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August 19, 2020

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

2020AP43-CRNM State of Wisconsin v. Don Michael Hale, Jr. (L.C. #2017CF611)

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).

Don Michael Hale, Jr., appeals from a judgment convicting him of second-degree sexual assault and felony bail jumping. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738 (1967). Hale filed a

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

response. Counsel then filed a supplemental no-merit report. After reviewing the record, counsel's reports, and Hale's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Hale was convicted following a jury trial of second-degree sexual assault and felony bail jumping. He was accused of having sexual contact with an intoxicated person who could not give consent. He was also accused of communicating with that person after he was released on bond, despite a no contact provision. For his actions, the circuit court imposed an aggregate sentence of eight years of initial confinement and eight years of extended supervision. This no-merit appeal follows.

The no-merit report addresses whether the evidence at Hale's jury trial was sufficient to support his convictions. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced ample evidence to convict Hale of his crimes. That evidence included testimony from eyewitnesses who heard the victim cry for help and observed Hale on top of her in a bathroom with both his and her pants down. It also included DNA evidence—the victim's DNA was found on Hale's penis, and Hale's DNA was found on the victim's feminine pad. At the time of the assault, the victim was highly intoxicated and unable to walk on her own.² After Hale's arrest

² A blood sample collected from the victim hours after the assault revealed an alcohol concentration of .182.

and release on bond with the no contact provision, he liked some of the victim's posts on Facebook and tried adding her on Snapchat. We agree with counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

The 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). In fashioning its sentence, the court considered the seriousness of the offenses, Hale's character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, the sentence imposed does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Hale's sentence would lack arguable merit.

Finally, the no-merit report addresses several other issues, including (1) whether the circuit court erred in determining competency;³ (2) whether the court correctly joined the two counts for trial; and (3) whether the court properly granted the State's pretrial motion to amend the sexual assault charge, changing the alleged conduct from sexual intercourse to sexual contact. We agree with counsel that these issues do not have arguable merit for appeal, and we will not discuss them further.

³ Before trial, Hale's counsel raised the issue of competency. The court-appointed examiner concluded that Hale was competent to proceed. Hale did not challenge that conclusion.

As noted, Hale filed a response to the no-merit report. In it, he discusses the issue of competency, which we have already addressed. He also attempts to raise new defenses that he failed to present at trial.⁴ Finally, he complains that he was not read his *Miranda*⁵ warnings when taken into custody for the assault, which is irrelevant as he gave no statement. In any event, we are not persuaded that Hale’s response presents an issue of arguable merit.

Our independent review of the record—including jury selection, jury instructions, Hale’s waiver of his right to testify, opening statements/closing arguments, and questions by the jury during deliberations—does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney John T. Wasielewski of further representation in this matter.

Upon the foregoing reasons,

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

⁴ For example, in an attempt to explain the DNA evidence, Hale asserts that he had sex with the victim earlier that day before they got alcohol. He also accuses the eyewitnesses of having a “vendetta” against him. There is nothing in the record to support these belated defenses.

⁵ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

IT IS FURTHER ORDERED that Attorney John T. Wasielewski is relieved of further representation of Don Michael Hale, Jr., in this matter.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals