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August 1, 2017

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

2016AP1050-CRNM State of Wisconsin v. Cherry L. Thomas, Jr.
(L.C. # 2015CF405)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Cherry L. Thomas, Jr., appeals from a judgment of conviction for two counts of first-degree sexual assault, sexual intercourse with a person under the age of thirteen. *See* WIS. STAT.

§ 948.02(1)(e) (2015-16).[1] Thomas's postconviction/appellate counsel, Angela C. Kachelski, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Thomas has not filed a response. We have independently reviewed the record and the no-merit report, as mandated by ***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 Thomas with two counts of first-degree sexual assault (sexual intercourse with a person under the age of twelve). The complaint alleged that between October 1, 2014, and January 18, 2015, Thomas sexually assaulted two child victims (one of the victims turned six years old during this timeframe and the other victim was eight years old) on multiple occasions. The complaint alleged numerous instances of sexual intercourse as reported by the victims, which included penis to vagina, penis to anus, and penis to mouth. The complaint detailed an incident, as described by one victim during a forensic interview, where Thomas put her in a closet in his bedroom with tape on her mouth, legs, and arms and forced her to have anal sex. All of the incidents occurred at the home of the victims' grandmother, which was where the victims and Thomas were living. The complaint further alleged that Thomas told the victims he would kill them if they told on him.

Thomas ultimately entered into a plea agreement with the State. Under the terms of that plea agreement, the two original counts of first-degree sexual assault, sexual intercourse with a person under the age of twelve, were amended to two counts of first-degree sexual assault, sexual intercourse with a person under the age of thirteen. Each of the original charges carried

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

with it a mandatory minimum confinement period of at least twenty-five years, *see* WIS. STAT. § 939.616(1r), whereas the amended charges did not. In exchange for Thomas's guilty pleas, the State agreed to recommend a period of substantial prison, leaving the length to the circuit court's discretion. Additionally, the State would request restitution.

The circuit court conducted a plea colloquy, accepted Thomas's pleas, and found him guilty.

At the sentencing hearing, the circuit court heard remarks from the attorneys, the victims' grandmother, and from Thomas. The prosecutor provided the circuit court with background information, explaining that the victims lived with their grandmother, who took care of them. The grandmother allowed Thomas's wife, who was her niece, and Thomas to live with her following their move to Milwaukee from Mississippi. The prosecutor explained that the assaults began almost immediately after Thomas moved into the home. Additionally, the prosecutor told the circuit court that although Thomas downplayed the events that transpired, the statement he gave after he was arrested was incriminating. The State adhered to the terms of the plea agreement and requested that the circuit court impose a period of substantial imprisonment.

In her remarks, Thomas's trial counsel pointed out that Thomas had minimal contact with the criminal justice system before these allegations. Trial counsel further noted that she had concerns about Thomas's competency and had him evaluated. According to trial counsel, the evaluator concluded that although Thomas functioned at a low level in terms of his intellect, he did understand the ***Miranda*** warnings that were given prior to his interview.[2] Trial counsel

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966).

asked the circuit court to sentence Thomas to two consecutive sentences of six years of initial confinement and six years of extended supervision.

The circuit court imposed two consecutive sentences of twenty-two years of initial confinement and eighteen years of extended supervision. In doing so, the circuit court reflected on the severity of the crimes, which consisted of "multiple times having sexual contact and sexual intercourse in a variety of manners with two small, defenseless girls." The circuit court highlighted that Thomas's behavior went on for as long as three months and may have gone on for much longer if the girls had not told. Additionally, the circuit court emphasized the threats Thomas made: "Not just to be quiet, not just 'Don't tell or you'll get hurt,' not just 'Don't tell or I'll hurt your family,' but 'I'll kill you' to a five[]year[]old and an eight[]year[]old." The circuit court concluded that the public needed to be assured Thomas would be confined for a lengthy period of time to address whatever issues caused him to commit these crimes. This appeal follows.

The no-merit report analyzes two issues: (1) the validity of Thomas's pleas and (2) the circuit court's exercise of its sentencing discretion. 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.

First, we consider Thomas's pleas. There is no arguable basis to allege that Thomas's guilty 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 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). The circuit court conducted a thorough plea colloquy that addressed Thomas's understanding of the plea agreement and the charges to which he was pleading guilty, 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. Finally, the circuit court confirmed that Thomas spoke with trial counsel about the fact that he would have to register as a sex offender and that the two had discussed the potential for a civil commitment under WIS. STAT. ch. 980.

Appellate counsel points out that the jury instruction for first-degree sexual assault and the instructions defining sexual contact and sexual intercourse were attached to the plea questionnaire. However, in doing so, counsel overlooked that the first-degree sexual assault instruction that was attached specifically pertained to sexual intercourse with a person who is under the age of twelve, which related to the charges *originally* filed against Thomas. *See* WIS JI—CRIMINAL 2102B; WIS. STAT. § 948.02(1)(b). Having compared the instruction that was attached with the instruction that should have been provided for first-degree sexual assault pertaining to sexual intercourse with a person under the age of thirteen, *see* WIS JI—CRIMINAL 2102B, we note that the only difference is the age of the victim.

Here, the plea questionnaire and waiver of rights form reflects what appears to be a subsequently written notation to show that Thomas was pleading guilty to the amended charges under WIS. STAT. § 948.02(1)(e). The circuit court explained the amended charges to Thomas at

the beginning of the plea hearing, and Thomas confirmed that he wanted to plead guilty.[3] The circuit court reiterated that the charges to which Thomas was pleading were first-degree sexual assault for having sexual intercourse with a person under the age of thirteen.[4]

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Thomas's conversations with his trial counsel, and the circuit court's colloquy appropriately advised Thomas 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 Thomas's pleas. To the extent there were minor misstatements by the prosecutor and the circuit court, presumably due to the fact that the amended information was filed on the same date as the plea hearing, they did not negate the knowing, intelligent, and voluntary nature of Thomas's pleas. The circuit court correctly went over the charges in the amended information with Thomas, informed him that the charges were Class B felonies, and advised him as to the maximum term of imprisonment. Thomas confirmed for the circuit court that he understood.

[3] At the beginning of the plea hearing, the prosecutor erroneously stated that the amended information charged Thomas with two counts of *second*-degree sexual assault of a child under the age of thirteen. The prosecutor intended to say two counts of first-degree sexual assault of a child under the age of thirteen. The prosecutor did, however, properly identify the amended charges as Class B felonies.

The charges were properly set forth in the amended information. Thomas's trial counsel acknowledged receipt of the amended information at the plea hearing.

[4] However, when it later accepted Thomas's pleas and found him guilty, the circuit court erroneously cited WIS. STAT. § 948.02(1)(b) instead of WIS. STAT. § 948.02(1)(e).

The next issue we consider is the sentencing. We conclude 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 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.

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 sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. While the circuit court imposed lengthy sentences on each count, consecutive to each other, we are not persuaded the sentences were overly harsh. Given the amended charges, which removed the possibility of mandatory minimum confinement time totaling at least fifty years, *see* WIS. STAT. §§ 948.02(1)(b), 939.616(1r), 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.[5]

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 Angela C. Kachelski is relieved of further representation of Thomas in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals

[5] The record does not include a transcript of the February 18, 2015 scheduling conference. Docket entries reflect that Thomas's trial counsel waived his appearance for the hearing and that only routine scheduling matters were addressed. *See* WIS. STAT. § 971.04(1)(a)-(h) (scheduling conference is not included in the statute that specifies when a defendant must be present in court). In the interest of judicial efficiency, we can proceed without this transcript given that by entry of his guilty pleas, Thomas forfeited any possible appellate issues from the proceedings conducted and rulings made before his pleas. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.