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December 6, 2017

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

2016AP1736-CRNM State of Wisconsin v. Latoya U. Bell (L.C. #2015CF333)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Latoya Bell appeals from a judgment convicting her of third-degree sexual assault of a child contrary to WIS. STAT. § 940.225(3) (2013-14) and from an order denying her sentence modification motion. Bell'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). Bell received a copy of the report and was advised of her right to file a response. She has not done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment and the order because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Bell's no contest plea was knowingly, voluntarily, and intelligently entered; (2) whether the circuit court misused its sentencing discretion; and (3) whether trial counsel was ineffective in relation to the sentencing proceeding. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of her no contest plea, Bell answered questions about the plea and her understanding of her constitutional rights during a thorough colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The plea questionnaire form Bell signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). The record discloses that Bell's no contest plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). The circuit court complied with ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835, with regard to

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

the dismissed and read-in offense (incest). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Bell's no contest plea.

With regard to the sentence, the record reveals that the sentencing court's discretionary 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). The plea agreement called for a joint recommendation of probation. The court rejected the parties' probation recommendation. In sentencing Bell to an eight-year term (three years of initial confinement and five years of extended supervision), the circuit court discussed the appropriate facts and factors. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In fashioning the sentence, the court considered the very aggravated and serious nature of the offense, Bell's character, the impact on the victim, and mitigating factors (Bell's mental health issues and Bell's behavior during pretrial release, including participating in counseling, being employed, and staying away from the victim as required by a no contact order). The court determined that Bell required rehabilitation in a confined setting and probation would unduly depreciate the crime. The weight of the sentencing factors was within the circuit court's discretion. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The $250 DNA surcharge was appropriately imposed. WIS. STAT. § 973.046(1r)(a). The circuit court also properly considered the dismissed and read-in offense. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

We further conclude that there would be no arguable merit to a challenge to the order denying Bell's sentence modification motion. The circuit court denied relief in part because Bell did not assert any factors about which the court had been unaware at sentencing. A new factor is

"a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶¶40, 52, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted).

In denying Bell's sentence modification motion, the circuit court noted that Bell did not raise at sentencing information relating to her personal history. Information about Bell's personal history was within her knowledge at the time of sentencing, and therefore such information cannot be a new factor justifying sentence modification. ***Id.*** In addition, Bell did not respond to the no-merit report to allege any facts relating to the failure to present aspects of her personal history, including prior abuse, at sentencing.

The no-merit report addresses whether Bell received effective assistance from her trial counsel at sentencing. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

The ineffective assistance issue arises from Bell's decision to proceed to sentencing without a presentence investigation report and from Bell's failure to present her personal history of alleged abuse in the hope of mitigating her sentence. Appellate counsel opines that it is not uncommon to forgo a presentence investigation report when the parties jointly recommend probation, as happened in this case.

We consider whether the record supports an arguable claim that Bell was prejudiced because counsel did not request a presentence investigation report. To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was deficient and that the deficiency was prejudicial. ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694. To establish prejudice, "the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense." ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885. The defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citation omitted). We conclude that the record does not support an arguable claim of prejudice arising from counsel's representation at sentencing.

Before the circuit court took Bell's no contest plea to third-degree sexual assault, the court warned Bell that the plea agreement's probation recommendation was a "red flag," the court was not bound by the recommendation, and the court could impose any appropriate sentence. Bell personally agreed to proceed to the plea colloquy. After a very thorough plea colloquy, the parties proceeded to sentencing. No presentence investigation report was ordered.[2]

[2] Notably, at a hearing two days before the plea and sentencing hearing, when the circuit court stated it did not have time to take Bell's plea and impose sentence, Bell's counsel informed the court (in Bell's presence) that she had wanted to proceed to sentencing that day, which would have precluded preparation of a presentence investigation report.

The no-merit report discusses the decision to proceed to sentencing without a presentence investigation report. Bell has not responded to the no-merit report to allege any facts relating that decision.

Given the circuit court's focus at sentencing on the severity of the offense, our review of the record does not establish that Bell was prejudiced by the absence of a presentence investigation report. It is not reasonably probable that a presentence investigation report would have made a difference in the outcome at sentencing (either via the imposition of probation or a lesser sentence). *See* ***id.***, ¶17. Bell was warned twice that the circuit court was not bound by any sentencing recommendation, and she personally agreed to proceed after the circuit court made its "red flag" comment about the probation recommendation. In his sentencing argument, Bell's counsel covered many of the topics that would have been found in the presentence investigation report. In the exercise of its discretion and after considering appropriate factors, the circuit court declined to impose probation. Finally, with both parties recommending probation, having a potentially contrary recommendation from a presentence investigation report author would have undercut the joint probation recommendation. We conclude that any ineffective assistance claim relating to the presentence investigation report would lack arguable merit.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did 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, affirm the judgment of conviction and postconviction order, and relieve Attorney Stephen Compton of further representation of Bell 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.

IT IS FURTHER ORDERED that Attorney Stephen Compton is relieved of further representation of Latoya Bell in this matter.

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

Diane M. Fremgen
Clerk of Court of Appeals