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March 1, 2017

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

2015AP1860-CRNM State of Wisconsin v. Murry Wayne Locke (L.C. # 2010CF162)

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

Murry Wayne Locke appeals from a judgment of conviction entered upon resentencing required by ***State v. Locke***, No. 2012AP2029-CR, unpublished slip op. at 6 (WI App July 30, 2013), and a subsequent circuit court order granting a second resentencing in front of a new judge. Locke's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2015-16),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Locke has filed a response to the no-merit report. Upon consideration of these submissions and an independent review of the resentencing 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.

The complaint in this case alleged ten counts of possession of child pornography occurring on or between August and September 2010, contrary to WIS. STAT. § 948.12(1m) and (3)(a) (2011-12). Pursuant to a plea agreement, Locke pled to two of the counts and the other eight were dismissed and read in. On appeal, we reversed and remanded the matter for resentencing in front of a new judge. ***Locke***, No. 2012AP2029-CR, at 6. Locke was resentenced in front of a new judge. Upon stipulation of the parties, the second sentencing judge determined that Locke was entitled to a new resentencing based on inaccurate information and ineffective assistance of counsel.

A new judge presided over the third sentencing hearing on February 18, 2015. Prior to the hearing, the parties provided an information packet for the sentencing court to consider, including the criminal complaint (with inaccurate information removed), criminal information, affidavit from state public defender investigator Ron Porter, presentence investigation report (PSI) from the Department of Corrections (with inaccurate information removed), and a private defense-commissioned PSI. At sentencing, the circuit court specified that the only records and information it reviewed were those contained in the information packet. The State remained silent and Locke's attorney recommended concurrent six-year bifurcated sentences on both

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

counts, with three years each of initial confinement and extended supervision. On each count, the sentencing court imposed a twelve-year bifurcated sentence with seven years of initial confinement and five years of extended supervision, to run consecutive to each other. This no-merit appeal followed.[2]

The no-merit report addresses whether there is any arguably meritorious challenge to Locke's 2015 resentencing. "[T]he role of a sentencing court is the same whether the proceeding is an initial sentencing or a resentencing." ***State v. Schordie***, 214 Wis. 2d 229, 233-34, 570 N.W.2d 881 (Ct. App. 1997). The sentencing court "must consider the gravity of the offense, the offender's character and the public's need for protection." ***Id***. at 233.

We agree with the analysis in the no-merit report and its conclusion that any challenge to the sentence as an erroneous exercise of discretion or as unduly harsh or excessive would be without arguable merit. The sentencing court considered the seriousness of the offense, the defendant's character and history, the punishment and rehabilitation of the defendant, 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. Highlighting Locke's prior record of child sexual assaults as well as information in the PSI "strongly suggest[ing]" the existence of "a reoccurring pattern of an obsession with children," the circuit court identified "the protection of the public and the punishment of the defendant" as its primary sentencing objectives. These are proper objectives. *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The sentencing court considered

[2] Originally, postconviction counsel filed a motion requesting that Locke be found eligible for the Substance Abuse Program, but withdrew the motion upon Locke's request. The no-merit report asserts and Locke does not dispute that he waives appellate review of that issue.

Locke's positive attributes, such as his military service and education, but determined that Locke's rehabilitation was not its primary focus. The circuit court based its sentencing decision on the proper law and facts and reasoned its way to a result that a reasonable judge could reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Additionally, the twenty-four year global sentence is well within the fifty-year maximum and cannot be considered unduly harsh or excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

In his response to the no-merit report, Locke suggests that the sentencing circuit erroneously exercised its discretion in weighing the severity of the offense. Locke argues that the sentencing court improperly "use[d] the fact that the pictures involved 'the very young'" because the victim's age "can not be an aggravating factor since it is included as the sole factor in making these pictures illegal." Asserting that the victim's age "has already been used in making it a Class D felony," Locke contends that his offenses are low on the severity scale "[d]ue to the low number of pictures and that they didn't come from contact with any other people." Locke's complaints do not give rise to an arguably meritorious issue. Locke's contention that the sentencing court considered the gravity of the offense to be aggravated by the mere fact that the victims were under age eighteen is not supported by the record.[3] The purpose of the sentencing court's comments about "the very young" was to point out that crimes against children are considered serious by society and that these were not Locke's first child-related sex

[3] The ages or apparent ages of the victims in Locke's pictures are not perfectly clear from the resentencing record. The resentencing court did not focus on the victims' ages. However, we point out that because the offense of possessing child pornography applies to any child victim under eighteen-years old, a victim's age might be an aggravating factor.

offenses. To the extent Locke points out that he was only convicted of two counts which didn't involve any contact on his part, we observe that eight counts were dismissed and read in, and that Locke was convicted of possessing images, not of any crime involving contact. The circuit court made an individualized sentencing determination based on Locke's characteristics and the specific circumstances of the instant case.

Locke's response also takes issue with the sentencing court's analysis concerning his risk to the public. He contends that the sentencing court made "a mistake of saying that the best indicator of the future is past behavior." The sentencing court's determination is not factually inaccurate. It was within the court's discretion to determine that based on Locke's history and behavioral patterns, he posed a risk to the public safety.

Locke also suggests that some error must flow from the sentencing court's review of the DOC PSI which, according to Locke, spoke "at length about the read-in charge of 10CF102." It appears from Locke's response and other parts of the record that 2010CF102 charged Locke with a crime of questionable constitutionality under ***State v. Oatman***, 2015 WI App 76, 365 Wis. 2d 242, 871 N.W.2d 513 (statute prohibiting registered sex offender from intentionally photographing a minor without parental consent is unconstitutionally overbroad). A review of the redacted criminal complaint and PSI provided to the resentencing court reflects that other than to provide background information, details concerning the prosecution of 2010CF102 were removed. The charge in 2010CF102 was never mentioned by the court at resentencing. Locke's claims do not give rise to an issue of arguable merit.

Locke's response also raises complaints about trial counsel's representation at sentencing. Our consideration of these issues is limited because claims of ineffective assistance

of counsel must first be raised in the circuit court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Because appointed counsel asks to be discharged from the duty of representation, we must determine whether Locke's claims have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

Locke complains that trial counsel was "unprepared" and did not make it a point to argue about the actuarial scores or truth-in-sentencing (TIS) guidelines included as part of Locke's defense PSI. There is no arguable merit to a claim that Locke was denied the effective assistance of trial counsel. To establish ineffective assistance, Locke must show that his counsel's actions or inaction constituted deficient performance which caused prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984); ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. First, trial counsel did refer to the Static-99 scores in the private PSI to support the defense's sentencing recommendation. Second, the circuit court stated it had reviewed all materials provided by the parties in preparing for resentencing. The materials included Locke's defense PSI, actuarial scores, and TIS guidelines. On this record, Locke has not shown any prejudice from trial counsel's alleged failure to highlight materials actually reviewed by the sentencing court, some of which Locke admits are out of date.

Locke's response also suggests that trial counsel was ineffective because "[t]here were numerous things [counsel] was going to say and didn't" and because "other things [counsel] said were better coming from me that he mentioned in his talk." Locke also criticizes trial counsel's use of the term "elephant in the room" when referring to Locke's prior child sexual assault convictions. Locke's complaints about trial counsel's performance lack sufficient specificity to show that counsel's performance was either deficient or prejudicial. In referencing Locke's prior record, trial counsel focused on the age of the prior convictions and Locke's successful

completion of sex offender treatment, pointing out "the elephant in the room is these things that happened twenty-five years ago" for which Locke had already served his time. Having considered Locke's ineffective assistance of counsel claims, we determine none presents an issue of arguable merit and will not address them further.

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 Locke 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 Catherine R. Malchow is relieved from further representing Murry Wayne Locke in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals