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DISTRICT III

September 11, 2018

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

2017AP277-CRNM State of Wisconsin v. Nicholas Joseph Billiot
(L. C. No. 2015CF721)

Before Stark, P.J., Hruz and Seidl, 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).

Counsel for Nicholas Billiot has filed a no-merit report concluding no grounds exist to challenge Billiot's convictions for kidnapping and battery. Billiot was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no

arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2015-16).¹

The State charged Billiot with kidnapping; false imprisonment; strangulation and suffocation; misdemeanor battery; and child neglect. The charges arose from allegations that Billiot kidnapped Bonnie² in retaliation for a perceived wrong related to an alleged drug transaction; threatened to hurt or kill Bonnie and her family if she attempted to escape; and battered and choked Bonnie. Another female attempted to intercede and, during a “chaotic fight” between Billiot and the interceding female, Billiot’s minor child fell and hit her head. The complaint further alleged that Billiot confronted and punched two other individuals “so hard that their blood splattered in the air and landed on” both Billiot and Bonnie. After that assault, Billiot returned to a residence where he and several other individuals smoked marijuana in the same room as Billiot’s minor child.

At the outset of the criminal proceedings, the circuit court granted defense counsel’s request for a competency examination. Consistent with the examining psychologist’s opinion, the court found Billiot competent to proceed. In exchange for Billiot’s no-contest plea to kidnapping and his guilty plea to misdemeanor battery, the State agreed to dismiss and read in the remaining charges in this case, as well as the charges in a companion case. The parties remained free to argue at sentencing. Out of a maximum possible sentence of forty years and

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

² Pursuant to WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim’s name.

nine months, the court imposed concurrent sentences totaling twelve years, consisting of seven years' initial confinement followed by five years' extended supervision.

Although the no-merit report does not specifically address it, we conclude there is no arguable merit to challenge the circuit court's competency determination. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." *State v. Byrge*, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings. *Id.*, ¶31. A circuit court's competency determination should be reversed only when clearly erroneous. *Id.*, ¶45.

The evaluating psychologist, Dr. Harlan Heinz, submitted a report opining to a reasonable degree of professional certainty that Billiot "does not lack substantial mental capacity to understand the proceedings or assist in his own defense." Doctor Heinz noted that although Billiot suffers from bipolar disorder "with some confusion and somewhat of an oppositional attitude," his disorder did not rise to the level that would interfere "too significantly" with his ability to understand court proceedings and work with his attorney. Doctor Heinz recounted that Billiot had an accurate understanding of the charges and potential penalties he faced; the roles of the participants at trial, including the role of his defense attorney; and the criminal trial process in general. Billiot was capable of discussing the allegations against him and providing alternative explanations for the underlying incidents forming the basis for the charges. Billiot also had an accurate understanding of his plea options. At the competency hearing, defense counsel agreed Billiot was competent to proceed. Based on Dr. Heinz's report and Billiot's

position that he was competent, the court found Billiot competent to proceed. The record supports the circuit court's determination.

The record discloses no arguable basis for withdrawing Billiot's guilty and no-contest pleas. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Billiot completed, informed Billiot of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering guilty and no-contest pleas. The plea questionnaire did not reflect that Billiot was taking any medication for his bipolar disorder. However, nothing in the record suggests Billiot was incapable of understanding the proceedings. Billiot was fully engaged at the plea hearing and answered the court's questions appropriately. With specific reference to the kidnapping charge, the circuit court explained the State would have to show that Billiot used either force or the threat of imminent force to carry a person from one place to another, without that person's consent and with intent to cause that person to be held to service against her will. Billiot initially disputed that his conduct satisfied the elements of kidnapping because he "did not physically take anyone." Billiot ultimately agreed, however, that he was verbally abusive and therefore could have taken Bonnie from one place to another by threat of imminent force.

The court confirmed Billiot's understanding that it was not bound by the terms of the plea agreement, *see State v. Hampton*, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also advised Billiot of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Billiot committed the crimes charged. The record shows the pleas were knowingly, voluntarily and intelligently made. *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The judgment of conviction reflects a total of \$450 in DNA surcharges for one felony conviction and one misdemeanor conviction. *See* WIS. STAT. § 973.046(1r) (requiring a circuit court to impose a \$250 surcharge for each felony conviction and a \$200 surcharge for each misdemeanor conviction). Because of the multiple DNA surcharges, we previously placed this appeal on hold pending the Wisconsin Supreme Court’s decision in *State v. Odom*, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his plea that multiple mandatory DNA surcharges would be assessed. Odom asserted the surcharge is punitive when assessed on a per-count basis against a defendant with multiple convictions and is, therefore, part of the “potential punishment” a circuit court must ensure a defendant understands. The *Odom* appeal, however, was voluntarily dismissed before oral argument.

This case was then held for a decision in *State v. Freiboth*, 2018 WI App 46, ___ Wis. 2d ___, ___ N.W.2d ___. In *Freiboth*, we determined that a court taking a plea does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is, therefore, not a direct consequence of the plea. *Id.*, ¶12. In light of the holding in *Freiboth*, there is no arguable merit to a claim for plea withdrawal based on the assessment of multiple mandatory DNA surcharges.

The record discloses no arguable basis for challenging the sentences imposed. Before imposing sentences authorized by law, the circuit court considered the seriousness of the offenses; Billiot’s character, including his criminal history; the need to protect the public; and the mitigating factors Billiot raised. *See State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court acknowledged that Billiot’s criminal history did not involve major offenses and dated back several years; however, an aggravating factor of the present case was

that Billiot’s child was exposed to his crimes as they unfolded. The court determined probation would unduly depreciate the seriousness of the kidnapping conviction. There is a presumption that Billiot’s total sentence, which is well within the maximum allowed by law, is not unduly harsh or unconscionable, nor “so excessive and unusual” as to shock public sentiment. *See State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507; *see also Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Mark A. Schoenfeldt is relieved of further representing Nicholas Billiot in this matter. *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