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DISTRICT I

February 22, 2022

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Charles Leon Banister 649554
Wisconsin Secure Program Facility
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You are hereby notified that the Court has entered the following opinion and order:

2020AP2087-CRNM State of Wisconsin v. Charles Leon Banister (L.C. # 2015CF1996)

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

Charles Leon Banister appeals a judgment convicting him of second-degree sexual assault of a child. He also appeals from an order denying his postconviction motion. His appellate counsel, Christopher D. Sobic, 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). Banister filed a response to

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

the no-merit report. Upon consideration of the no-merit report, the response, and an independent review of the record as required by ***Anders***, we affirm the judgment and order because there is no arguable merit to any issue that could be pursued on appeal. *See* WIS. STAT. RULE 809.21.

On June 17, 2015, the State charged Banister with five counts of first-degree sexual assault with the use of a dangerous weapon, two counts of second-degree sexual assault of a child under the age of sixteen, two counts of kidnapping with the use of a dangerous weapon, and one count of armed robbery. According to the criminal complaint, Banister sexually assaulted D.C. on April 18, 2011, and D.R.B. on December 12, 2011, both at gunpoint. D.C. was fifteen years old and D.R.B. was sixteen years old.

Banister pled guilty to one count of second-degree sexual assault of a child for having sexual contact with D.C. Pursuant to the plea negotiations, one of the remaining charges was dismissed outright, while the others were dismissed and read-in. The circuit court conducted a colloquy with Banister and accepted his guilty plea. Banister also signed a plea questionnaire/waiver of rights form. The circuit court sentenced Banister to twenty-five years of initial confinement and fifteen years of extended supervision.

Banister filed a postconviction motion arguing that his plea was not entered knowingly, intelligently, and voluntarily because he was denied the effective assistance of counsel. Specifically, Banister argued before he entered his guilty plea, trial counsel stated that he spoke with the prosecuting attorney and that the State would recommend "close to time served" at sentencing. At a hearing on the motion, trial counsel and the prosecuting attorney both testified, telling the postconviction court that no such agreement was ever made. Banister also testified, reiterating the argument raised in his motion. The postconviction court denied the motion.

Counsel's no-merit report addresses three issues: (1) whether Banister's plea was knowing, voluntary, and intelligent; (2) whether there is any basis to challenge the postconviction court's determination that Banister did not receive ineffective assistance of counsel; and (3) whether the circuit court erroneously exercised its sentencing discretion.

In response to appellate counsel's no-merit report, Banister reiterates his contention that trial counsel promised that the State would recommend a sentence of close to time served. Banister also contends that postconviction counsel should have called his mother to testify at the postconviction hearing to confirm this understanding. Specifically, Banister contends that trial counsel spoke to his mother before he entered the plea and told Banister's mother that the State would recommend a sentence of close to time served or eighteen months. Banister also argues that he is entitled to resentencing because he was seventeen years old when the offenses were committed and the circuit court should have considered the fact that he was a minor. Banister also faults trial counsel for failing to argue that he was a minor when the offenses were committed.

We begin with whether Banister's plea was knowing, voluntary, and intelligent. Our review of the record—including the plea questionnaire and waiver of rights form, the addendum, the jury instructions, and the 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, ¶34-35, 293 Wis. 2d 594, 716 N.W.2d 906. We conclude that there would be no arguable merit to a claim of circuit court error with regard to the plea.

As to Banister's claim that his plea was coerced based on a promise from counsel, we interpret the claim as alleging ineffective assistance of counsel. Banister also contends that postconviction counsel should have called his mother as a witness at the postconviction hearing to confirm that Banister was promised a sentencing recommendation of close to time served or eighteen months.

A defendant seeking to withdraw his or her plea after sentencing "must prove, by clear and convincing evidence, that a refusal to allow withdrawal of the plea would result in 'manifest injustice.'" ***Brown***, 293 Wis. 2d 594, ¶18 (citation omitted). Manifest injustice as it relates to plea withdrawal may be demonstrated by proving ineffective assistance of counsel. ***State v. Taylor***, 2013 WI 34, ¶49, 347 Wis. 2d 30, 829 N.W.2d 482.

To prove ineffective assistance of counsel, a defendant must show that trial counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The defendant "must prevail on both parts of the test to be afforded relief." ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. We review *de novo* "'the legal questions of whether deficient performance has been established and whether it led to prejudice rising to a level undermining the reliability of the proceeding.'" *See* ***State v. Roberson***, 2006 WI 80, ¶24, 292 Wis. 2d 280, 717 N.W.2d 111 (citation omitted). However, "[a] court need not address both components of this inquiry if the defendant does not make a sufficient showing on one." ***State v. Smith***, 2003 WI App 234, ¶15, 268 Wis. 2d 138, 671 N.W.2d 854.

Here, we agree with appellate counsel that the record does not support Banister's argument. Both trial counsel and the prosecuting attorney testified at the postconviction hearing

that pursuant to the plea negotiations, the parties would be free to argue their respective sentencing recommendations. Trial counsel testified that he never told Banister otherwise. Banister acknowledged that he did not raise a concern at the plea hearing when the State recommended the maximum sentence, telling the postconviction court that he was "just going through the motions." The postconviction court found both attorneys credible. Moreover, at the plea hearing, the circuit court confirmed Banister's understanding of the negotiations and asked Banister if any promises had been made. Banister made no mention of an alternative understanding. Accordingly, we conclude that Banister did not receive ineffective assistance of counsel because there is no reasonable probability that his mother's testimony at the postconviction hearing would have resulted in his plea withdrawal.

With regard to the circuit court's sentencing decision, we note that sentencing is a matter for the circuit court's 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. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It must also determine which objective or objectives are of greatest importance. *See* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, as well as additional factors it may wish to consider. *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 circuit court appropriately considered relevant sentencing objectives and factors. Specifically, the circuit court discussed the violent nature of

the offenses, the need to protect the public—particularly children—from sexual violence, Banister's character, and his partial acceptance of responsibility, among other things. The resulting sentence was the maximum authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and was 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).

Finally, Banister spends much of his response to the no-merit report asserting that he was seventeen years old at the time of the crimes and the circuit court should have considered his youth and immaturity as mitigating sentencing factors. However, the record conclusively establishes that Banister was eighteen years old at the time of the offenses. Banister's date of birth is December 23, 1992. The dates of the offenses are April 18, 2011, and December 12, 2011. Indeed, Banister admitted at the plea hearing that he was eighteen years old at the time of the offenses. Thus, to the extent Banister contends that his status as a minor should have been considered at sentencing, or elsewhere in the proceedings, we conclude that there would be no arguable merit to such a contention.[2]

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

[2] We note that even if Banister was seventeen years old at the time of the offenses, pursuant to WIS. STAT. § 938.02(10m), he was an "adult" as defined by § 938.02(1).

IT IS FURTHER ORDERED that Attorney Christopher D. Sobic is relieved of further representation of Banister 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