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DISTRICT III

July 28, 2015

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

2014AP2596-CRNM State of Wisconsin v. Dustin J. Pingel (L. C. No. 2013CF561)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Dustin Pingel filed a no-merit report and supplemental no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] concluding no grounds exist to challenge Pingel's conviction for second-degree sexual assault by use of force, as a repeater. Pingel was informed of his right to file a response to the no-merit report and has not responded. Upon our

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

independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Pingel with second-degree sexual assault by use of force, felony intimidation of a victim and misdemeanor bail jumping, all counts as a repeater. In exchange for his no contest plea to the sexual assault charge, the State agreed to dismiss and read in the remaining counts from this and two other cases. The State also agreed to cap its aggregate sentence recommendation at fifteen years' initial confinement for this case and a sentence Pingel was facing following revocation of his probation in a separate matter. Out of a maximum possible forty-six-year sentence, the court imposed a twenty-five-year sentence, consisting of sixteen years' initial confinement and nine years' extended supervision, concurrent with the sentence imposed after revocation of Pingel's probation in the other matter.

The record discloses no arguable basis for withdrawing Pingel's no contest plea. The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Pingel completed, informed Pingel of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no contest plea. The court confirmed Pingel's understanding that it was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also advised Pingel of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Pingel committed the crime charged. The record shows the plea was knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record discloses no arguable basis for challenging the effectiveness of Pingel's trial counsel. To establish ineffective assistance of counsel, Pingel must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the case. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Any claim of ineffective assistance must first be raised in the trial court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Because Pingel was found not guilty by reason of mental disease or defect (NGI) for criminal acts in 2002, the no-merit report and supplemental no-merit report address whether counsel was ineffective by failing to pursue an NGI plea in this case. WISCONSIN STAT. § 971.15(3) provides: "Mental disease or defect excluding responsibility is an affirmative defense which the defendant must establish to a reasonable certainty by the greater weight of the credible evidence." The presence of a mental disease or defect, however, does not automatically excuse a defendant from the legal consequences of his or her conduct. ***State v. Duychak***, 133 Wis. 2d 307, 316-17, 395 N.W.2d 795 (Ct. App. 1986). The critical inquiry is "whether, as a result of a certain mental condition, a defendant lacks substantial capacity to either appreciate the wrongfulness of the defendant's conduct or conform the defendant's conduct to the requirements of the law." ***Id.***

In an affidavit submitted with the supplemental no-merit report, trial counsel avers that he considered an NGI defense, but did not pursue it after reviewing Pingel's mental health history and records, and discussing all possible defenses with Pingel. Counsel noted that despite the NGI finding in 2002, a 2010 attempt to pursue an NGI defense in another case failed after an examining physician's report did not support an NGI plea. Counsel further concluded that the alleged assault in the present case did not suggest an NGI defense because it was "opportunistic

and deliberate"—the victim alleged Pingel threatened her and warned her not to report the assault to authorities. According to counsel, Pingel was also "instrumental in developing his defenses," and "showed full understanding of the wrongfulness of the conduct alleged." Because counsel demonstrates sound reasons for not pursuing an NGI defense, and nothing in the record otherwise suggests that such a defense should have been pursued in the present matter, any challenge to trial counsel's performance on this ground would lack arguable merit. Our review of the record and the no-merit reports disclose no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner*** hearing.

Finally, there is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Pingel's character, including his criminal history; the need to protect the public; and the mitigating circumstances Pingel raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Pingel's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Andrew H. Morgan is relieved of further representing Pingel in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals