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May 4, 2021

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

2019AP1309-CRNM State of Wisconsin v. Dennis L. Torres (L.C. # 2017CF2034)

Before Brash, P.J., Dugan and Donald, 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).

Dennis L. Torres appeals from a judgment, entered on his guilty plea, convicting him on one count of repeated acts of physical abuse of the same child. Appellate counsel, Marcella De Peters, has filed a no-merit report, pursuant to *Anders v. California*, 386 U.S. 738 (1967),

and WIS. STAT. RULE 809.32 (2019-20).¹ Torres was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by *Anders*, counsel's report, and Torres's response, we conclude that there are no arguably meritorious issues that could be pursued on appeal. We therefore summarily affirm the judgment.

On April 24, 2017, Missie Bowie received a phone call from her son, Torres, in which he told her to "come get this little mother fucker!" A few minutes later, Bowie received a phone call from Torres's live-in girlfriend, Latrice Randle, asking Bowie to pick up D.G., Torres's fifteen-month-old son.

Bowie went to Torres's residence to retrieve D.G. When she arrived, Bowie noted that D.G. was moaning as if in great pain and his eyes were closing; Torres instructed her to not let D.G. fall asleep. Bowie also noticed that D.G. was limp. When she asked Torres what happened, he punched himself multiple times in the head and said he did not need sympathy.

Bowie carried D.G. to her car and noticed that his jaw was swollen and his forehead bruised. Bowie took D.G. to the hospital. D.G. was admitted with severe bruising from head to toe, then transported to Children's Hospital of Wisconsin for treatment. At Children's Hospital, D.G. was diagnosed with a grade IV liver laceration, an adrenal hemorrhage, punctured lungs, and a possible traumatic brain injury. D.G.'s injuries were "diagnostic for child physical abuse."

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Milwaukee police officers responded to Torres's residence and found him hiding under the basement stairs. He was arrested and taken into custody for physical abuse of D.G.; Randle was also located and taken into custody for neglecting D.G.

Randle gave a statement to police. She and Torres had been together for five years and had two children in common. D.G. came to live with them after his mother died earlier that month. On April 24, 2017, she woke up around 6:00 a.m. and found Torres and D.G. both awake. Torres told her that D.G. had been awake all night and was now in a "time out," standing on a milk crate. When Randle told Torres that D.G. was too young for time outs, he replied, "he's my kid, not yours," and Randle went back to bed. When Randle got back up around noon, Torres and D.G. were in the same positions.

An hour later, Torres began beating D.G. with a belt, striking him repeatedly over the next ten to fifteen minutes. After that, Torres began striking D.G. with his hands, causing him to fall and strike his head on multiple objects. D.G. was crying, so Torres picked him up and began violently shaking him, causing D.G.'s head to snap back and forth. D.G. became sleepy and nonresponsive. Randle, fearing D.G. had brain damage and would go into a coma if he fell asleep, told D.G. to "stay woke," but did not summon medical help.

Police also obtained a statement from Ashley Baker, who told police she had been at Torres's residence to purchase marijuana shortly after 2:00 a.m. on April 24, 2017. She saw D.G. standing on a milk crate and asked why he was still up. Torres told her that D.G. would not go to sleep. Baker observed D.G. to have a gash on his forehead and bruises on the right side of his body. Baker returned around 8:00 a.m. to purchase more marijuana. D.G. was still on the milk crate and now had bruising on the left side of his body. She picked D.G. up and he clung to

her and began to cry. Torres told her to put him back on the crate and, when she refused, he took D.G. from her.

Torres also gave a statement to police. He admitted that he was striking D.G. with a belt or his hands seven to ten times per day, at least twice a day, when D.G. would not listen or would play in the toilet. He also admitted “to beating D.G. on two separate occasions” on April 24, 2017—once when he found his cell phone in the toilet and once when he found some of his marijuana in the toilet.

A child abuse pediatrician performed a clinical evaluation of D.G. on April 27, 2017. She noted severe abdominal trauma with a grade III liver laceration, a right adrenal hemorrhage, and pancreatitis. D.G. also had bruises over his entire body, except for his hands, feet, and genitals, and linear bruises on his neck were “highly concerning for a strangulation event.” A urinalysis produced results consistent with rhabdomyolysis, a potentially life threatening condition characterized by muscle tissue breakdown, which may be seen in the context of severe blunt force trauma to the muscle and which may cause kidney injury and/or failure.

