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June 27, 2018

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

2017AP2392-CRNM State of Wisconsin v. Gustav R. Schreiber (L.C. #2015CF77)

Before Neubauer, C.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).

Gustav R. Schreiber appeals from a judgment convicting him of one count of repeated sexual assault of a child and from an order denying his motion for postconviction relief. Appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and

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

Anders v. California, 386 U.S. 738 (1967). Schreiber has exercised his right to file a response. Upon consideration of the no-merit report and response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude there are no issues with arguable merit for appeal. We summarily affirm the judgment and the order. *See* WIS. STAT. RULE 809.21.

On July 14, 2015, the State charged Schreiber in Winnebago County with one count of first-degree sexual assault of a child (sexual contact with person under thirteen) and one count of incest with a child. The case stemmed from a one-time assault of CRS, Schreiber's then eight-year-old daughter. A week later, the State charged him in this Green Lake County case with one count of repeated sexual assault of a child, one count of incest, and one count of child enticement. The charges also involved CRS. The assaults began when she was about six.

In February 2016, Schreiber pled no contest in the Winnebago County case to the sexual assault charge; the incest charge was dismissed and read in. A week later, he pled guilty in Green Lake County to the charge of repeated sexual assault of a child. The incest and child-enticement counts were dismissed and read in.

Schreiber was sentenced in the Winnebago County case in May 2016. Although he had not yet been sentenced in the Green Lake County matter, the State requested that the sentence be made concurrent with the Green Lake sentence. The court imposed a sentence of fifteen years' initial confinement (IC) followed by fifteen years' extended supervision (ES), consecutive to any previously imposed sentence, of which there were none.

Schreiber was sentenced in this Green Lake County case in June. The State recommended twenty years' IC and twenty years' ES "consecutive to any other sentence." Defense counsel requested fifteen to twenty years' IC, concurrent with his Winnebago County

sentence. The court sentenced him to thirty-five years' IC and twenty years' ES, concurrent with his Winnebago County sentence.

Postconviction, Schreiber sought to withdraw his plea, arguing that his counsel ineffectively failed to ensure that he knew, understood, and agreed to the details of the plea agreement, specifically the "consecutive" recommendation the prosecutor would make at sentencing. The court denied the motion after an evidentiary hearing, finding "untruthful" and "self-serving" Schreiber's claims that his counsel assured him the State "likely" would seek a concurrent sentence and that he would have gone to trial if he knew the State would argue for a consecutive sentence.

The court concluded Schreiber's plea was validly entered, finding Schreiber's counsel's testimony more credible than Schreiber's, as to the nature of their discussions. In fact, the court expressly stated that it did not believe Schreiber because, not only had Schreiber told his lawyers in both counties that he did not want to put his daughter through the trauma of a trial, but it also made no sense that he would prefer to go to trial on a three-count Green Lake County complaint exposing him to one hundred and twenty-five years' imprisonment rather than plead guilty to a single charge that exposed him to only forty years. The court denied the motion. This no-merit appeal followed.

The no-merit report addresses two issues: would there be arguable merit to a challenge to the circuit court's finding that Schreiber's guilty plea was knowingly, intelligently, and voluntarily entered, and whether an arguably meritorious challenge could be made to the sentence imposed. Upon review of the record, we are satisfied that the no-merit report properly analyzes the issues it raises, and we discuss them no further.

In his response, Schreiber complains that defense counsel ineffectively failed to timely pursue a judicial substitution. Schreiber has both waived and forfeited this claim. A valid plea of guilty or no contest waives all nonjurisdictional defects and defenses, including claimed constitutional violations. ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984).

He also has forfeited this claim because his postconviction motion was premised on ineffective assistance of counsel. He did not advance in the circuit court any argument of ineffectiveness stemming from the failure to file a timely substitution request. "Arguments raised for the first time on appeal are generally deemed forfeited." ***State Farm Mut. Auto. Ins. Co. v. Hunt***, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (citation omitted).

Beyond that, there is nothing in the record indicating that Schreiber actually told counsel from the outset that he wanted to file a substitution request. A written request for substitution of the judge originally assigned to the trial of the action must be filed with the clerk before arraignment. WIS. STAT. § 971.20(4). Schreiber waived his preliminary hearing, such that the hearing became his arraignment. Schreiber's counsel filed a request a month later. The court denied the motion, stating that it has an "unwritten rule" that it will allow substitution motions up to ten days after the arraignment but, as Green Lake County is a one-judge county, later than that it is too difficult to get another judge within a reasonable time frame.

Even if, as Schreiber contends, his counsel did not inform him how the preliminary waiver/arraignment process worked such that she should have more carefully explained the procedure to him, his ineffectiveness claim would fail. To establish an ineffective assistance of

counsel claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudice him. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Schreiber asserts that the basis of his desire for substitution was that the judge had a conflict of interest because the judge "know[s] my family" and had "previous proceedings" with his younger brother. The Code of Judicial Ethics addresses judicial conflicts of interest:

> SCR 60.03 Conflict of interest. A judge shall not exercise his or her duties with respect to any matter in which a near relative by blood or marriage is a party, has an interest or appears as a counsel. A judge shall not participate in any matter in which he or she has a significant financial interest or in which he or she previously acted as counsel.

Green Lake County is a single-judge county of fewer than 20,000 people.[2] Mere acquaintance with Schreiber's family would not be unusual nor does it demonstrate a conflict of interest. He has not established prejudice from the failure to file a timely substitution request.

Schreiber also contends he should have been afforded a mental health examination because he allegedly repeatedly threatened suicide "over the period of [his] offense" while jailed in Winnebago County. He cites one specific instance of making a threat when he got fired from a job in 2014, a matter predating his 2015 arrests in Winnebago and Green Lake counties. He cites only one other specific example, stating he was put under observation for a week after his bond hearing in Winnebago County but now apparently soft-pedals the incident, saying the suicide threat was "only because I got sick of bologna sandwiches for every meal."

[2] WIKIPEDIA, https://en.wikipedia.org/wiki/Green_Lake_County,_Wisconsin (last visited June 11, 2018).

Whether Schreiber's claimed Winnebago County events should have triggered a mental health examination is not before us on this Green Lake County case. Furthermore, Schreiber states that in regard to the Winnebago County matters he "[e]ventually … was able to talk to someone and got put on depression/anxiety medication that helped for awhile." There is no appealable merit to this claim.

Schreiber next contends his sentence is unfairly harsh, citing the "huge inconsistency" in sentencing. Casting his offense as merely a "huge mistake," he asks why he, "a 39-year-old, who is working full time plus had a college degree in business" should "face more time than a murderer" would in another county. This issue also has no appealable merit.

Wisconsin adheres to a policy of sentencing individuals, not just crimes. "The sentencing court … must be permitted to consider any and all information that reasonably might bear on the proper sentence *for the particular defendant, given the crime committed*." ***State v. Guzman***, 166 Wis. 2d 577, 591, 480 N.W.2d 446 (1992) (emphasis added; citation omitted). A principle inherent in the concept of individualized sentencing is that a court may construe a particular factor or characteristic relating to a defendant as a mitigating or aggravating circumstance "*depend[ing] upon the particular defendant and the particular case*." ***State v. Thompson***, 172 Wis. 2d 257, 265, 493 N.W.2d 729 (Ct. App. 1992) (emphasis added). That is why a court orders a presentence investigation report. ***State v. Knapp***, 111 Wis. 2d 380, 384, 330 N.W.2d 242 (Ct. App. 1983) ("The purpose of a presentence report is to assist the judge in selecting *the appropriate sentence for the individual defendant*." (emphasis added)).

Here, the court clearly explained its rationale for the sentence it imposed on Schreiber for repeatedly sexually assaulting his young daughter:

> Sexual assaults, by their very nature, are some of the most serious offenses short of murder that we have in our society. It's aggravated by the fact that these sexual assaults occurred with your daughter, a person you're supposed to protect, nurture, and grow into a productive and loving adult. And you took advantage of that.
>
> The only thing the Court finds that could make this any more serious is if you had put some sort of threat or force against her—which, acknowledging that did not occur here, but everything else that makes it one of the most serious offenses this Court has seen short of homicide is present [and] … you blamed the victim.
>
> ….
>
> The Court finds there is a serious lack of empathy towards any other humans, much less your own child, and that's very concerning to the Court. Somebody who has no empathy, I believe, is a danger to society. Somebody who has no empathy for their own children and their well-being takes it one step further.

Finally, Schreiber repeatedly insists he was led to believe that the State would recommend concurrent rather than consecutive sentences. He not only beats a dead horse, his argument is irrelevant: his Green Lake County sentence was ordered concurrent with his Winnebago County sentence. The court also found highly suspect his post-sentencing claim that he would not have pled guilty had he known the State would argue for a consecutive sentence. By no stretch is that finding clearly erroneous.

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Catherine Malchow is relieved from further representing Schreiber in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals