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May 29, 2019

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

2018AP20-CRNM State of Wisconsin v. Robert Xavier Morales (L.C. # 2015CF1596)

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

Robert Xavier Morales pled guilty on October 27, 2015, to one count of second-degree sexual assault of a child younger than sixteen years old. The parties stipulated that the offense occurred in January 2009. Morales faced maximum penalties of forty years of imprisonment and

a $100,000 fine. *See* WIS. STAT. §§ 948.02(2) (2009-10),[1] 939.50(3)(c). The circuit court imposed an eighteen-year term of imprisonment, bifurcated as ten years of initial confinement and eight years of extended supervision, and the court ordered Morales to serve the sentence concurrently with an eighteen-year term of imprisonment he was serving for a previous conviction of third-degree sexual assault of a child. Morales appeals.

Appellate counsel, Attorney Marcella De Peters, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18). Morales filed a response. Based upon our independent review of the no-merit report, the response, and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21 (2017-18).

According to the criminal complaint, P.O.S, born June 25, 2002, disclosed to a police officer that when Morales was dating P.O.S.'s sister "back in 2008 or 2009," he had penis-to-anus sexual intercourse with P.O.S. at least fifteen times.[2] On April 14, 2015, the State charged Morales with one count of repeated sexual assault of a child during the period between January 1, 2008, and December 31, 2009. *See* WIS. STAT. § 948.025(1)(b).[3]

Morales decided to resolve the charge against him with a plea bargain. Pursuant to its terms, the State filed an amended information charging him with one count of second-degree

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] The exact date that P.O.S. disclosed the sexual assaults is not in the complaint. At sentencing, trial counsel explained that the disclosure was "some[time] in 2015."

[3] The charging period spans two versions of the Wisconsin Statutes, and the State did not specify the applicable version in the complaint. The court observes that the text of WIS. STAT. § 948.025(1)(b) was the same in both the 2007-08 version of the Wisconsin Statutes and the 2009-10 version.

sexual assault of a child "contrary to [WIS. STAT. §] 948.02(2)," and Morales pled guilty to the amended charge. The State agreed to recommend a prison sentence without specifying a recommended term of imprisonment and without taking a position on whether the sentence should be consecutive to or concurrent with the sentence Morales was already serving. Although the charging period remained January 1, 2008, through December 31, 2009, the parties agreed at the plea hearing that the factual basis for the plea was Morales's admission to only a single act of child sexual assault committed in January 2009, shortly after his seventeenth birthday on October 9, 2008.[4] The circuit court accepted Morales's guilty plea, and the matter proceeded to sentencing approximately six weeks later.

We first consider an issue that appellate counsel does not discuss in the no-merit report, namely, Morales's competency to proceed. "[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. A circuit court commissioner referred Morales for a competency examination at the outset of the criminal proceedings after trial counsel expressed concerns about Morales's competency at his initial appearance. The examining psychologist subsequently filed

[4] As trial counsel carefully explained in documents filed at the time of Morales's guilty plea, the penalty for violating WIS. STAT. § 948.02(2) was the same in 2008 and 2009. *Compare* WIS. STAT. §§ 948.02(2) (2007-08), 939.50(3)(c) (2007-08), *with* §§ 948.02(2) (2009-10), 939.50(3)(c) (2009-10). Moreover, the provisions of WIS. STAT. § 939.616 and WIS. STAT. § 939.617, governing mandatory minimum sentences for certain child sex offenses, do not apply to convictions under § 948.02(2), under either the 2007-08 version of the Wisconsin Statutes or the 2009-10 version. Accordingly, we see no basis for a meritorious challenge to the charging period in the amended information and judgment of conviction. To the contrary, the lengthy charging period appears potentially beneficial to Morales. *Cf.* ***State v. Sveum***, 2002 WI App 105, ¶18, 254 Wis. 2d 868, 648 N.W.2d 496 ("The double jeopardy provisions of the United States Constitution and the Wisconsin Constitution mutually prohibit ... a second prosecution for the same offense after conviction.").

a report with the court stating that Morales "has been diagnosed with various mood disorders and personality disordered behavior," but concluding that he "does not lack substantial mental capacity to understand the proceedings or aid in his defense." Neither the State nor Morales challenged the psychologist's conclusions, and the court found him competent to proceed.

This court will uphold a circuit court's competency determination unless that determination is clearly erroneous. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the psychologist's report and the standard of review, any further proceedings in regard to Morales's competency would lack arguable merit.

We next consider whether Morales could pursue an arguably meritorious challenge to the validity of his guilty plea. We agree with appellate counsel's conclusion that he could not mount such a challenge. The circuit court conducted a thorough plea colloquy that fully complied with the circuit court's obligations when accepting a plea other than not guilty. *See* WIS. STAT. § 971.08 (2015-16), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), *and* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The record—including the plea questionnaire and waiver of rights form and addendum; the attached jury instructions describing the elements of the crime to which Morales pled guilty; and the plea hearing transcript—demonstrates that Morales entered his guilty plea knowingly, intelligently, and voluntarily.

