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March 8, 2022

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

2019AP1117-CRNM State of Wisconsin v. Andrew M. Flores (L. C. No. 2016CF318)

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).

Andrew Flores appeals from a judgment convicting him of three counts of child enticement and from an order denying his postconviction motion for plea withdrawal. Attorney Melissa Petersen has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20).¹ The no-merit report sets forth the procedural history of the case and addresses Flores' pleas and sentences and his trial counsel's performance. Flores was

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

advised of his right to respond to the no-merit report, and he filed a series of responses raising additional issues, in turn prompting Petersen to file two supplements to her no-merit report. Having independently reviewed the entire record as mandated by *Anders v. California*, 386 U.S. 738, 744 (1967), we conclude there are no arguably meritorious issues for appeal.

The State charged Flores in an amended Information with repeated sexual assault of a child; incest with a child by a stepparent; felony bail jumping; first-degree sexual assault of a child under the age of twelve; incest, three counts of physical abuse of a child; disorderly conduct; and two counts of misdemeanor battery. The charges related to three different victims. On motions in limine, the circuit court ruled that audiovisual records of the victims' statements would be allowed into evidence (either in part or in their entirety, depending on each victim's age), and the court further determined that an in camera review of one of the children's counseling records revealed no exculpatory evidence.

The circuit court refused to allow Flores to discharge his counsel three weeks before trial. Flores then pled no contest to three amended charges of child enticement for the purpose of causing bodily or mental harm. He also agreed to stipulate to a factual basis for sex offender registration. In exchange, the State dismissed the remaining charges in this case and in two companion cases. The court accepted Flores' pleas after conducting a plea colloquy and reviewing Flores' signed plea questionnaire and waiver of rights form, with attached jury instructions.

Prior to the sentencing hearing and before obtaining the presentence investigation report (PSI), Flores moved to withdraw his pleas on the grounds of actual innocence, the haste with which he was called upon to enter the pleas, and the promptness of his request. Flores testified at

a plea withdrawal hearing that he was informed on the morning of the plea hearing that the State had changed the previously negotiated terms of a plea agreement after consultation with the victims, and it would now require Flores to plead to one additional amended charge of child enticement—which gave Flores nineteen additional years of sentence exposure. Flores claimed he had only five minutes to discuss this change with his trial counsel. Flores said that he also had considered, but decided not to pursue, a claim of ineffective assistance of counsel.

The State presented evidence of a recorded jail telephone call in which Flores told his mother, prior to entering his pleas, that he had decided to enter pleas to charges that would give him about fifty-six years of sentence exposure because his trial counsel had informed him that he could “beat the sexual assault and incest charges but ... not beat the abuse charges, so he would face more time than if he did not take the plea” deal. In a phone call made after he entered his pleas, Flores again told his mother that he had entered his pleas because he had “a better chance at less jail time by doing so,” and he might be able to get his teeth fixed in prison at the State’s expense, without giving any indication that he had been pressured into entering the pleas. In another call, Flores indicated that he felt the plea agreement was “not that bad of a deal.” In subsequent calls and visits, however, Flores and his mother discussed Flores withdrawing his pleas on the grounds of ineffective assistance of counsel and proceeding to trial with a female attorney. In none of the calls or visits with his mother did Flores indicate any misunderstanding of the charges or any confusion about the late change to the plea deal.

The circuit court first noted that there was no challenge to the adequacy of the plea colloquy and found that the colloquy (performed by another judge) had been thorough and proper. As to Flores’ claim of innocence, nothing had changed after Flores’ pleas regarding the strength of the State’s evidence, or lack thereof. The court further found that there was nothing

“new or complicated about the additional charge” to which Flores was being asked to plead, and it noted that Flores himself had told the court multiple times during the plea hearing that the half hour he had to think about the amended offer and discuss it with counsel was sufficient. Next, the court observed that the child victims would be stressed by having to prepare for trial again, and the State could be prejudiced by failing memories before a new trial date could be set. Finally, the court determined that the real reason Flores sought to withdraw his pleas was that he had changed his mind about wanting to go to trial. The court then denied the motion for plea withdrawal, concluding Flores had failed to establish a fair and just reason for it.

