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DISTRICT I

July 24, 2018

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

2018AP158-CRNM State of Wisconsin v. Gerald D. Johnson (L.C. # 2017CF48)

Before Kessler, P.J., Brennan and Dugan, 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).

Gerald D. Johnson appeals a judgment of conviction entered upon his no-contest plea to one count of second-degree sexual assault of a person who has not attained the age of sixteen years. *See* WIS. STAT. § 948.02(2) (2015-16).[1] Appellate counsel, Attorney Carl W. Chesshir,

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

filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Johnson did not file a response. Based upon our review of the no-merit report and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

On January 5, 2017, the State filed a criminal complaint charging Johnson, then forty-five years old, with two counts of first-degree sexual assault of a child younger than twelve years old. Count one arose on January 1, 2016. The State alleged that on that date M.N.W., born in October 2004, was asleep in the home she shared with her siblings, her mother, and her mother's boyfriend, Johnson. At approximately 1:00 a.m., M.N.W. awoke to find that Johnson, who was naked and intoxicated, had pulled down her pants and underwear and was touching her buttocks and vagina. Johnson then touched her lips with his penis. Count two arose in the spring of 2016. The State alleged that on a date between April 1, 2016, and May 31, 2016, Johnson pulled down M.N.W.'s pants and underwear and touched her vagina.

Johnson quickly decided to resolve the case with a plea bargain. At a plea hearing on April 3, 2017, the circuit court permitted the State to file an amended information that omitted count two and amended count one to a charge of second-degree sexual assault of a person younger than sixteen years old. The State advised the circuit court that, in exchange for Johnson's no-contest plea to the charge in the amended information, the State would recommend prison, "length to the court's discretion" and that count two was "dismissed outright." The circuit court accepted Johnson's no-contest plea to the amended charge, and the matter proceeded to sentencing on April 14, 2017. The circuit court imposed an evenly-bifurcated sixteen-year term of imprisonment. The circuit court granted Johnson 104 days of presentence credit against his sentence and did not order any restitution. He appeals.

The no-merit report addresses whether Johnson entered his no-contest plea knowingly, intelligently, and voluntarily, and whether the circuit court properly exercised its sentencing discretion. Upon our independent review of the record, we agree with appellate counsel that further pursuit of these potential issues would lack arguable merit. Additional discussion of these issues is not warranted.

Appellate counsel does not address that at the plea hearing the State said it would recommend "prison" as a disposition, but at sentencing the State advised that it would recommend "substantial prison." We have therefore considered whether Johnson has an arguably meritorious basis to seek relief based on a claimed breach of the plea bargain. We conclude he does not.

"To be entitled to a remedy, the defendant must rely on the agreement and the prosecutor's breach must be material and substantial." ***State v. Knox***, 213 Wis. 2d 318, 321, 570 N.W.2d 599 (Ct. App. 1997). Here, it is plain that the defendant did not rely on a promise by the State to recommend "prison." To the contrary, the guilty plea questionnaire that Johnson signed and filed at the time of the plea hearing states his understanding that the State would recommend "substantial prison," and Johnson told the circuit court during the plea colloquy that he had reviewed and understood the information in the plea questionnaire. At the outset of the sentencing hearing, the State advised the circuit court that the State had promised to recommend "substantial prison," and Johnson confirmed that the recommendation for "substantial prison" reflected his understanding of the plea bargain. In short, Johnson explicitly told the circuit court before entering his plea and again before sentencing that he was proceeding with the understanding that the State's recommendation was for "substantial prison." Accordingly, he

cannot pursue an arguably meritorious claim that he relied on an agreement by the State to recommend "prison."

Our review of the record does not disclose any other potential issues for appeal. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Carl W. Chesshir is relieved of any further representation of Gerald D. Johnson on 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