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May 8, 2017

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

2016AP2218-CRNM State of Wisconsin v. Gregory L. Wagner
(L.C. # 2015CF2537)

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

Gregory L. Wagner appeals from a judgment of conviction for two counts of third-degree sexual assault, contrary to WIS. STAT. § 940.225(3) (2015-16).[1] Wagner's postconviction/appellate counsel, Gregory Bates, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Wagner has not filed a response. We have independently reviewed the record and the no-merit report, as mandated by

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

Anders, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

The complaint charged Wagner with two counts of second-degree sexual assault of a child under the age of sixteen. The complaint alleged that in May 2015, seventeen-year-old Wagner twice had sexual intercourse (penis to vagina) with a fifteen-year-old girl at a party after another young man gave the girl cough syrup mixed with Sprite. The complaint further alleged that there were several videos of Wagner and the other young man engaging in sexual intercourse with the girl.

Wagner waived his right to a preliminary hearing. The case was in a trial posture when trial counsel moved to withdraw. At a hearing on her motion to withdraw, trial counsel told the trial court that Wagner had "refused to watch the video" of the assaults and indicated that he said he was going to retain private counsel, although he had not identified a new attorney as of the date of the hearing. The trial court engaged Wagner in a colloquy about his concerns with trial counsel and ultimately denied the motion to withdraw. The trial court said that although Wagner complained that his trial counsel did not visit with him more often, he was refusing to meet with her, which was "completely irrational." The trial court said: "I'm ordering you to have a conversation with your lawyer and get prepared for trial because that's what's happening next." The trial court scheduled a final pretrial for two weeks later.

There was no further discussion of Wagner's concern with his trial counsel at that hearing or at any subsequent hearing.[2] At the final pretrial, Wagner indicated that he had decided to enter into a plea agreement with the State. Under the terms of that plea agreement, the two charges were reduced to third-degree sexual assault and, in exchange for Wagner's no-contest pleas to those reduced counts, the State agreed to recommend a global sentence of five to seven years of initial confinement and five years of extended supervision.[3]

The trial court conducted a plea colloquy, accepted Wagner's no-contest pleas, and found him guilty. Neither party requested a PSI report, and the trial court did not order one.

At sentencing, the State indicated that there was an additional misdemeanor theft charge that would be dismissed and read in.[4] The State asserted that a prison sentence was necessary given the "aggravated" facts in the case. For instance, the State said that people from the party were watching the sexual assaults through the window of the garage where the assaults occurred. The State said that the assaults were video-recorded and posted on Facebook.

[2] In fact, when Wagner ultimately pled no contest, he replied "yes" when the trial court asked him the following question: "At this point, are you satisfied with the way [trial counsel] has represented you?" We do not discern any potential issues of merit associated with the denial of trial counsel's motion to withdraw.

[3] Wagner's guilty plea questionnaire also indicated that Wagner would be required to register as a sex offender for fifteen years, and the trial court recognized that mandatory requirement at sentencing.

[4] The no-merit report acknowledges there was not a specific plea colloquy concerning this offense, but concludes there would be no arguable merit to challenge the dismissal of that charge. We agree. At the conclusion of the plea hearing, the State recognized that Wagner had an outstanding theft charge still pending. At sentencing, the State told the trial court that the parties had discussed that charge in a series of email exchanges and had ultimately agreed to dismiss and read it in; both trial counsel and Wagner agreed with that representation. The State then provided brief factual information about the crime. Later, the trial court noted that Wagner had received a benefit from the charge's dismissal, but it did not otherwise discuss the facts of that case. We discern no basis to challenge the dismissal of the misdemeanor crime or its modest effect—if any—on Wagner's sentence for the two sexual assaults.

Trial counsel agreed that a prison sentence was appropriate given Wagner's "lack of following boundaries," but she urged the trial court to impose a sentence of two years of initial confinement and five years of extended supervision because Wagner did not have a prior juvenile or criminal history, was not yet an adult, was involved in "prosocial" activities including high school sports, and "has done good things for the community."

Wagner told the trial court that he "apologize[s] for coming in front of you with such foolish and poor choices" and said that he "will work to be a role model, not a follower." Wagner said that during the time he was in jail awaiting resolution of his cases, he had "come [up] with a plan to better" himself, and he pledged that the trial court would "never see [his] face in [the] courtroom again."

The trial court imposed the maximum potential sentence: two consecutive terms of five years of initial confinement and five years of extended supervision. In doing so, the trial court noted that Wagner had received the benefit of the plea bargain that reduced both of the charges from second-degree sexual assault of a child[5] and dismissed and read in the misdemeanor theft charge. The trial court ordered Wagner to provide a DNA sample and imposed two mandatory $250 DNA surcharges. No restitution was ordered. This appeal follows.

The no-merit report analyzes three issues: (1) whether "the trial court compl[ied] with the requirements for accepting a valid no contest plea"; (2) whether "any pretrial issues … were preserved despite the entry of the no contest plea"; and (3) whether "the trial court provide[d] a

[5] The maximum penalty for second-degree sexual assault of a child, a Class C felony, is forty years, including up to twenty-five years of initial confinement. *See* WIS. STAT. §§ 939.50(3)(c) and 973.01(2)(b)3.

reasonable basis for the sentence imposed." This court agrees with postconviction/appellate counsel's conclusions with respect to the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss those issues.

We begin with the second issue discussed in the no-merit report. The no-merit report recognizes that trial counsel did not file any suppression motions and states: "The case record and discussions with Mr. Wagner have not suggested to counsel that any viable motion should have been filed." Our review of the record likewise does not reveal any potential bases for a suppression motion. The State's comments at sentencing implied that when Wagner spoke with the police, he did not admit the sexual assaults.[6] The record does not indicate a basis to challenge Wagner's statement or suggest that there would be incriminating information to suppress. In sum, we agree that the record does not reveal issues of potential merit with respect to the lack of pretrial motions.

Next, we consider Wagner's pleas. There is no arguable basis to allege that Wagner's no-contest pleas were not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, as well as an addendum, which the trial court referenced during the plea hearing.[7] *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d

[6] The record does not contain a police report or other summary of Wagner's interview with the police. The State told the trial court at sentencing that Wagner "lied throughout" the interview, including "about the incident."

[7] A summary of the elements of the crime was attached to the guilty plea questionnaire. The attached pages also included an explanation of party-to-a-crime liability, but Wagner was not charged as a party to a crime and there was no discussion of party-to-a-crime liability at the plea hearing or sentencing.

627 (Ct. App. 1987). The trial court conducted a thorough plea colloquy that addressed Wagner's understanding of the plea agreement and the charges to which he was pleading no contest, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* WIS. STAT. § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

The trial court explained the maximum sentence for each count—ten years of imprisonment—and went over the elements of third-degree sexual assault. The trial court confirmed with Wagner that he knew the trial court was "not bound by any negotiations and could impose each of these maximums one after the other." The trial court also discussed with Wagner the constitutional rights Wagner was waiving, such as his right to a jury trial and his right to testify in his own defense. In addition, the trial court determined that the criminal complaint provided a factual basis for the pleas, as both the State and trial counsel stipulated. Finally, the trial court confirmed with trial counsel that she spoke with Wagner about the potential for a civil commitment under WIS. STAT. ch. 980, and a document discussing that possibility was also attached to the guilty plea questionnaire.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Wagner's conversations with his trial counsel, and the trial court's colloquy appropriately advised Wagner of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. The record does not suggest there would be an arguable basis to challenge Wagner's pleas.

The next issue we consider is the sentencing. We conclude there would be no arguable basis to assert that the trial 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 trial 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 trial 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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Its sentencing comments addressed Wagner's character, including his education, his work history, and his lack of prior juvenile or criminal convictions. However, it recognized that the most important factor in this particular case was "the gravity of the offense," which the trial court referred to as "pornography being acted out in real life." The trial court discussed the effect of such crimes on society, especially women.

The trial court recognized that Wagner had "already gotten a huge benefit of the bargain in the charging decisions that were negotiated for [him], or made by the State, and then the

amendment down to the third-degree sexual assaults and then the dismissed theft." It noted that Wagner easily could have been charged with crimes related to child pornography. The trial court concluded: "[T]his is a maximum sentence case with what I have left and I understand you have no record, I understand you've never been to prison, but you've gotten all of the benefit of the bargain with plea negotiations and so forth that you're going to get."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. While the trial court imposed the maximum sentence in each case, consecutive to each other, we are not persuaded the sentences were overly harsh. As the trial court noted, Wagner benefitted greatly from the charge reduction, which reduced his maximum total exposure from eighty years to twenty years. Given the reduction in charges and the egregious facts of this case, there would be no merit to alleging that the sentences were excessive.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Gregory Bates is relieved of further representation of Wagner in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals