OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II/I

June 29, 2017

To:

Hon. Dale L. English
Circuit Court Judge
Fond du Lac County Courthouse
160 South Macy Street
Fond du Lac, WI 54935

Eric Toney
District Attorney
Fond du Lac County
160 South Macy Street
Fond du Lac, WI 54935

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 South Macy Street
Fond du Lac, WI 54935

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Tristan Breedlove
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

Brian D. Spallas 354081
Kettle Moraine Corr. Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2016AP667-CRNM State of Wisconsin v. Brian D. Spallas
(L.C. # 2014CF445)

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

Brian D. Spallas entered ***Alford*** pleas to two counts of third-degree sexual assault.[1] *See* WIS. STAT. § 940.225(3) (2013-14).[2] Spallas' postconviction/appellate counsel, Tristan S.

[1] An ***Alford*** plea is a guilty plea where a defendant pleads guilty to a charge but either protests his or her innocence or does not admit to having committed the crime. *See* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). The plea derives its name from the United States Supreme Court's decision in ***North Carolina v. Alford***, 400 U.S. 25 (1970).

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

Breedlove, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Spallas filed a response. Upon consideration of these submissions and an independent review of the record as mandated by ***Anders***, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Spallas was charged with two counts of repeated sexual assault of a child and one count of sexual assault of a child under sixteen years of age. According to the complaint, the victim, who was the then-fourteen-year-old daughter of Spallas' wife, reported to police that she and Spallas first had sexual contact in February 2013 when Spallas felt her breasts over her clothing. She alleged four or five more incidents of Spallas touching her breasts, under her shirt and bra, took place in the weeks that followed. Spallas then began touching the victim's vagina and eventually forced the victim to have sex with him every couple of weeks. While these incidents were occurring, the victim repeatedly told Spallas to stop. She reported that Spallas told her not to tell her mother.

Spallas entered into a plea agreement with the State pursuant to which he entered ***Alford*** pleas to two amended charges of third-degree sexual assault. In exchange, the State agreed to dismiss and read in the charge of sexual assault of a child under sixteen years of age. The parties jointly requested a PSI, and pursuant to the agreement, the State would follow the PSI writer's recommendation as to initial confinement time unless the recommendation was more than seven years, in which case the State would cap its recommendation at seven years. The agreement left the State free to argue as to the length of extended supervision and the conditions to be imposed.

The circuit court accepted Spallas' pleas and imposed two consecutive ten-year sentences.

The no-merit report concludes there would be no arguable merit to assert that (1) Spallas' pleas were not knowingly, voluntarily, or intelligently entered, or (2) the circuit court erroneously exercised its sentencing discretion. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In his response, Spallas argues there was a lack of evidence to support the charges, the circuit court judge was biased against him, and erroneous dates were referenced as to past crimes he committed. Spallas concludes his response with the following: "The more I read the more I think I should have gone to trial." We will address Spallas' various issues below.

We begin with the ***Alford*** pleas. There is no arguable basis to allege that Spallas' pleas were not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form, which the circuit court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Although Spallas maintained his innocence, the prosecutor and defense counsel confirmed, and the circuit court concluded, that there was strong proof of his guilt. *See* ***State v. Garcia***, 192 Wis. 2d 845, 857-58, 532 N.W.2d 111 (1995). The circuit court conducted a thorough plea colloquy addressing Spallas' understanding of the plea agreement and the charges to which he was entering ***Alford*** pleas, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* § 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. There would be no basis to challenge Spallas' ***Alford*** pleas.

Insofar as Spallas raises arguments regarding the lack of supporting evidence and suggests that he thinks he should have gone to trial, he is too late. As set forth in the plea

questionnaire and waiver of rights form, by accepting the terms of the plea agreement—which significantly reduced his prison exposure[3]—Spallas gave up his right to a trial and his related right to testify and present evidence at trial. During the plea hearing, the prosecutor made clear the DNA test results obtained "support[ed] the [d]efense side more than it supports the State's side." The prosecutor further explained that a trial would likely come down to a credibility contest between Spallas and the victim.

Spallas went forward with his pleas. During the plea hearing, Spallas acknowledged that he had enough time to talk to his attorney about his options and possible defenses and that he was satisfied with his attorney's representation. Spallas' knowing and voluntary ***Alford*** pleas waived the nonjurisdictional defects and defenses he now wishes he had raised.[4] *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

Next, we turn to the sentencing. We conclude 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

[3] Spallas' maximum exposure to imprisonment was reduced from 120 years to 20 years.

[4] During the sentencing hearing, the circuit court noted some concerning remarks made by Spallas to the PSI report writer. The circuit court then reiterated to Spallas that he had the right to a trial. Spallas confirmed that he understood he had the right to a trial and affirmatively responded that he wanted to proceed with the plea agreement.

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. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The circuit court reflected on Spallas' 1998 convictions for three counts of fourth-degree sexual assault. At that time Spallas was twenty years old and the victim was fourteen. Although a significant amount of time had passed between those convictions and the convictions in this case, which again involved a fourteen-year-old victim, the circuit court emphasized: "You can't have sex with a 14-year-old girl. Period. It doesn't matter. It doesn't matter if you're almost 20 like back in 1997. Or if you're 35, 36 as you were here. There's nothing murky about that. It's against the law."

The circuit court disagreed with the PSI report writer's recommendation of two to three years of initial confinement and five years of extended supervision, citing Spallas' poor probation record from the 1998 case where he was ultimately revoked because he continued to have contact with the victim, whom he had impregnated. The circuit court further concluded that the PSI report writer's recommendation unduly depreciated the severity of the crimes, which involved a breach of the victim's trust of Spallas, who was in a position of authority at the time of the offenses and was married to the victim's mother. Additionally, the circuit court

highlighted that the severity of the charges, which involved multiple occurrences of inappropriate touching and sexual intercourse spanning a number of weeks.

Contrary to Spallas' assertion, we do not see anything in the sentencing transcript that reveals bias on the part of the circuit court judge. The circuit court's consideration of Spallas's criminal history was appropriate. *See* ***Odom***, 294 Wis. 2d 844, ¶7 (Sentencing factors that circuit courts may consider include past record of criminal offenses and history of undesirable behavior patterns.). To the extent that Spallas' prior convictions were, on occasion, erroneously said to have occurred in 1987 instead of 1997, the misstatements were of no consequence. What was significant to the circuit court was the fact that Spallas had three prior convictions for fourth-degree sexual assault, not the exact year when they occurred.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the circuit court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The circuit court sentenced Spallas to two consecutive sentences of five years of initial confinement and five years of extended supervision. Although the circuit court ultimately imposed the maximum time available, we are not persuaded the sentences were overly harsh. *See* WIS. STAT. §§ 940.225(3), 939.50(3)(g), 973.01(2)(b)7. & (d)4. (2013-14). Spallas benefitted greatly from the amended charges, which reduced his maximum total exposure by one hundred years. Given the reduction in charges and the severity of the crimes, 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 Tristan S. Breedlove is relieved of further representation of Spallas in this matter. *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