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October 16, 2019

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

2019AP743-CRNM State of Wisconsin v. Joseph L. Benka (L. C. No. 2018CF68)

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).

Counsel for Joseph Benka has filed a no-merit report concluding that no grounds exist to challenge Benka's convictions on five counts of possession of child pornography or to challenge an order denying his postconviction motion for sentence modification. Benka 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 v. California***, 386 U.S. 738 (1967), we conclude that there are no

issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21 (2017-18).[1]

On October 21, 2017, sergeant Michael Fitzpatrick of the Outagamie County Sheriff's Department began an undercover internet investigation. He determined that an internet user at a particular home address in Appleton likely possessed child pornography. Fitzpatrick determined that Benka lived at the address.

In January 2018, a search warrant was executed at Benka's residence. His computer was seized and found to contain numerous files containing child pornography. Benka was interviewed, and he admitted accessing and viewing videos and photographs of child pornography, stating that he had likely downloaded "millions" of images. Benka was charged with ten counts of possession of child pornography.

Benka agreed to resolve his case through a plea agreement. In exchange for his no-contest pleas to five of the child pornography counts, the State agreed to dismiss and read in the remaining five counts. The State also agreed to cap its initial confinement recommendation at five years. The defense would be free to argue at sentencing. The circuit court accepted Benka's pleas and ultimately sentenced him to four years' initial confinement and eight years' extended supervision on each count, to be served concurrently.

Benka subsequently filed a postconviction motion seeking sentence modification based on a new factor. He noted that the circuit court had expressed concern at sentencing about the

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

risk he posed to the public; in particular, the court had commented, "we know in the system that guys who look at child porn and jack off to it for years in a secret setting are those that are then going to touch those kids and victimize them[.]" Benka further noted that the court had imposed eight years of extended supervision because it believed the time was "absolutely critical to protect the community."

Benka contended that "the parties and Court unknowingly overlooked the fact that individuals who possess child pornography have low recidivism rates and that research shows there is no evidence to support the theory that someone who possesses child pornography will go on to commit a contact offense." Benka therefore argued that the circuit court "relied on an erroneous conclusion" when it suggested that Benka might go on to commit a contact offense, as there is no evidence to support that conclusion. The court held a hearing on the motion, which was ultimately denied. Benka appeals.

The no-merit report discusses two potential issues: (1) whether Benka's pleas were knowing, intelligent, and voluntary; and (2) whether there is any basis for challenging Benka's sentences. We agree with counsel's ultimate conclusion that these issues lack arguable merit.

There is no arguably meritorious basis on which to claim Benka's pleas were not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Benka completed a plea questionnaire and waiver of rights, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (circuit court colloquy may be supplemented by a plea questionnaire), in which he acknowledged that his attorney had explained the elements of the offenses. The form correctly stated the maximum penalties Benka

faced on each count, including the mandatory minimum sentence,[2] and the form also specified the constitutional rights Benka was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262, 272 ("Whether the plea is voluntary will in part depend on whether the defendant understands the nature of the constitutional protections he is waiving. … It is incumbent upon the trial court to inform the defendant of his rights and ascertain that he understands they are being waived.").

The circuit court also conducted a plea colloquy. Our review of the plea hearing transcript confirms that the court generally complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***Bangert***, 131 Wis. 2d at 261-62, and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Based on the record as a whole, there is no arguable merit to a claim that Benka's pleas were anything other than knowing, intelligent, and voluntary.

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[2] The plea questionnaire states that Benka faced a mandatory minimum sentence of "[b]ifurcated sentence including a term of initial [confinement] for at least three years." This statement is accurate on a per count basis, *see* WIS. STAT. § 939.617(1), but the full possible mandatory minimum, if the sentences were to run consecutively, would be fifteen years of initial confinement. In addition, the circuit court did not review the mandatory minimum sentence with Benka during the plea colloquy, *see* ***State v. Bangert***, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986), and the original complaint omitted any mention of a mandatory minimum sentence.

About one month before the plea hearing, the State filed an amended Information containing the mandatory minimum sentence information and sent a memorandum to defense counsel and the circuit court that explained the omission had occurred due to a software issue. At a pretrial conference at which Benka was present, the court reviewed the amended Information aloud, explaining that there was a mandatory minimum sentence of three years' initial confinement per count, up to a possible thirty years of confinement if the sentences were to run consecutively. The court inquired whether defense counsel "had a chance to look through that memo and discuss it with Mr. Benka[.]" Counsel answered, "I have, Your Honor, and I was aware of the mandatory minimum, so he was informed of that."

Thus, while the plea colloquy does not reflect a full review of the potential sentence with Benka, the record reflects that he was, in fact, advised of the mandatory minimum sentence. Consequently, there is no arguably meritorious basis on which to bring a plea withdrawal motion. *See* ***id.*** at 274 (explaining that a plea withdrawal motion based on defective plea colloquy must allege a prima facie defect *and* that defendant did not know or understand the information which should have been provided).

The no-merit report also addresses whether there are any arguably meritorious grounds on which to challenge the circuit court's exercise of its sentencing discretion. Subject to our discussion of the postconviction motion, we agree with counsel's description, analysis, and conclusion that any challenge to Benka's sentences would lack arguable merit.

Benka's postconviction motion alleged a new factor in the form of statistics showing a low level of recidivism for possessors of child pornography. A new factor is a fact or set of facts that is "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, even though it was then in existence, it was unknowingly overlooked by all of the parties." *See* ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see also* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant must demonstrate the existence of a new factor by clear and convincing evidence. ***Harbor***, 333 Wis. 2d 53, ¶36. If the circuit court determines that a new factor exists, the court then determines, in its exercise of discretion, whether modification of the sentence is warranted. ***Id.***, ¶37.

Benka's postconviction motion also alleged, indirectly, that the circuit court had relied on inaccurate information regarding the possibility he would move on to contact offenses. "[A] criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who seeks resentencing based on a circuit court's use of inaccurate information must show that the information was inaccurate and that the court actually relied on the inaccuracy in the sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1.

At the postconviction motion hearing, Benka argued the recidivism statistics were a new factor not because the information had not existed at the time of sentencing but because it had been unknowingly overlooked by all of the parties. He asserted this new factor and the circuit court's reliance on inaccurate information about his risk of recidivism warranted a reduction in his term of extended supervision from eight years to four years. Regarding the likelihood of Benka moving on to contact offenses, the State countered that "there are other studies which indicate that child pornography does lead to hands-on offenses."

The circuit court explained that the academic arguments were "interesting," but its sentence had been based on "the information that I had in front of me, most of it which was [Benka's] conduct or his misconduct, the acknowledgments or the admissions, and then the opinions of everybody else who had opportunities to weigh in."[3] It thus concluded that there was no new factor or, even if there were a new factor, "[i]t's not reasonable that it's going to change the result." Our review of the hearing transcript satisfies us that there is no arguable merit to a claim that the court erroneously exercised its discretion when it determined, in essence, that it had not relied upon the likelihood of recidivism when sentencing Benka and, thus, even as a new factor, the recidivism statistics would not warrant sentence modification.

Regarding the claim of inaccurate information, the circuit court explained:

> Okay. I am looking at that comment now. You quoted it accurately. Then, you know, what's important and I am sure you saw. This is on line 18 right after I got done saying that. I said, "And that's not the issue today." So that wasn't the issue. I wasn't sentencing him for victimizing kids or for what may happen in the future.

[3] In addition to a presentence investigation report prepared by the Department of Corrections, Benka submitted a "psychosexual evaluation report" and twenty-three character letters supporting him.

> So on line 18 I say, "And that's not the issue today but what the issue is is all of these people supporting you that you have misled. You violated their trust. You sort of misused your relationship with them, and you held these darkest secrets in the dark for such a long period of time. And then I said, okay, well, when you get released from prison, how likely is it that you are going to share secrets or be honest with them going forward in the future? I don't know."
>
> So right away I went back to his conduct, what we do know about him. Now, he kept dark secrets from the people that were closest to him for an extended period of time and that's what I focused on. So I think my comments … are part of what I said, but it's so little compared to what I took into consideration in how a sentence was structured. Again, I don't think that has any merit either.

It is, therefore, apparent from the court's sentencing and motion hearing comments that even if its concern that Benka might move on to a contact offense was an erroneous conclusion, it did not actually rely on that inaccuracy in fashioning its sentence. *See* ***Tiepelman***, 291 Wis. 2d 179, ¶14. Thus, there is no arguable merit to further pursuit of this issue.

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

Therefore, upon the foregoing,

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

IT IS FURTHER ORDERED that attorney Kathilynne Grotelueschen is relieved of further representation of Joseph Benka 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