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DISTRICT II

October 27, 2021

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Clerk of Circuit Court
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Joshua L. Vinson Sr., #319099
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You are hereby notified that the Court has entered the following opinion and order:

2021AP370-CRNM State of Wisconsin v. Joshua L. Vinson, Sr. (L.C. #2018CF92)

Before Gundrum, P.J., Reilly and Grogan, 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).

Joshua L. Vinson, Sr. appeals a judgment of conviction for first-degree sexual assault of a child and felony bail jumping. Vinson's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Vinson filed a response, which raises, among other issues: (1) concerns about double jeopardy; (2) the sufficiency of the jury instructions; and (3) the constitutional effectiveness of his various

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

attorneys. Vinson's counsel filed a supplemental no-merit report addressing the response. Upon consideration of the no-merit report, Vinson's response, and the supplemental no-merit report, and following an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal and we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21(1).

Vinson was charged in a seven-count Criminal Complaint and Information with repeated sexual assault of the same child, possession of cocaine as a second or subsequent offense, possession of drug paraphernalia, and four counts of felony bail jumping, with all but possession of cocaine charged as a repeater. Following the preliminary hearing, the State moved to dismiss the cocaine charge and the associated bail-jumping charge because the crime lab did not positively identify the substance as cocaine. The case proceeded to trial. Prior to voir dire, the State moved to dismiss an additional bail-jumping charge, and it submitted a proposed Amended Information renumbering the remaining offenses. The circuit court approved the Amended Information for filing and the State immediately filed it during the hearing. The State also notified the circuit court and defense counsel that it intended to request instructions for first-degree sexual assault of a child as a lesser-included offense of repeated sexual assault of the same child.

The victim testified at trial, alleging that on each day between January 5 and 7, 2018, Vinson had put his hand inside her underwear and penetrated her vagina with his finger. A DNA sample obtained following a sexual assault examination, performed a few days after the last reported incident, contained male DNA consistent with Vinson's Y-STR profile. The jury acquitted Vinson of the drug paraphernalia charge and the related bail-jumping charge, as well as of repeated sexual assault of the same child. However, the jury found Vinson guilty of the

lesser-included offense of first-degree sexual assault of a child and the related bail-jumping charge. The circuit court sentenced Vinson to thirty years' initial confinement and twelve years' extended supervision on the sexual assault conviction, and it imposed a consecutive sentence of three years' initial confinement and three years' extended supervision on the bail-jumping conviction.

The no-merit report addresses the following: (1) sufficiency of the Complaint; (2) sufficiency of the preliminary hearing and Information; (3) Vinson's personal presence at the arraignment and entry of not guilty pleas to the charges; (4) Vinson's assertion of his right to a speedy trial; (5) pretrial evidentiary motions; (6) the filing of the Amended Information and notice to Vinson; (7) the jury selection, during which defense counsel successfully raised a ***Batson***[2] challenge to the State's decision to strike the only two potential African-American jurors; (8) sufficiency of the evidence to support Vinson's convictions for first-degree sexual assault of a child and bail jumping; (9) Vinson's decision not to testify at trial; (10) jury instructions; (11) opening statements and closing arguments of counsel; (12) the circuit court's responses to the jury's questions during deliberations; (13) Vinson's competency, which was raised by defense counsel and addressed in presentencing proceedings; (14) the circuit court's denial of Vinson's request to adjourn sentencing to review the presentence investigation (PSI); (15) corrections to the PSI offered by the parties; and (16) the sentencing court's exercise of its discretion. Our review of the record satisfies us that the no-merit report thoroughly analyzes these matters as being without arguable merit.

[2] *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986), *as modified by* ***Powers v. Ohio***, 499 U.S. 400 (1991).

Vinson's response primarily argues that he was improperly convicted of the lesser-included offense of first-degree sexual assault of a child. He asserts he lacked notice that he was charged with that offense, the State's Amended Information was inadequate and filed too late, the jury was improperly instructed, and his conviction constituted a double jeopardy violation. Vinson's assertion that his charging documents should have alleged a violation of both WIS. STAT. §§ 948.02 and 948.025 lacks arguable merit because such dual charging is prohibited under § 948.025(3). However, subsec. (3) states that it "does not prohibit a conviction for an included crime under [WIS. STAT. §] 939.66 when the defendant is charged with a violation of this section." As the circuit court explained to Vinson, a single instance of sexual assault of a child during the relevant time frame is by definition a lesser-included offense of repeated sexual assault of the same child.

Vinson's conviction on the lesser-included offense of first-degree sexual assault of a child did not present a double jeopardy or jury unanimity problem. Vinson's conviction on the lesser-included offense does not implicate any of the Double Jeopardy Clause's three protections. *See* ***State v. Nommensen***, 2007 WI App 224, ¶5, 305 Wis. 2d 695, 741 N.W.2d 481. Contrary to Vinson's argument, no multiplicity issue exists because the jury was instructed not to consider the lesser-included offense unless it first acquitted him of repeated sexual assault of the same child. Moreover, the circuit court guarded against the potential for jury confusion arising from the lesser-included instruction by charging the jury with WIS JI—CRIMINAL 517, which mitigated any risk that the jury might convict Vinson of first-degree sexual assault of a child

without reaching a consensus on which specific act constituted the crime.[3] There is no issue of arguable merit to a challenge to Vinson's conviction on the lesser-included offense of first-degree sexual assault of a child.

To the extent Vinson argues he lacked notice of the charges against him, the record belies his argument. Vinson was present for the reading of the charges against him at his initial appearance. At the hearing on September 25, 2018, Vinson was present when his defense counsel and the prosecutor agreed that the State would dismiss the cocaine charge and the related bail-jumping charge because the material had not been verified to be cocaine. Vinson was not present in the courtroom on the first day of trial when, prior to voir dire, the State notified the circuit court and defense counsel that it would be filing the Amended Information. However, defense counsel stated she had no objection to the filing of the Amended Information, and the circuit court informed Vinson of what had occurred outside of his presence immediately upon his return to the courtroom shortly thereafter.

Vinson's response appears to raise issues regarding two of his attorneys' withdrawal requests. Vinson's first attorney twice sought to withdraw from the case. The circuit court

[3] Following the language of WIS JI—CRIMINAL 517, the circuit court instructed the jury as follows:

> In regard to the lesser offense, the defendant is accused of one count of first degree sexual assault of a child under twelve years of age. However, evidence has been introduced of more than one act, any one of which may constitute Intercourse with a child under the age of twelve.
>
> Before you may return a verdict of guilty on the charge of first degree sexual assault of a child under twelve years of age, all twelve jurors must be satisfied beyond a reasonable doubt that the defendant committed the same act and that the act constituted the crime charged.

granted the motion after the second request based on Vinson's verbal abuse and threatening conduct toward her. His second attorney was appointed and proceeded to trial. On the first day of trial, Vinson requested a new attorney, but his request was denied because the circuit court found no merit to the objection Vinson wished his counsel to raise regarding the accreditation of the laboratory that had conducted the DNA analysis. Prior to Vinson's sentencing hearing, his attorney advised the circuit court that Vinson had behaved aggressively toward her during a jail visit. Vinson refused to speak with his attorney at the sentencing hearing, requested a new attorney, and the circuit court granted the request. There are no issues of arguable merit regarding the decisions to allow the withdrawals. *See* ***State v. McDowell***, 2004 WI 70, ¶66, 272 Wis. 2d 488, 681 N.W.2d 500.

Vinson's response also alleges that his first attorney sought to adjourn the preliminary hearing without his consent, and that the State failed to establish probable cause at the preliminary hearing. The adjournment hearing transcript shows the circuit court personally asked Vinson if he had any objection to the one-week delay requested by his attorney. Vinson responded, "No." Vinson's assertion to the contrary lacks arguable merit. Additionally, the record developed at the preliminary hearing, which occurred the following week, demonstrates that the State, through the testimony of Investigator Joshua LaForge, established probable cause to believe Vinson had committed a felony.

Vinson's response asserts his various attorneys were constitutionally deficient in several ways. To the extent he claims his attorneys were deficient by failing to raise a multiplicity challenge, we have concluded that any such objection would have lacked arguable merit. He

also contends his trial attorney provided ineffective assistance by having him sign an ***Old Chief***[4] stipulation, whereby Vinson stipulated to two elements of the bail-jumping charge: (1) he was on bond at the time of the alleged sexual assaults and (2) a condition of that bond required that he commit no crimes. The stipulation prevented the jury from knowing the details of Vinson's past criminal conduct, and the circuit court engaged Vinson personally in a thorough colloquy before accepting this stipulation. There is no basis on this record to conclude there is any arguable merit to a claim that trial counsel was ineffective for entering into the ***Old Chief*** stipulation. Vinson's suggestion that there was no felony for which he was on bond at the time of the sexual assault is belied by the record.[5]

Vinson's response raises issues regarding the sufficiency of the appellate record. He asserts his appellate attorney received redacted transcripts with no filing dates entered by the circuit court clerk. He also asserts he was unable to access certain e-filed documents. Despite these claims, the appellate record includes the challenged documents and it appears reasonably

[4] *See* ***Old Chief v. United States***, 519 U.S. 172 (1997).

[5] The charging documents identify the bail-jumping charges as being predicated on the bond ordered in Racine County case No. 2017CF790, in which CCAP records show Vinson was charged with two felonies.

complete.[6] This court has reviewed the entire record, consistent with its obligations under ***Anders***, and Vinson's appellate counsel avers that Vinson was provided with all transcripts. The transcripts appear free of any redactions.

Vinson alleges fraudulent conduct by his appointed attorneys and other officials, including the circuit court and the court reporters, suggesting that these individuals conspired in some fashion to procure his convictions and deprive him of his rights. Nothing in the record substantiates Vinson's allegation that the court reporters intentionally or maliciously omitted statements from the transcripts, nor does the record support Vinson's conspiracy allegations. Indeed, the transcripts include material he accuses the court reporters of omitting; specifically, the sentencing transcript shows Vinson repeatedly interrupted the proceedings to address the circuit court regarding his belief that his convictions were invalid. Moreover, the supplemental no-merit report includes an affidavit by appellate counsel averring that the other participants in those hearings do not support Vinson's claims of erroneous transcription.

Vinson's response also asserts he has filed a federal lawsuit based on the foregoing allegations. We agree with appellate counsel that this lawsuit does not appear to have any

[6] Appellate counsel represented in his no-merit brief that he would be filing a request to supplement the appellate record with four transcripts from pretrial hearings that occurred between January and March 2019. It does not appear any request to supplement the record was filed. Counsel represents that at those hearings, the circuit court granted Vinson's first attorney's motion to withdraw, discussed Vinson's requests for "modification of the circuit court's minutes" of a previous hearing and to reduce bail, and appointed his second attorney, who filed a speedy trial demand on Vinson's behalf. The contents of the appellate record substantiate counsel's representations, including first counsel's withdrawal request filed on January 10, 2019, and an order appointing his second attorney dated February 27, 2019. Vinson's representations about what occurred at these hearings do not materially differ from his counsel's. We therefore accept counsel's representations about the subject matter of those hearings.

bearing upon whether the appellate record demonstrates an issue of arguable merit. Our independent review of the record discloses no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Gregory Bates is relieved of his obligation to further represent Joshua L.Vinson, Sr. in this matter. 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