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 II

September 18, 2019

To:

Hon. Phillip A. Koss
Circuit Court Judge
P.O. Box 1001
Elkhorn, WI 53121

Kristina Secord
Clerk of Circuit Court
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Dennis Schertz
Schertz Law Office
P.O. Box 133
Hudson, WI 54016

Zeke Wiedenfeld
District Attorney
P.O. Box 1001
Elkhorn, WI 53121

Cedric T. Braxton, 387992
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

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

2018AP131-CRNM State of Wisconsin v. Cedric T. Braxton (L.C. #2016CF71)

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).

Cedric T. Braxton appeals from a judgment of conviction entered upon his guilty pleas to two counts of possessing child pornography. Braxton's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),[1] and ***Anders v. California***, 386 U.S. 738

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

(1967). Braxton received a copy of the report and has filed two responses. Upon consideration of the no-merit report, the responses, and our independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Braxton was charged with two counts of possessing child pornography. Pursuant to a negotiated agreement, Braxton pled guilty to both counts and the State moved to dismiss and read in a separate case charging Braxton with four sex offenses, including incest by a stepparent. The State agreed to recommend prison but no specific length.

At a later hearing, trial counsel was allowed to withdraw so that Braxton could explore plea withdrawal. Successor counsel was appointed and Braxton decided he did not wish to pursue plea withdrawal. The court adjourned sentencing so that Braxton could retain an expert. Ultimately, the circuit court imposed six years of initial confinement followed by seven years of extended supervision on each count, to run consecutive. Braxton appeals.

Appellate counsel's no-merit report addresses whether Braxton's guilty pleas were knowingly, intelligently, and voluntarily entered. The record shows that the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.[2] Additionally, the court properly relied on Braxton's signed plea questionnaire to

[2] The circuit court did not expressly state that it was not bound by the parties' recommendations pursuant to ***State v. Hampton***, 2004 WI 107, ¶¶32, 38, 274 Wis. 2d 379, 683 N.W.2d 14. However, the agreement did not contemplate a particular sentencing recommendation by the State and prior to accepting Braxton's pleas, the court explicitly ascertained his understanding that he could receive the maximum sentence of fifty years, and would receive at least three years' initial confinement as a mandatory minimum. The court approved the bargained-for dismissal of a separate case. Beyond that, there was no sentencing agreement for the court to approve or reject. Any claim that Braxton should be permitted to withdraw his pleas under Hampton lacks arguable merit.

supplement its colloquy. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). We agree with appellate counsel that a challenge to the entry of Braxton's guilty pleas would lack arguable merit.

Appellate counsel's no-merit report also addresses whether 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. In fashioning the sentence, the circuit court considered the seriousness of the offense, Braxton's character and history, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court deemed the offenses "grave" and "tremendously" aggravated by the read-in charges. In terms of character, the circuit court acknowledged that Braxton "works hard" despite his "chaotic upbringing" but relied on his long history of juvenile and adult offenses and his failures on supervision. The court found that Braxton needed "incredibly high close rehabilitative control" and posed an "incredible risk to others." The court determined its sentence was the minimum necessary to protect the public, to deter Braxton and others, and "[t]o make sure frankly that you are punished and isolated for at least a long time from preying on other desperate families that take you in." Under the circumstances, it cannot reasonably be argued that Braxton's aggregate twenty-six-year bifurcated sentence, which is well below the maximum of fifty years, is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with appellate counsel that a challenge to Braxton's sentence would lack arguable merit.

The final issue addressed in appellate counsel's no-merit report is whether Braxton was denied the effective assistance of trial counsel. We agree with appellate counsel's analysis of this issue as without arguable merit. In his response to the no-merit report, Braxton asserts that trial counsel provided ineffective assistance by allowing him to waive his preliminary hearing.

To the extent Braxton claims this constituted a due process violation, Braxton's guilty pleas forfeited his right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.[3]

Braxton's final complaint is that the presentence investigation report (PSI) contained a COMPAS risk assessment tool. In ***State v. Loomis***, 2016 WI 68, ¶¶98-99, 371 Wis. 2d 235, 881 N.W.2d 749, the Wisconsin Supreme Court concluded that the COMPAS assessment tool could be considered at sentencing, but circumscribed its permissible use. According to his response, Braxton is not arguing that the sentencing court ran afoul of ***Loomis***, "but is asserting this argument because ***Loomis*** did not address racial disparities and Bias in COMPAS. I'm also raising the argument in order to preserve it for appeal." As Braxton acknowledges, this court is bound to follow ***Loomis***. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). Regardless, the sentencing court disclaimed any reliance on the COMPAS tool, going so far as to state that it reached its conclusions about Braxton's risk "based on the history of the record and his behavior over these years, his explanations and the explanations of those about him [,]" rather than on the PSI writer's statements, impressions, and conclusions. Because the circuit court did not rely on the COMPAS tool in sentencing Braxton, the tool's potential racial biases and shortcomings are irrelevant. For all these reasons, the PSI's inclusion of the COMPAS tool does not give rise to an arguably meritorious issue.

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[3] Further, Braxton's suggestion that trial counsel "conned [him] into signing and dating" the preliminary hearing waiver questionnaire is contradicted by Braxton's statements in open court at the March 24, 2016 waiver hearing.

Our review of the record discloses no other potential issues for appeal.[4] Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Braxton on appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved from further representing Cedric T. Braxton in this appeal. 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

[4] Without objection, the sentencing court ordered Braxton to pay $5000 in restitution to "Vicky," a victim in one of the child pornography convictions. The restitution award was a demonstrable exercise of discretion. After sentencing, the court awarded Braxton 485 days of sentence credit, the total amount he requested.