization of the offense in the summary revocation. The court specifically stated it relied on the information in the criminal complaint and PSI with respect to the offense, both of which

[3] The sentencing court conducted the original sentencing of Murphy in 2000. A transcript of the original sentencing was not available. The PSI used the word "onto" when describing the offense.

used the word "onto" to describe the offense. Although the sentencing court used the "into" word when describing the offense, it was nothing more than a misstatement in light of the court's explicit reliance on the complaint and PSI description. Moreover, the crime was fully committed by Murphy's rubbing action, something he admitted. If any distinction can be drawn between "onto" and "into," it has no significance in this case because it was not relied on. The court would have assessed the loathsome nature of the crime the same regardless of which version of the offense description was factually accurate. Its assessment of the severity of the crime was driven by Murphy's status as a father figure for the child.

We acknowledge that immediately after assessing the loathsome nature of the crime, the sentencing court discussed the seriousness of the crime in terms of today's crime known as first-degree sexual assault of a child by sexual intercourse with a child under the age of twelve under WIS. STAT. § 948.02(1)(b). By reference to § 948.02(1)(b), the court explained how the law regarding sexual assault of children has dramatically changed since Murphy committed his crime in 2000. The court explained that under § 948.02(1)(b) sexual intercourse "means vulvar penetration, however slight." It stated that "the facts of this case, I think under today's law, might fit that particular situation based on [the victim's] statement." It continued that under current sexual assault law Murphy would never have been afforded the privilege of probation upon conviction because a violation of § 948.02(1)(b) requires a mandatory minimum prison sentence of twenty-five years. *See* WIS. STAT. § 939.616(1r). Our determination that there is no merit to a claim that the sentence was based on inaccurate information does not change because of the sentencing court's discussion of § 948.02(1)(b). The court's reference to penetration, however slight, illustrates that under the facts of the case there is no distinction between characterizing the post-rubbing conduct as "onto" or "into." Rubbing "onto" to the point of

causing the victim pain can be equated with penetration, however slight. So even if the court used "into" or otherwise equated Murphy's conduct with slight penetration, it was not an inaccurate assessment of the nature of the crime.

There is no merit to a claim that Murphy was sentenced upon inaccurate information. Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Murphy further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Michelle L. Velasquez is relieved from further representing Shawn D. Murphy in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals