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DISTRICT III

December 10, 2019

To:

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

2017AP1733-CRNM State of Wisconsin v. Johnathan M. Hutter (L. C. No. 2016CF261)

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 Johnathan Hutter has filed a no-merit report concluding no grounds exist to challenge Hutter's conviction for second-degree sexual assault of a child, as a repeater.¹ Hutter

¹ This court previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review of our decision in *State v. Trammell*, No. 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). The order noted that here, at trial, jury instruction WIS JI—CRIMINAL 140 was

(continued)

was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2017-18).²

The State charged Hutter with repeated first-degree sexual assault of a child, as a habitual criminal, and with notice that the State would be seeking lifetime supervision as a serious sex offender. The allegation was that Hutter had sexual contact with Donna³ (born in March 1999) on at least three occasions between “summer 2014 and summer of 2015.” After the prosecution’s final witness testified at trial, the circuit court granted the State’s motion for an instruction on the lesser-included offense of second-degree sexual assault of a child. The jury found Hutter guilty of the lesser-included offense. Out of a maximum possible forty-six-year sentence, the circuit court imposed a twelve-year sentence, consisting of six years’ initial confinement and six years’ extended supervision, to run concurrent with a sentence Hutter was serving in another case. The court also ordered lifetime sex offender registration.

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdict; whether the circuit court properly exercised its sentencing discretion; and

given to the jury. In *Trammell*, the supreme court granted review to address whether the holding in *State v. Avila*, 192 Wis. 2d 870, 535 N.W.2d 440 (1995)—that it is “not reasonably likely” that WIS JI—CRIMINAL 140 reduces the State’s burden of proof—is good law, or whether *Avila* should be overruled on the ground that it stands rebutted by empirical evidence. The supreme court has now issued a decision in *Trammell*, holding “that WIS JI—CRIMINAL 140 does not unconstitutionally reduce the State’s burden of proof below the reasonable doubt standard.” *State v. Trammell*, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

² All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

³ In compliance with WIS. STAT. RULE 809.86(4), we refer to the victim by pseudonym.

whether there are any grounds to challenge the effectiveness of Hutter's trial counsel. The no-merit report also addresses a number of additional trial-related issues, including whether Hutter properly waived his right to testify; whether the court properly denied Hutter's motion to adjourn; and whether the court properly granted the State's request for a jury instruction on the lesser-included offense. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit. The no-merit report sets forth an adequate discussion of the potential issues to support the no-merit conclusion, and we need not address them further.

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of his obligation to further represent Johnathan Hutter 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