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DISTRICT IV

December 12, 2017

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

2016AP2004-CRNM State of Wisconsin v. Joshua W. Rowe (L.C. # 2014CF1211)

Before Sherman, Blanchard and Fitzpatrick, 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).

Attorney Philip Brehm, appointed counsel for Joshua Rowe, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Counsel provided Rowe with a copy of the report, and both counsel and this court advised him of

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

his right to file a response. Rowe has not responded. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

Rowe was convicted of three counts of possession of child pornography. The court imposed concurrent sentences of five years of initial confinement and seven years of extended supervision.

The no-merit report addresses whether Rowe's pleas were entered knowingly, voluntarily, and intelligently. With one possibly arguable exception discussed further below, the plea colloquy sufficiently complied with the requirements of ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, and WIS. STAT. § 971.08 relating to the nature of the charge, the rights Rowe was waiving, and other matters.

Rowe filed a postconviction motion claiming that the court provided an incomplete or inaccurate description of one of the elements of the crime. Specifically, he argued that the court failed to include the part of the definition of "sexually explicit conduct" that required the images to be lewd exhibition of genitalia, and not merely pictures of genitalia.

The circuit court concluded that the absence of that content was not a plea colloquy defect, but allowed Rowe to present evidence on his understanding of that point. After hearing the evidence, the court rejected Rowe's testimony that he did not understand that lewdness was a component of the definition, and also rejected Rowe's testimony that he would have declined the plea agreement if this information had been provided.

We assume, for purposes of this order, that it would not be frivolous for Rowe to argue that the plea colloquy was defective. However, if Rowe prevailed on that issue, and the burden then shifted to the State to prove his understanding, it would be frivolous for him to argue that the State failed to meet its burden. It could not reasonably be argued that the court's findings about Rowe's understanding were clearly erroneous, in light of the testimony from his trial counsel and the court's opportunity to evaluate Rowe's credibility.

Rowe's postconviction motion also moved to withdraw his plea on a second ground. Rowe claimed that one reason he accepted the plea offer was that his trial counsel told him that at a trial the jury would be told of his status as a registered sex offender. He argued that this advice was legally incorrect.

In argument at the end of the hearing, Rowe's focus appears to have changed from his status as a registrant to whether his earlier sexual assault *conviction* would have been admitted. He argued that the admissibility of that conviction depended on certain analyses that would have occurred before trial, and it was "not a guarantee" that the conviction would have been admitted. The circuit court concluded that Rowe's counsel gave him proper advice on this point, in light of the trial defenses Rowe was considering.

In the no-merit report, current counsel appears to regard the circuit court's decision on the correctness of counsels' advice as a factual finding that is not clearly erroneous. The report does not cite any case law support for the idea that the legal accuracy of counsel's advice is a question of fact. We are not inclined to agree that the circuit court's decision on the legal correctness of trial counsels' opinions is a factual question. It appears to be more in the nature of

a legal question. And, as such, it would not be subject to the "clearly erroneous" test, but would be a question we review without deference to the circuit court.

However, we conclude that it would be frivolous to argue that counsels' opinion was incorrect. For the reasons correctly described by the circuit court, there was a high probability that the evidence of Rowe's prior sexual assault would have been admitted under WIS. STAT. § 904.04(2), if he had pursued the defenses under discussion.

Rowe's postconviction motion also raised a third issue. He argued that his counsel at sentencing was ineffective by failing to object to certain material in the presentence investigation (PSI) report. Rowe argued that counsel failed to object to the report's improper use of statements he made about the current offense that he was compelled to give by rules of supervision. The circuit court denied this claim because there was no indication in the sentencing transcript that the court relied on this material.

To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

We assume, for purposes of this order, that Rowe's counsel performed deficiently by failing to object to this PSI material. However, we conclude that it would be frivolous to argue that our confidence in the outcome should be undermined. As noted, the sentencing court did not

expressly refer to the improper material. The court's sentence was well short of the maximum, and included three years less of initial confinement than was argued for by the State. The sentence was well supported by the facts of the case, Rowe's prior record, and Rowe's unrepentant allocution during which he denied committing the crimes. There is no arguable merit to this issue.

The no-merit report addresses whether the court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well-established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

Our review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Brehm is relieved of further representation of Rowe 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