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January 2, 2020

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

2018AP1307-CRNM State of Wisconsin v. Colby D. Welch (L.C. #2017CF12)

Before Neubauer, C.J., Reilly, P.J., and Davis, 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).

Colby D. Welch appeals from a judgment convicting him of second-degree sexual assault of a child as a repeater, and from an order denying postconviction relief. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*,

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

386 U.S. 738, 744 (1967). Welch received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment and order may be summarily affirmed because there are no arguably meritorious issues for appeal. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Welch had sexual intercourse with the victim in 2016, when Welch was thirty years old and the victim was fourteen years old. The victim became pregnant. Welch pled guilty to second-degree sexual assault, a Class C felony, as a repeater. The circuit court imposed ten years of initial confinement followed by ten years of extended supervision.

Welch filed a postconviction motion for resentencing on grounds that the circuit court relied on inaccurate information at sentencing. *See State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (a defendant has a due process right to be sentenced based upon accurate information). The motion alleged that a remark made by the circuit court at sentencing suggested that it mistakenly believed that Welch was charged with sexual assault in connection with a relationship he had in 2004 with A.C. According to the postconviction motion: “The criminal case that arose out of Welch’s relationship with A.C. was in regards to a restraining order brought by A.C.’s father. There was no sexual assault case.” Following a hearing, the circuit court denied the postconviction motion, explaining that its fleeting reference to a “sexual assault of [A.C.]” was “a real misspeak” and not indicative of its belief that Welch was charged with sexually assaulting A.C. This no-merit appeal follows.

Appellate counsel’s no-merit report addresses whether Welch’s guilty plea was 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), *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. See also *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Additionally, the circuit court properly relied upon Welch’s signed plea questionnaire. See *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). We agree with appointed counsel that a challenge to the entry of Welch’s guilty plea would lack arguable merit.

Appellate counsel’s no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court’s sentencing decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The circuit court’s sentencing remarks show that it considered the seriousness of the offense, the character of the offender, 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 determined that the already serious offense was aggravated by its effect on the victim and her family. The circuit court’s sympathy for Welch’s difficult upbringing was overshadowed by its consideration of his lengthy and varied criminal record, and his history of continuing to engage in serious criminal behavior despite periods of incarceration and various opportunities for rehabilitation. In the end, the circuit court determined that a prison sentence was necessary for community protection. Under the circumstances, it cannot reasonably be argued that Welch’s bifurcated sentence totaling twenty years, which is well below the forty-six year maximum, 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 Welch’s sentence would lack arguable merit.

Appellate counsel's no-merit report addresses whether Welch's sentence was based on erroneous information, namely, that Welch was charged with sexual assaulting A.C. A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy. *Tiepelman*, 291 Wis. 2d 179, ¶26. Here, the circuit court's explanation that it simply misspoke when referring to the sexual assault of A.C. is well supported by the record. As the circuit court stated, Welch *was* convicted of a 2004 sexual assault involving a different female, and A.C. was mentioned in the report. The court's other sentencing remarks reflected its understanding that the fourth-degree sexual assault conviction did not involve A.C. Its reference to A.C. was "a real misspeak after the defendant interrupted with [a comment about] the neighbor." We agree with appellate counsel's conclusion that any challenge to the circuit court's order denying Welch's postconviction motion for resentencing would lack arguable merit.

Our review of the record discloses no other potential issues for appeal. Accordingly, the court accepts the no-merit report, affirms the judgment of conviction and order denying postconviction relief, and discharges appellate counsel of the obligation to further represent Welch in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Carl W. Chessir is relieved from further representing Colby D. Welch in this appeal. *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