



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

August 6, 2019

To:

Hon. Kendall M. Kelley
Circuit Court Judge
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

Erica L. Bauer
Bauer & Farris, LLC
103 W. College Ave., Ste. 410
Appleton, WI 54911

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Derek J. Hanek 497546
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2018AP1134-CRNM State of Wisconsin v. Derek J. Hanek (L. C. No. 2014CF757)

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).

Derek Hanek appeals from a judgment convicting him, based upon his no-contest pleas, of one count of physical abuse of a child and one count of causing mental harm to a child. Attorney Erica Bauer has filed a no-merit report seeking to withdraw as appellate counsel. *See*

WIS. STAT. RULE 809.32 (2017-18),¹ *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report sets forth the procedural history of the case and addresses the validity of the pleas and sentences. Hanek was sent a copy of the report and filed a response challenging the accuracy of the information upon which he was sentenced, the sentence structure, the requirement that he register as a sex offender, the amount of his sentence credit, and the effectiveness of his counsel at sentencing. The response further asserts that he is entitled to resentencing based upon new information about cooperation he provided to authorities. Counsel has filed a supplemental no-merit report addressing the issues raised by Hanek, to which Hanek has filed an additional reply. Upon independently reviewing the entire record, as well counsel's original and supplemental no-merit reports and Hanek's responses, we conclude that counsel may be allowed to withdraw, and the judgment of conviction may be summarily affirmed. *See* WIS. STAT. RULE 809.21.

The State initially charged Hanek with repeated sexual assault of a child and incest, based upon allegations that Hanek made his child "suck his dick" on multiple occasions in return for the child avoiding punishment from Hanek, beginning when the child was about four years old. Hanek entered guilty pleas to amended charges of physical abuse of a child and mental abuse of a child in place of the sexual assault charge and in exchange for having the State dismiss and read in the incest charge and cap its sentence recommendation at ten years of initial confinement. The circuit court accepted the pleas after conducting a colloquy. Hanek does not claim that his pleas were unknowingly or involuntarily entered, and we agree with counsel's analysis and conclusion that any challenge to the pleas would lack arguable merit.

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

The circuit court sentenced Hanek to consecutive terms of imprisonment consisting of four years of initial incarceration and five years of extended supervision on each of the two counts of conviction. The court also directed that Hanek register as a sex offender for a period of fifteen years. Following the hearing, the court determined that Hanek was not entitled to sentence credit because he had already been given credit on a prior case. Once again, we agree with counsel's assessment that the length of the sentences and the registration requirement were authorized by law and that the circuit court properly exercised its discretion in imposing them by applying the relevant factors to the facts of the case.

We further agree with counsel's analysis of the concerns raised by Hanek. Specifically, and first, Hanek has not shown that any information in the presentence investigation report (PSI) was inaccurate with regard to his criminal history. While the State did misstate the number of Hanek's prior felony convictions, the circuit court expressly noted that it was relying on defense counsel's summary of Hanek's criminal history. Moreover, the court noted that it was limiting its consideration of the facts to those upon which the plea was based, which did not include additional disputed facts set forth in the PSI.

Second, as counsel explains, the circuit court was not required to provide a separate explanation for why the sentences were consecutive. *State v. Berggren*, 2009 WI App 82, ¶45, 320 Wis. 2d 209, 769 N.W.2d 110. It was sufficient to explain why the sentence structure as a whole was being imposed.

Third, counsel is also correct that the circuit court could properly determine that the offenses of conviction were sexual in nature, based upon conduct that overlapped with the dismissed read-in charge. This is not a situation such as that in *State v. Martel*, 2003 WI 70, 262

Wis. 2d 483, 664 N.W.2d 69, where the offenses of conviction were completely separate from the read-in offenses. Here, the allegation that Hanek would make his son choose between beatings or sexual assaults as “punishments” constituted a pattern of abuse with a sexual component. Therefore, the court acted within its discretion in ordering Hanek to register as a sex offender. *See* WIS. STAT. §§ 973.048(1m) and 301.45(1g)(e).

Fourth, it was determined after the sentencing hearing that sentence credit for the read-in offense had already been applied to a prior sentence, to which the present sentences were made consecutive. Under *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), Hanek was not entitled to dual credit.

Fifth, Hanek could not demonstrate prejudice from his trial counsel’s alleged failure to dispute negative opinions about Hanek expressed by the prosecutor and in the PSI. The circuit court commented that it had been considering imposing a lengthier sentence, but that it was impressed by Hanek’s remarks, which it deemed “articulate and very thoughtful,” as well as “heartfelt” and “encouraging.” In other words, the court already treated Hanek’s character traits as a mitigating factor, rather than an aggravating one.

Finally, Hanek’s cooperation with authorities did not constitute a new factor warranting resentencing because it had already occurred prior to sentencing, and, even assuming it was overlooked, it was not highly relevant to any of the factors the circuit court relied upon.

Again, we agree with counsel’s analysis of each of the foregoing concerns expressed by Hanek. Meanwhile, our independent review of the record discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that attorney Erica Bauer is relieved of any further representation of Derek Hanek in this matter pursuant to 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