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January 27, 2021

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

2019AP2275-CRNM State of Wisconsin v. Andrew T. Franz (L.C. #2015CF585)

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

Andrew T. Franz appeals from a judgment imposing sentence after the revocation of probation. His appellate counsel 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). Franz filed a response to the no-

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

merit report, and appellate counsel filed a supplemental no-merit report addressing Franz's response. Franz subsequently filed a response to the supplemental no-merit report. Upon consideration of the reports, the responses, and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In 2016, pursuant to a plea agreement, Franz pled no contest to one count of second-degree sexual assault of a child, and the State recommended probation with conditional jail time. At sentencing, the trial court withheld sentence and placed Franz on probation for five years. It ordered Franz to serve twelve months of conditional jail time, but it stayed three of those months. Franz completed the Notice of Right to Seek Postconviction Relief form, indicating that he did not intend to seek postconviction relief. Consequently, postconviction counsel was not appointed for Franz, and he did not appeal his conviction.

In 2018, Franz's probation was revoked for violations of the rules of probation, including having a consensual sexual relationship without prior agent approval, drinking alcohol, having nonconsensual sexual contact with a woman he knew, and others. After numerous delays, Franz appeared before a different judge for sentencing after revocation in January 2019. The trial court indicated that in preparation for the sentencing hearing, it reviewed the 2016 sentencing transcript, a written sentencing memo prepared by the defense, the revocation order, and other materials. It sentenced Franz to ten years of initial confinement and six years of extended supervision. The parties agreed that Franz was entitled to 681 days of credit, including credit for twenty-five days he spent in custody before he was convicted, nine months he spent in jail as

conditional jail time, and time he spent in custody prior to the sentencing after revocation.[2] The trial court granted Franz those 681 days of credit.

This appeal brings before the court only the sentence imposed after revocation. *See* ***State v. Scaccio***, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449 ("A challenge to a post-revocation sentence does not bring the original judgment of conviction before the court."). The only possible issue for appeal is whether the 2019 sentence was an erroneous exercise of discretion or excessive.

We agree with the no-merit analysis that the trial court properly exercised its sentencing discretion. The trial court considered the seriousness of Franz's crime, including the significant impact on the child victim. It considered Franz's character, including his "pattern of sexual misbehavior and sexual assaultive behavior," and it recognized the need to protect the public. There would be no arguable merit to challenging the trial court's exercise of sentencing discretion or asserting that the sentence was unduly harsh and excessive. The trial court considered the requisite sentencing factors and explained its sentencing decision, consistent with the dictates of ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Further, the trial court could have imposed twenty-five years of initial confinement and fifteen years of extended supervision. The sentence imposed was well within the maximum, and we

[2] In Franz's responses and the supplemental no-merit report, there is discussion about credit for conditional jail time. The days of credit that were ultimately awarded included Franz's conditional jail time, which was consistent with controlling case law. *See* ***State v. Gilbert***, 115 Wis. 2d 371, 375-76, 380, 340 N.W.2d 511 (1983) (holding that where sentence was withheld and the defendant was ordered to serve conditional jail time as part of his probation, he was entitled to credit for that conditional jail time when his probation was later revoked and he was sentenced to prison). There would be no arguable merit to assert that Franz is entitled to any additional credit because he has received credit for the conditional jail time he served.

discern no erroneous exercise of discretion. *See* ***Scaccio***, 240 Wis. 2d 95, ¶18 (“A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.”).

Franz raises several issues in his responses. First, he challenges the facts underlying his conviction, suggesting that there was false evidence provided to the trial court and asserting that the victim “changed her statements at least 4 times with no explanations.” Franz chose not to pursue postconviction relief in 2016; he cannot challenge his no-contest plea or the facts underlying his conviction in this appeal. *See* ***id.***, ¶10.

Second, Franz argues that he should not have been sentenced to prison in 2019 because the trial court in 2016 sentenced him to twelve months in jail, with three months stayed, and that sentence cannot be changed. We disagree. The trial court in 2016 explicitly stated: “I will withhold sentence, place you on probation for five years. As a condition, 12 months in jail; nine up front and three stayed.” This unambiguous statement is controlling. *See* ***State v. Prihoda***, 2000 WI 123, ¶29, 239 Wis. 2d 244, 618 N.W.2d 857 (“In Wisconsin, an unambiguous oral pronouncement of sentence controls over a written judgment of conviction.”). Moreover, contrary to Franz’s assertions, the judgment of conviction entered in 2016 clearly indicated that the sentence was withheld and that jail time was being imposed as a condition of probation. There would be no arguable merit to pursuing an appeal based on Franz’s argument that it was improper to sentence him in 2019.

Next, Franz takes issue with three other sexual assaults that the State discussed in its sentencing remarks.[3] He argues that he was sentenced based on inaccurate information. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. A defendant seeking resentencing based on inaccurate information "must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing." ***Id.***, ¶26 (citations omitted). We conclude that in this case, there would be no arguable merit to pursue postconviction proceedings based on ***Tiepelman***.

The earliest sexual assault discussed by the State took place in 2011. Franz was charged with one count of fourth-degree sexual assault and one count of disorderly conduct after a woman claimed that Franz sent her a picture of his penis and grabbed her breast. At the 2019 sentencing, the parties reviewed the criminal complaint and amended criminal complaint for that case. Trial counsel noted that the fourth-degree sexual assault charge was dismissed outright and that Franz pled guilty to one count of disorderly conduct. Trial counsel urged the trial court not to consider the dismissed charge. The trial court said that this prior case had been discussed at the 2016 sentencing hearing and would be given "proper consideration."

The second sexual assault concerned allegations by a fifteen-year-old girl that Franz kissed her, touched her breast, and rubbed her vagina on two occasions. The State said that because the victim did not want to prosecute Franz, the parties agreed in 2016 that the allegations

[3] Trial courts have a responsibility "to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." ***Elias v. State***, 93 Wis. 2d 278, 285, 286 N.W.2d 559 (1980). The trial court can consider unproven offenses, uncharged offenses, and pending charges. ***Id.*** at 284.

would be treated as an "uncharged read-in" in this case. Franz denied the assault at the 2016 sentencing and in the 2019 defense sentencing memo, but he did not provide any other details concerning the allegations.

The third sexual assault was one of the bases for the revocation of Franz's probation. A female friend of Franz claimed that she awoke to find his fingers down her pants, touching her vagina, and that Franz later rubbed her breasts. The probation revocation materials indicated that Franz denied putting his hands in the woman's pants, claiming her pants were too tight, but he admitted touching her breasts. At the sentencing after revocation, trial counsel did not discuss the details of the alleged assault, acknowledging only that something "might" have happened.

Notably, when Franz had the opportunity to make a statement at his sentencing after revocation, he simply said, "Your Honor, I pretty much just agree with what my attorney says." In his response to the no-merit report, however, Franz asserts that the three assaults did not happen. He claims that charges were dismissed or not filed in each case because the allegations were untrue. Further, despite what Franz admitted during the revocation proceedings, he claims with respect to the third assault that he "did not re-offend, did not continue to commit sexual assaults, [and] was not sexually aroused."

We conclude that Franz's response does not establish an issue of arguable merit. To set forth a colorable ***Tiepelman*** claim, a defendant must first establish by clear and convincing evidence both that inaccurate information was presented at sentencing and that the court actually relied upon the misinformation in reaching its determination. *See* ***State v. Coffee***, 2020 WI 1, ¶38, 389 Wis. 2d 627, 937 N.W.2d 579. A trial court "actually relies on incorrect information

when it gives explicit attention or specific consideration to it, so that the misinformation formed part of the basis for the sentence." ***Id.*** (citations and internal quotation marks omitted).

The record does not suggest that there is clear and convincing evidence to refute the detailed information about the three assaults that was provided to the trial court. The trial court explicitly acknowledged that Franz was contesting the prior assaults, including the one that was treated as an uncharged crime pursuant to the plea agreement. The trial court accepted the State's allegations over Franz's denials, and Franz's response does not demonstrate that he could establish that the information was inaccurate.

Moreover, the trial court explicitly found that the crime for which Franz was being sentenced—which it discussed in detail—on its own justified the sentence imposed. The trial court explained: "I think this sentence … can stand on its own considering what he did to [the victim], notwithstanding all of the other factors that are present in this case, the 2011 incident, the [most recent] incident, and so on, all of the things that I've talked about and so I think punishment is justified." This suggests Franz would not be able to demonstrate that the trial court "actually relied" upon the alleged misinformation in reaching its determination, because the trial court indicated that the crime for which Franz was convicted justified the sentence even if the other sexual assaults were not considered. *See* ***Coffee***, 389 Wis. 2d 627, ¶38.

For these reasons, we conclude that there would be no arguable merit to pursuing postconviction proceedings based on ***Tiepelman***.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report and supplemental no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Franz further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved from further representing Andrew T. Franz 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