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DISTRICT III

September 28, 2021

To:

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Circuit Court Judge
Electronic Notice

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Polk County Justice Center
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Frances Philomene Colbert
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Criminal Appeals Unit
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You are hereby notified that the Court has entered the following opinion and order:

2019AP273-CRNM State of Wisconsin v. Terry Lee Bruss (L. C. No. 2016CF87)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Terry Lee Bruss has filed a no-merit report concluding no grounds exist to challenge Bruss's conviction for first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1) (1991-92).¹ Bruss filed a response that appears to challenge the validity of his plea, and claims that he could not have committed the charged crime. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no

¹ We cite to the statutes in effect at the time Bruss committed the crime for which he was convicted. All other references to the Wisconsin Statutes are to the 2019-20 version.

arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

In March 2016, the State charged Bruss with two counts of first-degree sexual assault of a child under the age of thirteen. The charges arose from allegations that Bruss had sexual contact with Kim² sometime between June 1, 1993, and November 12, 1994, when Kim was between five and six years old. The complaint recounted that in 1994, Kim told a police interviewer that she had seen Bruss's penis, but that Bruss had not touched her private parts. Based on an investigation at that time, the State charged Bruss with seven counts of first-degree sexual assault of another child and one count of exposing genitals to Kim. Bruss pleaded guilty to two counts of first-degree sexual assault of a child and the remaining counts, including the count related to Kim, were dismissed on the prosecutor's motion. The circuit court imposed and stayed concurrent ten-year prison terms and placed Bruss on ten years' probation. In 1997, Bruss was charged with three new counts of first-degree sexual assault of a child and convicted, upon a jury's verdict, of all three counts.

During a 2014 interview with law enforcement, Kim reported, among other things, that in 1993, when she was five years old, Bruss put his fingers in her vagina while they were on the couch in his home. Kim stated that this type of contact became a "usual thing" when she spent the night at Bruss's home, with similar contact also occurring with Bruss in the shower. Kim further explained that when interviewed in 1994, she did not report anything beyond Bruss

² Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

exposing himself because Bruss warned her that if she told anybody, her mother would not love her anymore and nobody would believe her.

Thereafter, Bruss was charged in the present case with the two counts of first-degree sexual assault of a child. He filed motions to dismiss, alleging that because Kim was a victim in the 1994 case, there had been a significant delay in the reporting and charging, and the charging period was too vague, the State was precluded from charging him under the due process and double jeopardy provisions of the United States and Wisconsin Constitutions. After a hearing, the circuit court denied Bruss's motions to dismiss, concluding there was no double jeopardy violation because the elements of the crime of exposing one's genitals to a child differed from the elements of first-degree sexual assault of a child. See *State v. Ziegler*, 2012 WI 73, ¶60, 342 Wis. 2d 256, 816 N.W.2d 238 (when analyzing claims of multiplicity, the court determines whether the offenses are identical in law and in fact using an elements-only test). The court also determined that Kim's allegations, as set forth in the complaint, "particularize[d] much with regard to date, time, who may have been present ... and what transpired," so as to allow Bruss to prepare a defense. See *State v. Fawcett*, 145 Wis. 2d 244, 250-51, 426 N.W.2d 91 (Ct. App. 1988) (because due process includes the right to be informed of the nature and cause of an accusation, a criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense).

The State filed a motion to admit evidence of other acts at trial, consisting of: (1) the facts giving rise to Bruss's 1994 and 1997 convictions for first-degree sexual assault of a child other than Kim; (2) Burnett County Sheriff's Department reports containing allegations of sexual abuse regarding yet another child; and (3) allegations of sexual abuse regarding two more

children. The circuit court ruled that the judgments of conviction and testimony of the three alleged victims were admissible as other acts evidence at trial.

The parties subsequently reached a plea agreement. In exchange for Bruss's no-contest plea to one count of first-degree sexual assault of a child, the State agreed to recommend the dismissal and read in of the other count and to cap its sentence recommendation consistent with the recommendation made in the presentence investigation report. Out of a maximum possible twenty-year sentence, the circuit court imposed an indeterminate sentence of fifteen years' imprisonment.³

The no-merit report and Bruss's response address whether Bruss knowingly, intelligently, and voluntarily entered his no-contest plea. Claiming that he was unaware of additional incidents of sexual contact with Kim that are mentioned in the no-merit report and taken from the criminal complaint, Bruss asserts that he "would not have taken a plea if [he] had known about" the other allegations. It is unclear how knowledge of allegations that did not form the basis for the actual offense to which he pled would have impacted Bruss's decision to enter into a plea agreement. Ultimately, we are not persuaded that Bruss's claimed ignorance of allegations beyond those for which he was convicted establishes grounds for a nonfrivolous challenge to the validity of his plea.

The record discloses no arguable basis for withdrawing Bruss's no-contest plea. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form

³ Because the acts comprising the first-degree sexual assault charge were alleged to have occurred between June 1, 1993, and November 12, 1994, the circuit court imposed an indeterminate sentence. "Truth-in-sentencing" revisions were enacted in 1998 and are applicable to felonies committed on or after December 31, 1999. *See* 1997 Wis. Act 283, § 419.

that Bruss completed, informed Bruss of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no-contest plea. The court advised Bruss of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the court properly found that a sufficient factual basis existed in the record to support the conclusion that Bruss committed the crime charged. To the extent Bruss claims he entered into the plea agreement believing this was a “probation case,” the record belies his claim. The court confirmed that Bruss understood it was not bound by the terms of the plea agreement. *See State v. Hampton*, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. The record shows the plea was knowingly, voluntarily and intelligently made. *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

In his response, Bruss also asserts he could not have committed the crimes in 1993 because he did not move into the trailer house across the street from Kim until July 1994. The complaint, however, alleged that the sexual assault happened sometime between June 1, 1993 and November 12, 1994, which overlaps with the period of time Bruss concedes he lived in the trailer. Bruss also asserts that he offered to take a lie detector test, but his request was refused. There is no arguable merit stemming from this claim: lie detector tests results are inadmissible for any purpose in criminal proceedings in Wisconsin, so there is no requirement that such a test be administered. *See State v. Ramey*, 121 Wis. 2d 177, 179, 359 N.W.2d 402 (Ct. App. 1984). To the extent Bruss claims he is innocent of the crime to which he pled, a valid no-contest plea waives all nonjurisdictional defects and defenses. *See State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

The no-merit report also addresses whether the circuit court properly exercised its sentencing discretion and whether there are any grounds to seek modification of the sentence

imposed. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that any challenge to the sentence would lack arguable merit.

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Frances Philomene Colbert is relieved of her obligation to further represent Terry Lee Bruss 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