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DISTRICT IV

August 3, 2017

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

2015AP2150-CRNM State of Wisconsin v. Shane R. Gage (L.C. #2011CF439)

Before Lundsten, P.J., Sherman and Blanchard, 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).

Shane Gage appeals two related judgments convicting him of one count of aggravated battery with intent to cause great bodily harm as domestic abuse and one count of strangulation and suffocation as domestic abuse. He also appeals an order denying his postconviction motion

for sentence modification.[1] Attorney Anthony Jurek has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);[2] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses Gage's pleas and sentences. Gage was sent a copy of the report, and has filed a response challenging his sentence on the aggravated battery count. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice, such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Gage entered his pleas pursuant to a negotiated plea agreement that was presented in open court. In exchange for Gage's pleas, the State agreed to dismiss repeater penalty enhancers

[1] As is commonly done, the conviction for strangulation was set forth in a separate judgment because the court imposed probation on that count. The notice of appeal refers to a "judgment" in the singular, entered on the date of the postconviction order, without specifying either charge, and the no-merit report discusses a plea agreement that encompassed both charges and the postconviction motion, as if all three had been appealed. We will therefore treat the notice of appeal as encompassing both judgments and the postconviction order.

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

on both counts and to dismiss and read in four additional enhanced felonies and four enhanced misdemeanors on this case and another case. The plea agreement reduced Gage's sentence exposure by 48 years.

The circuit court conducted a very thorough plea colloquy, inquiring into Gage's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Gage's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure that Gage understood that the court would not be bound by any sentencing recommendations. In addition, Gage provided the court with a signed plea questionnaire. Gage indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint, adduced at the preliminary hearing, and acknowledged by Gage at the plea hearing—namely, that he punched his girlfriend in the eye, fracturing her eye socket, and choked her, cutting off her air—provided a sufficient factual basis for the pleas. Gage indicated satisfaction with his attorney, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Gage has not alleged any other facts that would give rise to a manifest injustice. Therefore, Gage's pleas were valid and operated to waive all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Gage's sentence and term of probation would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record shows that Gage was afforded an opportunity to comment on the PSI, to present an alternate sentencing report and character letters, and to address the court, both personally and through counsel. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offenses, the court observed that the victim had suffered lifelong physical injury, as well as mental scars from the aggravated battery. The court treated the read-in offenses as aggravating, and referred to the behavior described in one of the read-in offenses as appearing to involve "sadomasochism." With respect to Gage's character, the court noted that, as a juvenile, Gage had committed an egregious sexual assault with a knife and, as an adult, had inflicted domestic abuse on three victims, repeatedly stating that Gage's behavior demonstrated a pattern of exercising power and control over women. The court noted that the five years Gage had spent at Lincoln Hills, four prior unsuccessful terms of probation, and multiple other contacts with the justice system had been insufficient to get Gage to change his behavior or address his underlying problems. The court concluded that a substantial prison term was warranted to protect Gage's next potential victims, to give the victim some sense of security, and to give Gage a more extended opportunity to "come to grips" with himself and address his treatment needs.

The court then sentenced Gage to eight years of initial confinement and four years of extended supervision on the aggravated battery count, and withheld sentence on the strangulation count, subject to a consecutive three-year term of probation. The court also awarded 214 days of sentence credit, ordered Gage to pay restitution, imposed standard costs and conditions of supervision, and directed Gage to provide a DNA sample, but did not impose a DNA surcharge on either conviction. The judgments of conviction indicated that Gage was not eligible for the challenge incarceration program or the substance abuse program.

The components of the bifurcated sentence on the aggravated battery count and the length of the probation term on the strangulation count were within the applicable penalty ranges. *See* WIS. STAT. §§ 940.19(5) (classifying aggravated battery with intent to cause great bodily harm as a Class E felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E felony); 940.235(1) (classifying strangulation as a Class H felony); 973.09 (setting term of probation for a felony at not less than one year and not more than the greater of three years or the initial period of confinement, which for a Class H felony was three years, § 973.01(2)(b)8.) (all 2009-10 Stats.).

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here was not "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). That is particularly true when taking into consideration the amount of additional sentence exposure that Gage avoided on the read-in offenses.

After the judgments of conviction had been entered, and following a separate hearing, the court denied a pending request by the State to have Gage placed on the sex offender registry. The court concluded, based upon uncontroverted expert testimony from a defense witness, and in the absence of an admissible statement from the victim,[3] that there was an insufficient evidentiary basis to conclude beyond a reasonable doubt that the offenses were sexually motivated.

Gage then moved to modify his sentence, either on the grounds of a new sentencing factor or because Gage had been sentenced on inaccurate information. Gage argued that the court's post-sentencing acceptance of the expert witness's opinion that Gage was not a sadist and that the offenses were not sexually motivated conflicted with the court's comment at sentencing that it appeared, based on the victim's account that Gage required her to call him master and daddy, that Gage had become "a person that appears … to be involved in sadomasochism."

The court first noted that its decision on the sex offender registration was largely based on the State failing to brief the issue. Next, the court distinguished the issue of whether the State had proven that the offenses of conviction were sexually motivated from the court's comment suggesting that a read-in offense involved sadistic elements, and rejected the proposition that its comment was inaccurate. The court stated that it still agreed with the State that there was a "sexual undertone" to Gage's conduct, even though his conduct did not "rise to the level" necessary to warrant sex offender registration. Finally, the court concluded that the additional information from the expert witness would not change the sentence the court had imposed

[3] The court refused to consider an ex parte letter that the victim had sent to the court but which the State had not introduced at the registry hearing.

because the sentence was based on Gage's inability to control his violent behavior over a long period of time, not the characterization of one of his acts as being sadomasochistic. We agree with counsel that the circuit court's determination that it would not change the sentence based on the expert's opinion is dispositive of Gage's motion for sentence modification, under either the new factor or inaccurate information framework.

We do note that the judgments of conviction fail to reflect that the repeater allegations were dismissed on the aggravated battery and strangulation counts. Accordingly, we direct that the judgments of conviction be amended to conform with the pleas that were entered.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction or the order denying postconviction relief. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgments of conviction shall be modified to conform to the record by removing the repeater allegations from Counts 1 and 2.

IT IS ORDERED that the judgments of conviction, as modified, and the postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Anthony Jurek is relieved of any further representation of Shane Gage in this matter pursuant to 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