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

2017AP153-CRNM State of Wisconsin v. Isaiah D. Parker
(L.C.# 2014CF003578)

Before Brennan, P.J., Kessler and Dugan, 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).

Isaiah D. Parker appeals from a judgment of conviction for one count of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2013-14).[1] Parker's

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

postconviction/appellate counsel, Thomas J. Erickson, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Parker filed a response and Erickson filed a supplemental no-merit report. We have independently reviewed the record, the no-merit reports, and Parker's response, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

The criminal complaint alleged that in 2014, Parker had sexual intercourse with a fourteen-year-old girl in his home. The complaint said the victim told the police that Parker "put his hand over her mouth," held "her hands over her head," and had penis-to-vagina sexual intercourse with her. The complaint further stated that Parker told the police that the intercourse was consensual although he knew it was wrong.

At the initial appearance, Parker's counsel requested a competency evaluation. The examining psychiatrist concluded that Parker was competent to proceed. Neither the defense nor the State challenged that conclusion and the trial court found Parker competent to proceed.

Four months later, Parker entered a plea agreement with the State pursuant to which he agreed to plead guilty as charged and the State agreed to recommend a prison sentence with the length of imprisonment left to the trial court's discretion. The trial court conducted a plea colloquy, accepted Parker's guilty plea, and found him guilty. During the course of the plea hearing, trial counsel emphasized that Parker contested the State's suggestion that he "force[d] himself" on the victim. Trial counsel asserted that the sexual intercourse was consensual although Parker recognized that the girl could not legally consent. The trial court found that both

the State's version of events and Parker's version of events provided a factual basis for Parker's guilty plea.[2] The trial court ordered a presentence investigation (PSI).

The trial court sentenced Parker to eighteen years of initial confinement and fifteen years of extended supervision. The trial court also ordered Parker to pay a $250 DNA surcharge "if you haven't paid it already."[3]

The no-merit report addresses two issues: (1) whether Parker's "guilty plea was knowing and voluntary"; and (2) whether the trial court erroneously exercised its sentencing discretion. Counsel concludes there would be no merit to challenging Parker's guilty plea or sentence. This court agrees with counsel's description and analysis of the potential issues identified in the no-merit report, and we independently conclude that there would be no arguable merit to pursuing those issues. We briefly discuss the issues below.

We begin with Parker's guilty plea. There is no arguable basis to allege that it was 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). Parker completed a plea questionnaire and waiver of rights form, as well as an addendum, which the trial court referenced during the plea hearing.

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[2] There are two elements to the crime of second-degree sexual assault of a child: (1) the defendant had sexual contact or intercourse with the victim; and (2) the victim was under 16 years of age at the time. *See* WIS JI—CRIMINAL 2104 (2008).

[3] Consistent with the trial court's oral pronouncement, the judgment of conviction lists a $250 DNA surcharge and also includes this language in the comments section: "Provide DNA sample, unless previously submitted, pay surcharge unless previously paid." It is an open question whether a trial court has discretion to waive the DNA surcharge mandated by WIS. STAT. § 973.046. *See* ***State v. Cox***, No. 2016AP1745-CR (certification filed August 29, 2017). However, because the trial court's decision to waive the surcharge if Parker paid it already is favorable to Parker, it does not provide a basis for further postconviction appellate proceedings; an appellant cannot seek review of a favorable ruling. *See* WIS. STAT. RULE 809.10(4) (appeal from final judgment brings only adverse rulings before this court).

See ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The jury instructions for both second-degree sexual assault of a child and sexual intercourse were also referenced. The trial court went over with Parker the elements of the crime, and it also determined that there was a factual basis for the plea. In addition, the trial court discussed with Parker the fact that he would have to register as a sex offender and could be subject to a WIS. STAT. ch. 980 petition in the future.

The trial court conducted a thorough plea colloquy that addressed Parker's understanding of the plea agreement and the charge to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his plea. *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. Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Parker's conversations with his trial counsel, and the trial court's colloquy appropriately advised Parker 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 plea was knowing, intelligent, and voluntary. The record does not suggest there would be an arguable basis to challenge Parker's plea.

The next issue we consider is the sentencing. We conclude there would be no arguable basis to assert that the trial 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 trial 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 trial 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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Its sentencing comments addressed Parker's character, including the fact that he was previously convicted of both armed robbery and second-degree sexual assault with use of force. It observed that Parker had not been successful on probation and supervised release.

In addition, the trial court discussed a prior sexual assault allegation against Parker made by the same victim in this case. The trial court confirmed with Parker that after the victim made that allegation, a plan had been put in place where Parker was not "to be left alone with this child and … [was not] to place [him]self in the circumstances where even this kind of allegation could be made." The trial court said that even if Parker's description of the current offense was accurate—that the child came to his room and was "willing" to engage in sexual intercourse—Parker was on notice that he should not have "sexual contact with minors."

The trial court recognized that the public needed protection, stating: "I am deeply concerned, given your history and given all the warning signs here, about the safety of children that you might come into contact with in the future." The trial court said that the offense was serious and noted that the maximum period of initial confinement was twenty-five years. The

trial court rejected the sentence recommendations of the PSI writer and a psychologist retained by the defense, explaining that they had "recommend[ed] far less time than the Court believes is appropriate."[4] It explained that a longer period of initial confinement was needed to adequately address Parker's actions and ensure that children in the community are protected. The trial court said that "the maximum period of extended supervision is being ordered because I'm gravely concerned about your propensity to re-offend once you are released."

Our review of the sentencing transcript leads us to conclude there would be no merit to challenging the trial court's compliance with ***Gallion***. Further, there would be no merit to asserting that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Parker's sentence of eighteen years of initial confinement and fifteen years of extended supervision—which was based in part on his criminal history, including a prior conviction for sexual assault—was well within the maximum sentence and we discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

In his response to the no-merit report, Parker raises a single issue. He disputes information in the no-merit report indicating that when he was on extended supervision for his first sexual assault conviction, his supervision was revoked because Parker engaged in inappropriate behavior with a child in his home. He explains:

> I was revoked for [one and one-half] years because of not informing my probation officer that my wife and I allowed [two] children to live with us for a couple of months. I believe that I was

[4] The PSI writer recommended an eight-to-ten-year period of initial confinement, while the psychologist recommended a three-to-five-year period of initial confinement.

> judged wrongly because of the incorrect information that was [given] and was handed a harsh sentence. I hope to get relief from this sentence.

Counsel filed a supplemental no-merit report to address Parker's response. The report rejects Parker's suggestion that there was a basis to challenge his sentence, stating:

> [The trial] court stated that during the Defendant's second revocation process, the least serious of the allegations was that he was living in a household with minors and that the most serious allegation was that he was accused of sexually assaulting a child. The court did not speculate as to which violations were committed but stressed that the Defendant was revoked and that it was his second failure on [supervision].
>
> Thus, taking the Defendant at his word, that he was in fact revoked for living in his home with minor children, the court's statements do not constitute incorrect information or [indicate] that it relied on incorrect information in passing sentence. The court merely stated the nature of the alleged violations of supervision while placing its reliance on the Defendant's inability to conform his conduct to the rules of supervision on two occasions as relevant to its sentencing analysis.

We have carefully reviewed the sentencing transcript, as well as the PSI report, which recounted the allegations brought against Parker that led to the revocation of his extended supervision. Those allegations included allowing minors to reside in his home, as well as an incident where a nine-year-old child alleged that Parker exposed his penis, "rubbed his clothed penis" against the child's buttocks, attempted an act of penis-to-anus intercourse, and hit the child with an extension cord.[5] At the outset of the sentencing hearing, trial counsel challenged the second allegation, noting that "there was no arrest let alone a prosecution there."

[5] The alleged victim of those acts was not the same child who was the victim in the case currently before this court.

When the trial court discussed Parker's failed attempts to live in the community under supervision, it commented on the alleged sexual assault involving the nine-year-old child. The trial court said:

> Now, there was obviously some record made of that and I'm not going to speculate about why you never got charged with that offense or whether or not—I don't even know that it's been confirmed that the police were ever called or if that matter was actually even reported. Otherwise I don't know how the probation agent would have found out about it if it wasn't reported to someone. So it was reported enough to the degree that your probation agent knew about it and it's in your records that that allegation was made.
>
> Whatever the case is, at the very least you were living in a household and having unsupervised contact with minors. And that's not a good sign either because that's a second example of your violating supervision while you're in the community and disregarding the rules. And there's a reason that we have certain rules in place for sex offenders.

The trial court then turned to other issues, including allegations that Parker previously sexually assaulted the victim in this case. It did not again comment on the allegations concerning the nine-year-old child.

A defendant who seeks resentencing based on the sentencing court's alleged reliance on inaccurate information "must establish that there was information before the sentencing court that was inaccurate, and that the [sentencing] court actually relied on the inaccurate information." ***State v. Tiepelman***, 2006 WI 66, ¶2, 291 Wis. 2d 179, 717 N.W.2d 1. We agree with counsel that there would be no arguable merit to challenging Parker's sentence based on the trial court's discussion of allegations concerning the nine-year-old child. The trial court acknowledged that Parker had not been charged with the incident, and it did not attempt to determine if the assault happened. There is no indication that the trial court relied on that alleged

incident in crafting its sentence. Instead, it focused on Parker's prior sexual assault conviction and the current offense, as well as his general failures on supervision.

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 Thomas J. Erickson is relieved of further representation of Parker 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