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DISTRICT II

October 24, 2018

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

2018AP411-CRNM State of Wisconsin v. Nathaniel J. Davis (L.C. #2017CF638)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Nathaniel J. Davis appeals from a judgment convicting him of intentional physical abuse of a child and disorderly conduct, both as a repeater. Davis' appointed appellate counsel has 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). Davis was advised of his right to file a response but has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

During an argument with his then-girlfriend, Davis punched her and her minor daughter with a closed fist. He fled. Police gave chase. When they apprehended him and patted him down, they found in his pocket a small baggie of what proved to be marijuana. Davis was charged with intentional physical abuse of a child; battery; disorderly conduct; possession of THC, second or subsequent offense; and obstructing an officer. All of the offenses were charged as a repeater. Davis pled guilty to the intentional physical abuse of a child and disorderly conduct charges, both as a repeater. The other charges were dismissed and read in.

The circuit court initially sentenced Davis to three years' initial confinement (IC) followed by four years' extended supervision (ES) on the child-abuse charge and a concurrent term of eighteen months' IC and six months' ES on the disorderly conduct charge. In response to a letter from the department of corrections, the court reduced the period of ES on the child-abuse charge, a Class H felony, from four years to three years and entered an amended judgment of conviction. *See* WIS. STAT. § 973.01(2)(d)5. This no-merit appeal followed.

The no-merit report first addresses whether there would be arguable merit to a challenge to the circuit court's finding that Davis' guilty plea was knowingly, intelligently, and voluntarily entered. The plea colloquy was adequate, *see* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, with two exceptions. First, the court failed to give Davis the deportation warning WIS. STAT. § 971.08(1)(c) mandates. The failure to do so is not grounds for relief,

however, unless the defendant can show that his or her plea is likely to result in deportation, exclusion from admission to this country, or denial of naturalization. Sec. 971.08(2). Nothing in the record suggests that Davis would be at risk of any of those consequences. Further, the plea questionnaire/waiver-of-rights form he signed advised him of those consequences and he confirmed to the court that he reviewed the form with counsel and understood it. There would be no merit to a motion to withdraw the plea based on the failure to give the deportation warning.

The circuit court also failed to specifically advise Davis, as required by ***State v. Hampton***, 2004 WI 107, ¶69, 274 Wis. 2d 379, 83 N.W.2d 14, that it was not bound by any sentencing recommendations and could impose up to the maximum sentence. Counsel advises that he discussed this possible issue with Davis in writing and in a later telephone conversation to make certain Davis understood that he risked a longer sentence if he withdrew his plea and was reconvicted. Counsel states that Davis "very vehemently" did not want to take that chance.

Counsel advises that Davis said he wanted to pursue sentence modification instead, raising as possible bases judicial bias or a new factor. A motion for sentence modification would be reviewed for whether the sentencing court erroneously exercised its discretion in sentencing the defendant. ***State v. Noll***, 2002 WI App 273, ¶4, 258 Wis. 2d 573, 653 N.W.2d 895.

Judge Mary Kay Wagner sentenced Davis in this matter. Davis told appellate counsel that Judge Wagner also sentenced him about four years earlier on his first conviction of intentionally causing bodily harm to a child. On his initial disposition, he was given probation and, on being sentenced after revocation, was sentenced to the county jail. Davis contends Judge Wagner told him at that time that if he appeared before her again he would go to prison. Davis said those remarks did not appear in that sentencing transcript.

"A challenge to a judge's right to adjudicate a matter must be made as soon as the alleged infirmity is known and prior to the judge's decision on a contested matter." ***State v. Marhal***, 172 Wis. 2d 491, 505, 493 N.W.2d 758 (Ct. App. 1992). The sentencing transcript in this case is devoid of any references—by Judge Wagner, either attorney, or Davis himself—to the statement the court allegedly made at the prior sentencing. Davis did not object to Judge Wagner presiding over this case by filing a recusal motion or a request for substitution. The issue thus is not preserved for an appeal. We also agree with counsel that a second conviction for a violent felony after a failed probation likely would result in a prison sentence by virtually any sentencing judge and does not evince judicial bias.

Seeking sentence modification based on a new factor also would be without arguable merit. "A circuit court has the inherent power to modify a sentence based upon a showing of a new factor." ***State v. Stenklyft***, 2005 WI 71, ¶60, 281 Wis. 2d 484, 697 N.W.2d 769. 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." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). Whether a fact or set of facts satisfies this standard presents a question of law. ***Id.***, ¶33. If the facts do not constitute a new factor, a court need go no further in its analysis. ***Id.***, ¶38.

The circuit court mistakenly found Davis eligible for the earned release and challenge incarceration programs (ERP, CIP). He actually is statutorily ineligible because the child-abuse offense was a violation of WIS. STAT. § 948.03(2)(b). *See* WIS. STAT. § 973.01(3g), (3m).

The court emphasized that it based the sentence on the seriousness of the offense ("this is a second assault of a child that's in his record"), the need to protect the public from Davis' "volatile temper" and anger, and his "significant" rehabilitation needs. As to ERP and CIP, the court said only, "And you are eligible for Challenge and Substance Abuse." The circuit court did not tie the length of Davis' confinement to his eligibility for either program or suggest in any way that his eligibility was "highly relevant to the imposition of sentence." ***Harbor***, 333 Wis. 2d 53, ¶40 (citation omitted). Davis could not show the existence of a new factor.

Finally, the no-merit report considers whether an arguably meritorious challenge could be made to the sentence imposed. As our review of the record satisfies us that the no-merit report properly analyzes this issue as without merit, we address it no further.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Davis further in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved from further representing Davis 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