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DISTRICT II

January 17, 2018

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

2017AP1778-CRNM State of Wisconsin v. Enrique Hernandez (L.C. #2008CF175)

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).

Enrique Hernandez appeals from a judgment convicting him of third-degree sexual assault and from an order denying his motion for postconviction relief. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*,

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

386 U.S. 738 (1967). Hernandez did not exercise his right to file a response. After reviewing the no-merit report and the record, we conclude there are no issues with arguable merit for appeal and therefore summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

In 2006, about six weeks shy of his nineteenth birthday, Hernandez had sexual intercourse with a sixteen-year-old girl against her will. He pleaded no contest to third-degree sexual assault. The court placed him on five years' probation with one year conditional jail time. His probation subsequently was revoked. In 2016, the court sentenced him to nine years' prison, comprising four years' initial confinement and five years' extended supervision

Hernandez filed a motion requesting sentence modification and an additional day of sentence credit. The court granted the sentence credit but denied his motion for sentence modification. This no-merit appeal followed.

The no-merit report first considers whether the sentencing court erroneously exercised its sentencing discretion when it sentenced Hernandez after his probation was revoked. "When considering a challenge to a sentence after revocation, we review both the original sentencing and the sentencing after revocation 'on a global basis, treating the latter sentencing as a continuum [sic] of the first.'" *State v. Reynolds*, 2002 WI App 15, ¶8, 249 Wis. 2d 798, 643 N.W.2d 165 (Ct. App. 2001) (alteration in original; citation omitted).

The court found that Hernandez initially received a "graceful" sentence but proved unable to comply with the terms of his probation. His violations involved alcohol, illegal drugs, failure to report, and engaging in unapproved sexual and romantic relationships. He also served time in Texas on felony drug charges. It found the level of his offense, his rehabilitative needs, and the need to protect the public all were high. When making a sentencing determination, a

court must consider the protection of the public, the gravity of the offense, and the rehabilitative needs of the defendant, as well as any appropriate mitigating or aggravating factors. WIS. STAT. § 973.017(2); *State v. Naydihor*, 2004 WI 43, ¶78, 270 Wis. 2d 585, 678 N.W.2d 220; *see also State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The court here did so.

Hernandez faced a ten-year prison sentence and a fine of up to \$25,000. Considering that he first was given probation but failed to navigate it successfully, no arguable claim could be made that his nine-year sentence was unduly harsh or excessive. It was not “so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Postsentencing, Hernandez sought sentence modification alleging a new factor. A circuit court may modify a sentence upon a defendant’s showing of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. 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 ... it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (citation omitted). He argued that the parties and the court focused on the victim’s youth but unknowingly overlooked his young age at the time of the offense. “Whether a fact or set of facts presented by the defendant constitutes a ‘new factor’ is a question of law.” *Id.*, ¶33.

At the hearing on his postconviction motion, the court stated that, while Hernandez’s exact age at the time of the offense may not have been put into the record, it was aware on sentencing after revocation that Hernandez was a much younger person at the time of the

offense. It explained that it had reviewed the charging documents, which contain Hernandez's date of birth, was aware of when the case was initiated, and pointed to Hernandez's own statements during allocution acknowledging that he had made mistakes as a young man and was still growing up and wanted to start over. Hernandez's counsel likewise had argued at sentencing after revocation that his client had "been plagued by a series of poor choices he made beginning about a decade ago when he was a younger male entering into his adulthood." No meritorious argument could be made for resentencing on the basis of Hernandez's age at the time of the offense being a new factor.

Our independent review of the record discloses no other potentially meritorious issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Alisha Lenae McKay is relieved from further representing Hernandez in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

Diane M. Fremgen
Acting Clerk of Court of Appeals