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DISTRICT II

September 25, 2019

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

2019AP1230-CRNM State of Wisconsin v. Jarriel D. Barry, Jr. (L.C. #2017CF506)

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).

Jarriel D. Barry, Jr., appeals from a judgment, entered upon his no contest plea, convicting him on one count of incest. Appellate counsel, Jeffrey W. Jensen, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32

(2017-18).[1] Barry was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

In April 2017, Racine police were dispatched for a report of a sexual assault. When the responding officer arrived, Barry's eleven-year-old cousin reported that Barry "put his thing in me." The victim's mother clarified that this meant Barry put his penis into the girl's vagina. When Barry was interviewed by police, he stated that he and his cousin were in the basement laundry room, where he "inserted his fingers in her vagina as she bent over, leaning against the wall, and then proceeded to put his penis into her vagina and had sex with her." Barry, who was seventeen years old at the time, also stated that they had been having consensual sex for approximately three years. Barry was charged with one count of first-degree sexual assault of a child younger than twelve years of age, a Class B felony contrary to WIS. STAT. § 948.02(1)(b).

Barry eventually agreed to resolve his case with a plea.[2] The State filed an amended information that added one count of incest, a Class C felony contrary to WIS. STAT. § 948.06(1), to which Barry would plead no contest. In exchange, the State would move to dismiss and read in the sexual assault charge and agreed to follow whatever sentence recommendation that was made in the presentence investigation report. Barry would be free to argue the sentence. The

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

[2] Barry had filed a pretrial motion to suppress his statement to police, but entered the plea before the motion was ruled upon. The record is silent on precisely why the motion was abandoned, but it appears that Barry agreed to the plea after the State Crime Lab returned DNA results.

circuit court accepted Barry's plea and later sentenced him to ten years of initial confinement and eight years of extended supervision. Barry appeals.

The first potential issue appellate counsel identifies is whether the circuit court followed the appropriate procedures for ensuring a knowing, intelligent, and voluntary plea. Our review of the record—including the plea questionnaire and waiver of rights form and plea hearing transcript—confirms that the circuit court generally complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

The circuit court did not expressly review the elements of incest with Barry. However, it did take other steps to establish his understanding of the nature of the crime. *See* WIS. STAT. § 971.08(1)(a); ***Bangert***, 131 Wis. 2d at 268. It first asked Barry whether trial counsel had explained the elements, and Barry answered, "Yes." The circuit court next noted that the jury instruction for incest, which listed the elements of the offense, had been attached to the plea questionnaire, and it asked Barry if he understood those elements. Barry again answered, "Yes." Barry then declined the circuit court's offer to review the elements with him again.

Therefore, based on the entirety of the record, we are satisfied that there is no arguable merit to a claim that the circuit court failed to fulfill its obligations during the plea colloquy or that Barry's plea was anything other than knowing, intelligent, and voluntary.

The other issue appellate counsel discusses is whether the circuit court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or whether there is any new factor justifying a motion for sentence modification. At sentencing, a court must consider the principal objectives of sentencing, including the

protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

While the circuit court's comments largely mirror the information contained within the presentence investigation report, this is because the circuit court expressly noted its agreement with the report author's impressions. In particular, the circuit court explained that probation was "absolutely inappropriate" given the serious nature of the crime, and the court identified appropriate objectives—punishment and rehabilitation of the defendant, plus protection of the community—that it considered in determining that "a lengthy prison sentence is warranted." The circuit court appears to have acknowledged Barry's willingness to participate in sex offender treatment, which it believed he clearly needed because he was "put[ting] all of the blame on the victim saying she initiated it." However, the circuit court was also troubled by Barry's poor history of supervision on his juvenile record and his "deplorable" behavior in school.

Our review of the circuit court's sentencing decision satisfies us that it considered only appropriate factors when setting the length of Barry's sentence. The maximum possible sentence Barry could have received was forty years' imprisonment. *See* WIS. STAT. § 939.50(3)(c). The sentence totaling eighteen years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so

excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion. We also agree with appellate counsel's assessment that the record does not support a motion for sentence modification based on a new factor.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jeffrey W. Jensen is relieved of further representation of Barry 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