We also agree with appellate counsel's conclusion that the circuit court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court identified appropriate sentencing objectives and discussed the sentencing factors that it viewed as relevant to achieving those objectives. *See* ***id.***, ¶¶41-43. The

sentence imposed was well within the maximum sentence allowed by law and cannot be considered unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. Further discussion of this issue is unwarranted.

In response to the no-merit report, Morales suggests he wanted new trial counsel appointed to replace the lawyer who represented him during the plea and sentencing hearings, but his trial counsel told him that she could not withdraw because doing so would anger the circuit court.[5] The record reflects, however, that Morales told the court at the outset of the sentencing hearing that he wanted a new attorney. He alleged "a breakdown in communication" with trial counsel, asserting that the two did not see "eye to eye" about his presentence investigation report and therefore had not reviewed it. The court responded by asking trial counsel whether Morales had noted any errors in the report, and trial counsel described several alleged errors that Morales wanted to correct. Morales interposed a further clarification, and the court told him it had "made that notation." The court then implicitly rejected Morales's request for new counsel and proceeded to sentencing.

"A [circuit] court has discretion to deny a[n] indigent defendant's request for a new lawyer, and we will uphold the [circuit] court's decision if it examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***State v. Boyd***, 2011 WI App 25, ¶8, 331 Wis. 2d 697, 797 N.W.2d 546 (citation omitted). When a defendant requests new trial counsel based on a

[5] The lawyer who represented Morales at his plea and sentencing hearings was the second trial lawyer appointed to represent him. Morales successfully moved the circuit court to permit his first trial lawyer to withdraw early in the proceedings on the ground that "there's a breakdown in communication."

breakdown in communication, the circuit court must consider "(1) whether the request for a new lawyer is timely, and (2) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case." *See* ***id.*** (citation omitted). A request is timely if it is made when the "'total lack of communication'" becomes apparent. *See* ***id.*** (citation omitted). The circuit court's findings are binding on this court unless they are clearly erroneous, "and those findings may be implicit in the [circuit] court's ultimate conclusion." *See* ***id.***

Here, the circuit court explored the alleged breakdown in communication on the record. The inquiry demonstrated that Morales and his trial counsel had successfully communicated to prepare for sentencing and that trial counsel was able to make a fair presentation of Morales's concerns to the court. Morales therefore could not successfully challenge the court's decision to reject his request for new counsel and instead proceed to sentencing.

Morales next suggests that he should be permitted to withdraw his guilty plea because his trial counsel was ineffective. Specifically, he asserts that his trial counsel "wanted him to lie" and coerced him to plead guilty to a "made-up scenario." A claim that a plea is infirm for reasons extrinsic to the plea colloquy invokes the authority of ***Nelson v. State***, 54 Wis. 2d 489, 195 N.W.2d 629 (1972), and ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). We have considered whether Morales shows that he has an arguably meritorious basis for plea withdrawal under those cases.

A person is entitled to a hearing on a claim for plea withdrawal if the person alleges facts that, if true, would entitle the person to relief. *See* ***Nelson***, 54 Wis. 2d at 497. If, however,

> the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [circuit] court may in the exercise of its legal discretion deny the motion without a hearing.

Bentley, 201 Wis. 2d 303 at 309-310 (citation omitted).

In this case, the circuit court stated at sentencing that it had reviewed the presentence investigation report and noted Morales's statements to the investigator that "[Morales] did not commit this offense and that [trial counsel] in some way caused him to enter a plea that was false.... [L]ater in the [report], he again claims not to have committed the offense." Morales responded that he was "angry" when he spoke to the investigator because "[s]he brought something up [that he] did not want to speak about." The court then asked Morales: "So were those, in fact false statements, that you did not commit the offense?" Morales responded, "Yes." The court probed further, asking him: "And you pled because, in fact, you committed the act you pled to, right?" Morales again responded, "Yes." The record thus conclusively shows that Morales cannot pursue an arguably meritorious claim that his trial counsel coerced him to plead guilty to a false charge.

We also understand Morales to suggest that his guilty plea was infirm because personnel at the Milwaukee County Jail mistreated him and did not give him his prescribed medication. The record shows, however, that the circuit court ascertained during the plea colloquy that he had taken his medication before the plea hearing. Further pursuit of this issue would lack arguable merit.

Finally, Morales complains that he was "not anywhere near" the victim's home until "sometime in January 2009," and that his guilty plea wrongly required him to admit all of the

allegations in the criminal complaint. As we have seen, however, Morales explicitly admitted only a single instance of sexually assaulting a child in January 2009, and he was convicted of only a single count of sexual assault of a child. Further pursuit of this issue would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings in this matter would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32 (2017-18).

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of any further representation of Robert Xavier Morales on appeal. *See* WIS. STAT. RULE 809.32(3) (2017-18).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals