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DISTRICT IV

November 21, 2018

To:

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

2018AP1400-CRNM State v. Phillip D. Winchell (LC # 2017CF29)

Before Kloppenburg, Sherman and Fitzpatrick, 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).

Attorney Len Kachinsky, appointed counsel for Phillip Winchell, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). Winchell filed responses, and counsel filed a

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

supplemental report. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Upon consideration of the report, the responses, the supplemental report, and an independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

The charges against Winchell arise out of an alleged incident that occurred after Winchell discovered that the victim, his fiancée at the time, was having an affair. According to the complaint, Winchell waved a rifle around while threatening to kill “everyone,” and then proceeded to pin the victim’s forearms against a bed while engaging in sexual intercourse with the victim without her consent. Winchell pled guilty to one count of third-degree sexual assault and one count of disorderly conduct with use of a dangerous weapon. On the sexual assault count, the circuit court sentenced Winchell to three years of initial confinement and three years of extended supervision. On the disorderly conduct count, the court sentenced Winchell to six months of imprisonment.

The no-merit report addresses whether Winchell’s pleas were knowing, intelligent, and voluntary. In his responses, Winchell does not claim that his pleas were not knowing, intelligent, and voluntary. We adopt the no-merit report’s analysis of this issue and agree with counsel that the issue has no arguable merit. The record shows no other ground for plea withdrawal.

The no-merit report and supplemental report address whether the circuit court erroneously exercised its sentencing discretion. Winchell’s sentences were within the maximums allowed, and the court discussed the required sentencing factors along with other relevant factors. *See State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. We agree with counsel that there is no arguable merit to this issue.

In his responses, Winchell asserts that there is merit to arguing that the circuit court relied on inaccurate information at sentencing in violation of Winchell's due process rights. Specifically, Winchell asserts that the court relied on unproven allegations that Winchell used or threatened to use force during the sexual assault and that Winchell committed a sexual assault against his sister as a juvenile. There is no merit to this issue. The circuit court was free to consider unproven allegations at sentencing. *State v. Leitner*, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341 ("A sentencing court may consider uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted."). Further, as to the juvenile assault allegations, we disagree with Winchell that the court's sentencing remarks provide a basis to argue that the court erroneously believed that Winchell was adjudicated delinquent based on those allegations.

Our review of the record discloses no other potential issues for 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 Len Kachinsky is relieved of any further representation of Phillip Winchell 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