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June 28, 2017

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

2016AP1444-CRNM State of Wisconsin v. Robert L. Shea (L.C. #2015CF11)

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

Robert L. Shea appeals a judgment convicting him of repeated sexual assault of the same child. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967); Shea filed a response. On review of the no-merit report, the response, and the record, we conclude there are no issues with arguable merit for appeal and summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

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

Shea, a close family friend, was charged with repeatedly sexually assaulting EJN over a two-and-a-half-year period beginning when EJN was eleven. Shea is over eleven years older than EJN. The conduct began with fondling over clothing and progressed to frequent anal intercourse. Shea did not deny the allegations.

Shea pled no contest to one count of repeated sexual assault of the same child in violation of WIS. STAT. § 948.025(1)(e). The court imposed a twenty-year sentence, bifurcated as eight years' initial confinement (IC) and twelve years' extended supervision. The parties stipulated to restitution of $563.72. This no-merit appeal followed.

The no-merit report addresses the potential issues of whether Shea's plea was freely, voluntarily, and knowingly entered and whether the sentence was the result of an erroneous exercise of discretion.[2] As we are satisfied that the no-merit report properly analyzes the issues raised as being without merit, this court will not discuss them further.

Shea raises three points in his response. He first alleges that the PSI contained inaccurate and highly biased information, namely a significant amount of references to and descriptions of uncharged allegations predating this offense and not involving EJN. He contends the court's refusal to order a new or redacted PSI violated his due process rights at sentencing.

"A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. "Failure of a presentence report to provide the court with true and correct information may

[2] We commend the circuit court on its well-considered sentencing decision. It reflects the gravity, care, and empathy with which the court approaches its task.

deprive a defendant of liberty without due process." ***State v. Coulthard***, 171 Wis. 2d 573, 591, 492 N.W.2d 329 (Ct. App. 1992).

At the hearing on Shea's motion, the court found that "weaving" the uncharged allegations into the PSI and tying them to the allegations to which Shea had pled was "problematic." It expressly stated, however, that it "took them at very limited value" and was "very satisfied" that the prior allegations would have "very little impact" on its sentencing decision. Shea filed a sentencing memorandum. The court reiterated at sentencing that it was giving little regard to uncharged prior acts. Shea thus fully aired, and the court fully examined, the claim that the PSI recommendation was prejudicially based on inaccurate and highly biased information. As Shea has not demonstrated that the circuit court actually relied on that information, *see* ***Tiepelman***, 291 Wis. 2d 179, ¶2, there is no arguable merit to his claim.

Similarly, Shea asserts that the State necessarily had to have been influenced by the complained-of information in the PSI because its sentencing recommendation of ten years' IC virtually mirrored the agent's recommendation of ten to eleven years. Even with no mention of uncharged allegations, the conduct described in the criminal complaint easily supports the State's recommendation. In any event, the court ordered less IC than the State or PSI recommended.

Finally, Shea asserts that he was unaware that the State and defense counsel agreed to argue for no greater IC than what the PSI recommended. Had he been privy to the agreement, he asserts, he would have made different choices about pleading and motions.

Defense counsel argued strenuously for a new or redacted PSI. Shea does not indicate what other "motions" he would have pursued. We infer from his claim, therefore, that he believes counsel's failure to advise him of the agreement was ineffective assistance and resulted

in a plea that was not freely, voluntarily, and knowingly entered, *see* ***State v. Bentley***, 201 Wis. 2d 303, 318, 548 N.W.2d 50 (1996), such that he might have opted for trial. To prevail on a claim of ineffective assistance of counsel, a defendant must establish that trial counsel's performance was deficient and that this performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Shea's conclusory suggestion that being unaware of the agreement led him to plead has no substance. He knew he faced twenty-five years' IC, *see* WIS. STAT. §§ 948.025(1)(e) and 973.01(2)(b)3., and confirmed his understanding that the court could impose it regardless of other recommendations. He does not explain why, armed with that knowledge, an agreement to cap IC recommendations at less than half of the maximum might have prompted him to opt for trial. *See* ***Bentley***, 201 Wis. 2d at 314. He also offers no objective facts that would allow a court to meaningfully assess how he was prejudiced. *See* ***id.*** at 318. The same court would have sentenced him after a trial at which a guilty verdict was virtually certain. Therefore,

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

IT IS FURTHER ORDERED that Attorney Tristan Breedlove is relieved from further representing Shea in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals