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DISTRICT IV

December 5, 2019

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

2018AP507-CRNM State v. Roger Clarence Nichols (L.C. # 2015CF1979)

Before Blanchard, Kloppenburg and Graham, 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).

Attorney Vicki Zick, appointed counsel for Roger Nichols, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738 (1967).

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

Counsel provided Nichols with a copy of the report, and he responded to it. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Nichols pled guilty to three counts of third-degree sexual assault. The circuit court imposed consecutive sentences on each count of five years of initial confinement and five years of extended supervision. Nichols filed a postconviction motion to withdraw his pleas. The circuit court held an evidentiary hearing and denied the motion.

The no-merit report addresses whether the circuit court erred in denying Nichols' postconviction motion. We address the motion's three grounds separately.

The first ground for the motion was that Nichols did not understand that he was pleading guilty to sexual intercourse rather than sexual contact. After considering the testimony of Nichols and his trial counsel, and its own recollection of the plea hearing, the circuit court found that Nichols did understand the elements of the charges, which included sexual intercourse. It would be frivolous to argue that the circuit court's finding about Nichols' knowledge was clearly erroneous.

The second ground for the motion was that Nichols did not understand the maximum penalty he faced on the charges he was pleading guilty to. As above, the circuit court found that Nichols understood the maximum penalty, and it would be frivolous to argue that the finding was clearly erroneous.

The third ground for the motion was that Nichols did not understand that the sentences could be imposed consecutively. The circuit court did not expressly address this ground in its decision. However, during the plea hearing the judge asked Nichols whether he understood that the court could sentence him to up to thirty years in prison (which would be the effect of running three maximum sentences consecutively), and Nichols replied that he did. In denying the postconviction motion, the circuit court emphasized its own perception of Nichols at the plea hearing by stating: “At no time did I believe Mr. Nichols did not understand. He understood at that time.” We interpret that as a finding that includes Nichols’ understanding that consecutive sentences could be imposed, and we conclude that it would be frivolous to argue that the finding was clearly erroneous.

Although the postconviction motion did not raise an issue about sentencing, the no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the circuit court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

Nichols’ response to the no-merit report raises several issues. Some of those relate to issues that were presented in his postconviction motion, which we have already discussed above, and we now address some of the others.

Nichols makes several assertions that relate to whether the evidence was sufficient to support convictions on the charges that he pled guilty to. A guilty or no contest plea forfeits the 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; *County of Racine v. Smith*, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). The issues that Nichols raises relating to sufficiency of the evidence were forfeited by his guilty pleas.

Similarly, Nichols raises issues relating to the preliminary examination, and those are also forfeited by his guilty pleas.

Nichols appears to assert that the circuit court judge had a conflict of interest because the judge prosecuted him for offenses in 1987 and 2002. Even if we assume this assertion is factually correct, we are not aware of any law that would disqualify a judge in that situation, and Nichols does not cite any. By statute, a judge is disqualified if he or she has previously acted as counsel to any party “in the same action or proceeding.” WIS. STAT. § 757.19(2)(c). There is no mention in the statute of prior proceedings between the same parties.

Nichols asserts that his plea agreement became void because the judge did not follow it. This argument is based on Nichols’ assertion that there was a plea agreement for a maximum sentence of five years. Nichols does not show any reason to believe the State agreed to such a recommendation. The agreement recited at the start of the plea hearing included a term that the State was free to argue, and Nichols agreed with the stated description of the agreement. There is no arguable merit to this issue.

To the extent Nichols raised other issues in his response, we have considered those and found no arguable merit. Our review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Zick is relieved of further representation of Nichols 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