Torres was charged with repeated physical abuse of a child where at least one violation resulted in great bodily harm to the child, contrary to WIS. STAT. § 948.03(5)(a)3. (2017-18), and one count of child neglect resulting in great bodily harm, contrary to WIS. STAT. § 948.21 (2017-18).

At the initial appearance, Torres’s attorney requested a competency evaluation. The examining psychiatrist concluded that Torres did not lack substantial capacity to understand court proceedings or to assist in his own defense. Torres did not challenge the report.

Torres subsequently agreed to resolve this case through a plea agreement. In exchange for his guilty plea to the repeated physical abuse charge, the State would dismiss and read in the child neglect charge. The State would further recommend a sentence consisting of fifteen years of initial confinement and eight years of extended supervision. Torres would be free to argue for whatever he thought constituted an appropriate sentence and appropriate terms of supervision. The circuit court accepted the guilty plea, ordered a presentence investigation report, and ultimately imposed the twenty-three-year sentence recommended by the State. Torres appeals.

The first issue that appellate counsel addresses in the no-merit report is whether Torres should be allowed “to withdraw his guilty plea because the [circuit] court erroneously found that he was competent to proceed.” WISCONSIN STAT. § 971.13(1) prohibits the trial of incompetent defendants. To be competent, a defendant must: (1) “possess[] sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding”; and (2) possess “a rational as well as factual understanding of a proceeding against him or her.” *State v. Garfoot*, 207 Wis. 2d 214, 222, 558 N.W.2d 626 (1997).

The record reflects that the competency evaluation was sought because the intake attorney from the State Public Defender’s office was concerned when she observed Torres rocking back and forth. Torres told the psychiatrist performing the competency evaluation that he often rocks when anxious or stressed. The psychiatrist noted that Torres was cooperative, communicated clearly, did not have any perceptual disturbance, and demonstrated a clear understanding of both his own legal circumstances and general trial proceedings. The psychiatrist thus concluded that Torres was competent. At the return hearing on the report, Torres declined to challenge the findings. There is no competing evaluation in the record; thus,

we agree with appellate counsel that there is no arguable merit to seeking plea withdrawal based on a claim that the circuit court erroneously determined Torres to be competent.

The next issue appellate counsel discusses in the no-merit report is whether Torres should be allowed to withdraw his guilty plea because it was not knowing, intelligent, and voluntary. Our review of the record—including the plea questionnaire and waiver of rights form and addendum, jury instruction, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, *State v. Bangert*, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.² We thus conclude that there is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Torres’s plea was anything other than knowing, intelligent, and voluntary.

The final issue appellate counsel discusses in the no-merit report is whether this court should remand the case for resentencing because the circuit court erroneously exercised its sentencing discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and

² We observe that the circuit court failed to provide the immigration warning required by WIS. STAT. § 971.08(1)(c) during the colloquy. However, in order to obtain relief because of such an omission, a defendant must show that the plea is likely to result in deportation, exclusion from admission, or denial of naturalization. See *State v. Negrete*, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749. Here, the record reflects that Torres was born in Milwaukee; thus, he is a citizen of the United States and would not be subject to adverse immigration consequences. See *State v. Reyes Fuerte*, 2017 WI 104, ¶9, 378 Wis. 2d 504, 904 N.W.2d 773. Accordingly, there is no arguable merit to a claim for plea withdrawal based on this error.

determine which objective or objectives are of greatest importance, *see Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider a variety of additional factors. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See id.*

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The twenty-three-year sentence imposed is well within the forty-year range authorized by law, *see State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Thus, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

As part of its sentencing comments, the circuit court deemed Torres ineligible for participation in either the substance abuse program or the challenge incarceration program. In his no-merit response, Torres says that he wanted appellate counsel to file a motion for sentence modification asking the circuit court to make him eligible for that programming. However, there is no arguably meritorious basis on which to seek the requested sentence modification because individuals like Torres, convicted of offenses under WIS. STAT. § 948.03, are statutorily excluded from program eligibility. *See* WIS. STAT. § 973.01(3g)-(3m); *see also* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of further representation of Torres 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