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October 19, 2017

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Madaysha M. McGee
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You are hereby notified that the Court has entered the following opinion and order:

2016AP1922-CRNM State of Wisconsin v. Madaysha M. McGee
(L.C. # 2015CF3804)

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).

Madaysha M. McGee appeals from a judgment convicting her of one count of child neglect causing bodily harm. *See* WIS. STAT. § 948.21(1)(b) (2015-16).[1] McGee's postconviction/appellate counsel, Becky Van Dam, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). McGee 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 alleged that on July 21, 2015, McGee's seven-month-old daughter, J.S., was admitted to Children's Hospital of Wisconsin for a broken femur. At that time, medical personnel also discovered that J.S. had healing rib fractures on the left and right sides of her body. An officer responded to the hospital to investigate possible child abuse and spoke with McGee and with J.S.'s father, Jaquis Smith.

McGee indicated that on July 19, 2015, she was at her home with J.S. and Smith. McGee's eight-year-old sister, A.T., and Smith's three-year-old cousin, T.J., were also at the home. McGee relayed that she moved a mattress from the bedroom to the living room floor in front of the television. She then sat on the mattress with J.S. on a pillow next to her. A.T. and T.J. sat on a love seat next to the mattress. According to McGee, Smith said something to T.J., which prompted T.J. to jump off of the love seat and run across the mattress toward the kitchen. McGee said that she felt T.J.'s feet move across the mattress and could tell that he either stepped

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

on or kicked J.S. McGee reported that she yelled at T.J. for kicking her baby; however, J.S. did not wake up or cry, so she felt she had no reason to be concerned.

McGee told the officer that the following day, she woke up, fed J.S., and changed J.S.'s diaper. J.S. did not cry but was slightly fussy. McGee left the home for a meeting and to run errands, returning at 1:00 p.m. During that time, Smith was home with J.S. A.T. and T.J. were also still at the home, and when McGee returned, J.S. was crying. J.S. continued to cry throughout the day, but McGee did not know why. At around 4:00 p.m., McGee said that she picked J.S. up by the armpits and tried to have her stand on her feet, at which point J.S. began to cry even harder. McGee said that J.S. continued to cry slightly during the evening hours and only ate twice that day when she would normally have eaten five times. McGee said that J.S. was not acting normally and cried herself to sleep that night.

The next day, on July 21, 2015, McGee woke up at 8:00 a.m. to feed J.S., who cried. Around 11:00 a.m., McGee and Smith had a conversation about J.S. after Smith changed her diaper and noticed that her left leg was swollen and bruised. McGee said at this point, she was afraid that J.S.'s leg was broken.

Later that day, McGee and Smith went to Smith's mother's house to ask her for advice. Smith's mother told them to take J.S. to the hospital. They did so around 6:30 p.m.

As set forth in the complaint, a doctor at the hospital reviewed the history provided by McGee and Smith and stated that J.S.'s injuries were not explained by the incident described and were highly concerning for physical abuse. According to the doctor, the fracture was severe and would have resulted in immediate symptoms such as crying and decreased use of the leg. Additionally, the doctor noted that the incident that was described with T.J. would not be

expected to cause a femur fracture and that blaming another child for an injury commonly occurs in abuse scenarios. The doctor further indicated that J.S.'s multiple healing rib fractures were highly indicative of abuse.

McGee ultimately entered into a plea agreement with the State. Under the terms of the agreement, McGee pled guilty to the crime as charged. In exchange, the State recommended probation with six to nine months of condition time. The State additionally agreed to stand silent as to Huber privileges. The agreement left McGee free to argue as to her sentence.

The circuit court conducted a plea colloquy, accepted McGee's plea, and found her guilty. The circuit court imposed and stayed a sentence of eighteen months of initial confinement and eighteen months of extended supervision. It then placed McGee on probation for a period of up to twenty-four months, explaining that when McGee's probation agent felt that McGee had "gotten as much out of probation as [she] need[ed] to get, they can come in and ask me to terminate probation early and … I will do that." As a condition of probation, the circuit court ordered McGee to spend sixty days in the House of Correction: thirty days to be served at the outset and thirty days, stayed, pending a request from the probation agent. The circuit court allowed McGee Huber release and child care release privileges.

The no-merit report analyzes three issues: (1) the validity of McGee's plea; (2) the circuit court's exercise of its sentencing discretion; and (3) the circuit court's denial of McGee's expungement request. 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 each one in turn.

First, we consider McGee's plea. There is no arguable basis to allege that McGee's guilty plea 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). She 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). A listing of the relevant elements was attached to the form. The circuit court conducted a plea colloquy that addressed McGee's understanding of the plea agreement and the charge to which she was pleading guilty, the penalties she faced, and the constitutional rights she was waiving by entering her plea, as set forth on the form. *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.

The circuit court did not give the deportation warning. *See* WIS. STAT. § 971.08(1)(c). However, to be entitled to plea withdrawal on this basis, McGee would have to show "that the plea is likely to result in [her] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the record that McGee can make such a showing.

Additionally, the circuit court did not expressly delineate the direct consequences of McGee's plea on the record. Yet, our review of the plea colloquy, as supplemented by the plea questionnaire and waiver of rights form that McGee signed, establishes that she was notified of the direct consequences of her plea before the circuit court accepted it. The circuit court made a point during the plea colloquy to verify that McGee had reviewed the form with her attorney. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a

substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken).

We ultimately conclude that the plea questionnaire and waiver of rights form, McGee's conversations with her trial counsel, and the circuit court's colloquy appropriately advised McGee of the elements of the crime and the potential penalties she 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 McGee's plea.

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.

At sentencing, the circuit court noted that it was "not buying [McGee and Smith's] explanation for how this injury occurred. I think one or both of them knows more than they are telling me today about what happened, but they are choosing not to talk about that[.]" In explaining that probation was appropriate, the circuit court noted that some degree of supervision was required to protect J.S. and to make sure McGee "stay[ed] on the path[.]" Additionally, the circuit court held that there was a need for condition time as a form of punishment.

McGee faced six years imprisonment. *See* WIS. STAT. §§ 948.21(1)(b), 939.50(3)(h). Ultimately, the circuit court imposed a stayed sentence with up to twenty-four months of probation. The maximum period of probation time was three years. *See* WIS. STAT. § 973.09(2)(b)1. Although the circuit court ordered McGee to serve thirty days of condition time in the House of Correction with an additional thirty days of time stayed, she could have been ordered to serve as much as a year there. *See* § 973.09(4)(a). 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.

We last consider whether McGee could pursue an arguably meritorious challenge to the circuit court's order denying her request for expungement of her conviction upon completion of the sentence. McGee was twenty years old at the time of the offense. When the circuit court sentences a person who was younger than twenty-five years old when he or she committed a crime such as the one at issue here, the circuit court may order expungement of the conviction upon completion of the sentence if the circuit court concludes both that the person will benefit and that society will not be harmed. *See* WIS. STAT. § 973.015(1m)(a). Whether to order

expungement under § 973.015 rests in the circuit court's discretion. ***State v. Matasek***, 2014 WI 27, ¶2, 353 Wis. 2d 601, 846 N.W.2d 811.

Here, the circuit court explained that given the nature of the offense and its concern about how J.S.'s injury occurred, it was not willing to expunge McGee's record. Against this backdrop, a challenge to the circuit court's exercise of discretion would lack arguable merit.

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 Becky Van Dam is relieved of further representation of McGee 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