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February 14, 2019

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

2018AP465-CRNM State of Wisconsin v. Gregory Allan Behling (L.C. # 2015CF442)

Before Lundsten, P.J., Blanchard, 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 Susan E. Alesia, appointed counsel for Gregory Allan Behling, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

there would be arguable merit to a challenge to Behling's plea or sentencing or to the circuit court's order denying sentence modification. Behling was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel that there are no issues of arguable merit. We affirm.

In November 2015, Behling was charged with first-degree sexual assault of a child under the age of sixteen, by use of force. Pursuant to a plea agreement, Behling pled no-contest to an amended charge of second-degree sexual assault of a child. The court sentenced Behling to ten years of initial confinement and five years of extended supervision. Behling moved for sentence modification based on the new factors of: (1) research indicating that harsher sentences have little impact on general deterrence; and (2) an alleged factual inaccuracy in the victim's SANE report. The circuit court found that Behling had not established a new factor, and denied the motion.

The no-merit report addresses whether there would be arguable merit to a challenge to Behling's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel, a plea that was not knowing, intelligent, and voluntary, or lack of a factual basis to support the plea. ***State v. Krieger***, 163 Wis. 2d 241, 250-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Behling signed, satisfied the court's mandatory duties to personally address Behling and determine information such as Behling's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. The criminal complaint provided a factual basis for the plea. There is no

indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Behling's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Behling's sentence. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Behling's character and criminal history, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. We discern no basis to challenge the sentence imposed by the circuit court.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's decision denying sentence modification. We agree with counsel's assessment that a challenge to the court's decision would be wholly frivolous. Behling moved for sentence modification based on two new factors that he argued warranted sentence modification. First, he argued as a new factor that research indicated that harsher sentences have little impact on general deterrence. He argued that the concept of general deterrence was highly relevant to sentencing, pointing out that the court had stated that: "A significant sentence is warranted to deter other potential offenders from engaging in similar conduct." Behling argued that the group the court likely intended to deter, young men, were the least susceptible to general deterrence, citing research as to brain development through adolescence. He argued that sentence modification was warranted because, had the court been aware that a harsh sentence

would not further the goal of general deterrence, the court would not have imposed as lengthy of a sentence.

Second, Behling argued as a new factor that the victim's SANE report indicated that the victim stated that she had been raped twice previously and had never said anything about either incident, while in fact a criminal complaint had previously been filed against another individual for sexually assaulting the victim. Behling argued that the victim's statement that she never said anything about the prior rapes was false. He argued that, at sentencing, a critical factor was whether or not physical force had been used against the victim, with Behling disputing the victim's account that Behling used physical force. He argued that the victim's credibility was highly relevant to the court's sentencing determination. He contended that sentence modification was warranted because, had the court been aware that the victim had made a false statement during the SANE examination, the court would not have credited the victim's claim that Behling used physical force during the sexual assault.

The court found that Behling had not established a new factor warranting sentence modification because the research indicating that harsher sentences have little effect on general deterrence and the victim's statement during the SANE examination were not highly relevant to the sentence the court imposed. *See* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (A new factor for sentence modification 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.'") (quoted source omitted). The court agreed that it intended its sentence to have a deterrent effect, but found that a study stating that more severe sentences have little general deterrent effect is not the same as saying more severe sentences have no deterrent effect. The

court also explained that the two most significant factors for the court at sentencing were the gravity of the offense and Behling's character, and that it intended the sentence to serve as punishment. The court also agreed that it made credibility determinations at the time of sentencing, but found that the victim's statement in the SANE report did not undermine the court's credibility determinations. The court found that it was not clear that the victim was referencing the assault underlying the prior charged sexual assault when she stated that she had been previously raped two times and had not said anything about it. We agree with counsel that a challenge to the court's decision to deny sentence modification would lack arguable merit. *See* ***id.***, ¶¶33, 37, 40 (a fact not highly relevant to sentencing is not a new factor; even if a fact constitutes a new factor, it is within the circuit court's discretion to deny sentence modification if it determines that the factor does not justify sentence modification).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Susan E. Alesia is relieved of any further representation of Gregory Allan Behling 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