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April 27, 2015

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

2014AP1887-CRNM State v. Frank Lymos Spates (L.C. #2012CF005907)

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

Frank Lymos Spates appeals from a judgment entered after he pled guilty to first-degree sexual assault of a child (sexual contact with a child thirteen or younger), contrary to WIS. STAT. § 948.02(1)(e) (2011-12), and from an order denying his postconviction motion for resentencing.[1] Spates's postconviction and appellate lawyer, Assistant State Public Defender Colleen Marion, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738

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

(1967), and WIS. STAT. RULE 809.32, to which Spates has responded.[2] After independently reviewing the record, the no-merit report, and Spates's response, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The criminal complaint charged Spates with five crimes: count one, first-degree sexual assault of a child (sexual intercourse with a child twelve or younger); count two, first-degree sexual assault of a child (sexual contact with a child thirteen or younger); count three, first-degree sexual assault of a child (sexual contact with a child thirteen or younger); count four, first-degree sexual assault of a child (sexual contact with a child thirteen or younger); and count five, felony intimidation of a victim.

According to the complaint, at 3:00 a.m. on December 4, 2012, Spates arrived—uninvited—at the home of a woman with whom he had been romantically involved. The woman's eight-year-old daughter let him into the home. The girl's mother, who was getting ready for work at the time, left Spates alone with her daughter in the living room. Upon hearing her daughter say "'stop'" repeatedly, the woman entered the living room where she saw that Spates's pants were undone and her daughter was naked from the waist down. The woman told police that when she tried to call 911, Spates knocked the phone from her hand and threatened to kill her. She and her daughter were eventually able to barricade themselves in her daughter's bedroom with the phone. The girl was interviewed by police and provided details about the various charges.

[2] We construe Spates's letter to this court dated September 18, 2014 as his response.

Spates filed a motion to suppress DNA evidence where he argued that DNA samples were obtained from him without valid consent; however, the motion was never argued or decided. Instead, Spates proceeded to plead guilty to count two, first-degree sexual assault of a child (sexual contact with a child thirteen or younger). Pursuant to the plea agreement, the State agreed to move to dismiss and read in the other counts and to recommend a prison term without specifying the length. The court accepted Spates's plea, dismissed the other counts against him, and sentenced him to fourteen years of initial confinement and six years of extended supervision.

Spates subsequently pursued a postconviction motion for resentencing, which the circuit court denied.

In her no-merit report, counsel addresses whether there would be arguable merit to an appeal on three issues: (1) the validity of Spates's plea; (2) the circuit court's exercise of sentencing discretion; and (3) the denial of Spates's postconviction motion for resentencing. For reasons explained below, we agree with the conclusion that there would be no arguable merit to pursing these issues on appeal. Additionally, we will address the issues raised in Spates's response. Namely, we address the fact that the PSI contained a sentencing recommendation, which was contrary to the circuit court's order. According to Spates, the circuit court followed the recommendation in the PSI. Additionally, Spates devotes space in his response to challenging both the victim's credibility, writing that it was clear she was lying about her story, and the DNA testing that occurred.

Plea

Counsel first addresses whether Spates has an arguably meritorious basis for challenging his plea on appeal. To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See*

State v. Bangert, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Spates completed a plea questionnaire and waiver of rights form and an addendum. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The form listed the maximum sentence Spates faced (along with the sex-offender registration requirement), and the circuit court confirmed that Spates understood the length of time he was facing. The form, along with the addendum, further specified the constitutional rights that Spates was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 270-72. Additionally, the circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

We note that the circuit court did not recite the text of WIS. STAT. § 971.08(1)(c) verbatim. We have held that, although the statutory language is "strongly preferred," a court's failure to use the exact language set forth in § 971.08(1)(c) does not entitle a defendant to plea withdrawal, as long as the court "substantially complied" with the statutory mandate. *See* ***State v. Mursal***, 2013 WI App 125, ¶¶15-17, 20, 351 Wis. 2d 180, 839 N.W.2d 173. Like in ***Mursal***, here, the circuit court substantially complied with the statute.[3] *See* ***id.***, ¶16 ("Substantively, the

[3] WISCONSIN STAT. § 971.08(1)(c) directs courts to do the following, before accepting a plea of guilty or no-contest:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

Here, the circuit court stated: "You understand if you are not a citizen of the United States, your plea could result in deportation, exclusion or denial of naturalization?"

[circuit] court's warning complied perfectly with the statute, and linguistically, the differences were so slight that they did not alter the meaning of the warning in any way.").

Insofar as Spates, in his response, challenges the victim's credibility and the DNA testing that occurred, he gave up his right to pursue these issues when he entered his guilty plea. The plea questionnaire and waiver of rights form specifically states: "I give up my right to confront in court the people who testify against me and cross-examine them." Spates checked the box to indicate his understanding that he was giving up this right, which would have allowed him to attack the victim's credibility at trial. Additionally, the addendum to the plea questionnaire provides:

> I understand that by pleading I am giving up my right to challenge the constitutionality of any police action such as the police stopping me, arresting me, searching me or my property, seizing any evidence, taking a statement from me, or having any witness identify me. (If the court already decided my suppression motion, I can still appeal that decision.)

Again, Spates signed this document to acknowledge his understanding that he was giving up this right. When Spates decided to forego his suppression motion and instead enter a plea, he gave up his right to challenge the DNA testing that occurred.

There would be no arguable merit to challenging the validity of Spates's guilty plea.

Sentencing

The next issue the no-merit report discusses is the circuit court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that the circuit 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 circuit 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 circuit 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 circuit court's discretion. ***Gallion***, 270 Wis. 2d 535, ¶41.

At the start of the sentencing hearing, Spates's trial counsel moved to strike the sentencing recommendation set forth in the PSI. Spates's counsel reminded the court that it had ordered the PSI without a recommendation, and upon review, the court concluded that this information had not been conveyed to the Department of Corrections. Without ruling on the motion to strike, the court proceeded to hear from the parties as to their recommendations and then it made its own remarks.

Specifically, the circuit court focused on the horrific nature of the acts and concluded that confinement time was necessary to protect the public. The circuit court further found that it would depreciate the seriousness of the offense if it did not incarcerate Spates. In its comments, the circuit court noted that Spates's reported alcoholism was not an excuse for his behavior. Additionally, the circuit court took into account the read-in charges, which included attempts by

Spates to prevent the victim's mother from reporting the incident. The circuit court reflected on the fact that the victim was traumatized by this and would have to live with the "emotional scars."

The circuit court sentenced Spates to fourteen years of initial confinement and six years of extended supervision. The maximum sentence Spates could have received was sixty years. *See* WIS. STAT. §§ 948.02(1)(e), 939.50(3)(b). Spates's sentence is within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock the public's sentiment, *see* ***Ocanas***, 70 Wis. 2d at 185. For these reasons, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

Resentencing

Spates filed a postconviction motion for resentencing before the same circuit court judge who sentenced him, arguing that the circuit court erroneously exercised its sentencing discretion and that his trial counsel gave him ineffective assistance. The motion focused on the fact that the PSI contained a sentencing recommendation, which was contrary to the circuit court's order. Spates argued that the circuit court's failure to rule on his trial counsel's motion to strike the recommendation was an erroneous exercise of discretion. Additionally, Spates argued that insofar as his trial counsel failed to ask the court for a ruling on the motion, counsel was ineffective. Spates pointed out that the sentence the court imposed "land[ed] squarely within the range recommended by the PSI writer (10-15 years initial confinement and 5-6 years extended supervision)."

The circuit court set a briefing schedule and after reviewing the parties' submissions, denied Spates's motion. In its decision, the court set forth the exchange that had occurred at the sentencing hearing:

> [SPATES'S TRIAL COUNSEL]: I move to strike the recommendation. Your honor ordered a PSI without a recommendation. The PSI author apparently disregarded your order. So for what it's worth, I move to strike that.
>
> But yes, we've discussed the PSI.
>
> THE COURT: Is that correct, sir?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Okay. This was ordered without a recommendation.
>
> THE CLERK: I'm looking at the order, and whatever clerk that was here that day did not put down—
>
> THE COURT: So apparently that wasn't conveyed to the department. So the court's just going to—
>
> [SPATES'S TRIAL COUNSEL]: Okay.

The court then explained in its decision:

> Actually, the court said it was just going to "disregard it," but the court's voice evidently trailed off and was not picked up by the court reporter, or the court was poised to say "disregard it" (as all parties would have understood the court to do so under the circumstances). That it was more likely that the court's voice trailed off is supported by trial counsel's response, "Okay," to the court's statement. In any event, the court certainly intended to disregard the recommendation, and it is satisfied that the parties understood that the court would do so.

A sentencing court has an additional opportunity to explain its sentence when challenged by a postconviction motion. *See* ***State v. Fuerst***, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994). Here, the sentencing hearing transcript in conjunction with the circuit court's decision denying Spates's postconviction motion for resentencing reflect that the court properly

exercised its discretion to arrive at an appropriate sentence. There would be no arguable merit to a challenge to the circuit court's conclusions that there was no erroneous exercise of discretion by the court and no ineffective assistance of counsel.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Assistant State Public Defender Colleen Marion is relieved of further representation of Spates in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals