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August 23, 2017

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

2017AP180-CRNM State of Wisconsin v. Brandon S. Sturm (L.C. #2015CF335)

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

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).

Brandon S. Sturm appeals from a judgment of conviction and an order denying his motion for postconviction relief. Sturm's 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). Sturm

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

received a copy of the report, was advised of his right to file a response, and has elected not to do so. After reviewing the record and counsel's report, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment and order. WIS. STAT. RULE 809.21.

Sturm was convicted following a no contest plea to second-degree sexual assault of a child. The charge stemmed from allegations that he had sexual intercourse with a fourteen-year-old girl when he was twenty-seven years old. One additional count of second-degree sexual assault of a child was dismissed and read in. The circuit court sentenced Sturm to six years of initial confinement followed by ten years of extended supervision.

After sentencing, Sturm filed a motion for postconviction relief. He sought to modify his sentence on the basis of a new factor, namely his mental health diagnoses of borderline intellectual functioning, bipolar disorder, and attention deficit hyperactivity disorder.² Following a hearing on the matter, the circuit court denied the motion. This no-merit appeal follows.

The no-merit report addresses whether Sturm's no contest plea was knowingly, voluntarily, and intelligently entered. The record shows that the circuit court engaged in a colloquy with Sturm that satisfied the applicable requirements of WIS. STAT. § 971.08(1) and

² Sturm asked that his sentence be modified to four years of initial confinement followed by fourteen years of extended supervision.

State v. Brown, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.³ We agree with counsel that a challenge to the entry of Sturm’s no contest plea would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court’s sentencing decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In making its decision, the court considered the seriousness of the offense, Sturm’s character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Sturm’s criminal record, the sentence imposed does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Sturm’s sentence would lack arguable merit.

The no-merit report also addresses whether the circuit court properly denied Sturm’s motion for postconviction relief. Here, the circuit court acknowledged that the specificity as to Sturm’s mental health diagnoses was, in some ways, a new factor.⁴ However, it declined to modify Sturm’s sentence on that basis, citing his history of misconduct, the nature of the offense,

³ There is one exception to this. The circuit court failed to provide the deportation warning required by WIS. STAT. § 971.08(1)(c). This failure does not present a potentially meritorious issue for appeal, however, as there is no indication that Sturm’s plea is likely to result in his deportation, exclusion from admission to this country, or denial of naturalization. Indeed, Sturm told the court that he was born in Wisconsin.

⁴ The circuit court was aware that Sturm had cognitive impairments/intellectual deficits before accepting his plea and sentencing him. However, it was not aware of his specific mental health diagnoses until after sentencing. No presentence investigation report was requested by the parties or ordered by the court.

the harm to the victim, and the need to protect the public. Whether a new factor justifies sentence modification is left to the circuit court's sound discretion. See *State v. Harbor*, 2011 WI 28, ¶37, 333 Wis. 2d 53, 797 N.W.2d 828. Because the record demonstrates a proper exercise of discretion in denying Sturm's motion for postconviction relief, we agree with counsel that a challenge to the court's decision would lack arguable merit.

Finally, the no-merit report addresses whether any suppression issue should have been raised in the circuit court. Sturm filed no motion to suppress, and there is nothing in the record to suggest that he should have done so. Sturm gave no statement to police. Moreover, the police's search of his apartment was pursuant to a lawful warrant. Consequently, we conclude that the no-merit report properly analyzes this issue as without merit, and we will not discuss it further.⁵

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Patricia A. FitzGerald of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

⁵ Sturm also forfeited this issue by virtue of his no contest plea. See *State v. Kelly*, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (a plea forfeits all nonjurisdictional defects, including constitutional claims).

IT IS FURTHER ORDERED that Attorney Patricia A. FitzGerald is relieved of further representation of Sturm in this matter.

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

*Diane M. Fremgen
Clerk of Court of Appeals*