The circuit court held a sentencing hearing, at which the parties addressed the PSI and provided recommendations and Flores exercised his right of allocution. After hearing from the parties, the court discussed proper sentencing factors, including the gravity of the offenses and the character of the offender, and it related those factors to what it viewed to be the most important sentencing objective—the protection of the public. The court explicitly stated that it found the victims credible as to the read-in offenses involving sexual abuse and that it did not believe Flores’ denials of those offenses. Therefore, the court was sentencing Flores for behavior that included multiple instances of first-degree sexual assault of a child, as well as other physical and mental abuse. The court then followed the recommendations of the State and the PSI and sentenced Flores to consecutive terms of fifteen years’ initial confinement followed by ten years’ extended supervision on each of the three child enticement counts. The court also awarded \$260 in restitution and required Flores to register as a sex offender. The court subsequently entered a corrected judgment of conviction awarding 393 days of sentence credit.

Following sentencing, Flores filed a postconviction motion again seeking to withdraw his pleas, this time alleging that his counsel had provided ineffective assistance by failing to advise

Flores that he would be subject to sex offender registration and by failing to raise a claim of ineffective assistance of counsel in Flores' first plea withdrawal motion. Flores further claimed that the circuit court had failed to discuss the relevant factors or make the necessary prerequisite findings under WIS. STAT. § 973.048(3) before ordering sex offender registration.

The circuit court held another plea withdrawal hearing. Flores' trial counsel testified that his goal was to negotiate a plea deal that would avoid Flores entering pleas to any charges that included elements of sexual contact or intercourse, while still meeting the amount of sentence exposure the State was seeking. Trial counsel recalled discussing the stipulation to sex offender registration with Flores, but he could not recall if he specifically informed Flores that child enticement could be deemed a sexually motivated crime under the statutes. Flores did not indicate to his trial counsel any opposition to the sex offender registration requirement after counsel explained to him what it would entail. Flores testified that counsel advised him that it was not likely that the court would actually impose the sex offender registration requirement when the counts of conviction related only to physical abuse.

The circuit court issued a written decision denying Flores' postconviction motion. The court made factual findings that Flores' trial counsel had informed him that he would need to stipulate to a factual basis for sex offender registration as part of the plea deal; that Flores had in fact agreed to do so; and that Flores was aware when he entered his plea that the court *could* impose the registration requirement. The court concluded that Flores had failed to establish a claim of ineffective assistance of counsel. The court further determined

based upon the stipulation of the parties and the file, filings, and proceedings heretofore had herein, that the underlying conduct of the offenses was sexually motivated, and it is in the interests of justice for the defendant to register as a sex offender under

[WIS. STAT.] § 301.45. The counts dismissed and read in involved sexual assaults of two different children.

Flores now asserts that he should be allowed to withdraw his pleas based upon: (1) the circuit court's refusal to grant Flores' motion to discharge his trial counsel based upon a breakdown in communications; (2) trial counsel's failure to adequately explain to Flores the meaning of a stipulation as to the factual basis for sex offender registration; (3) the insufficiency of the evidence—in conjunction with alleged credibility problems with the victims' accounts, alleged assaults against one of the victims by Flores' stepfather, and an alleged pattern of accusations and coaching of the victims by Flores' wife; and (4) trial counsel's failure to investigate the scene of the crimes.

First, as to Flores' request to discharge his trial counsel shortly before trial, we agree with counsel's analysis that the circuit court properly exercised its discretion by addressing relevant factors when denying the request. These included the reasons for the request; the timeliness of the request; the victims' interests; the length of the delay that would result; the availability of successor counsel; whether other continuances had been granted; and the inconvenience to the parties, witnesses, and the court. *See State v. Lomax*, 146 Wis.2d 356, 359-60, 365, 432 N.W.2d 89 (1988).

Second, the circuit court determined that Flores' claim that he did not understand the stipulation to a factual basis for the sex offender registration requirement was not credible. Such credibility determinations are not subject to appellate review. *See State v. Oswald*, 2000 WI App 3, ¶47, 232 Wis. 2d 103, 606 N.W.2d 238 (1999).

Third, Flores cannot raise a sufficiency of the evidence claim because he did not go to trial. Flores waived his right to challenge the strength of the State's case by entering his pleas.

Moreover, all of the points he contends weigh in favor of his innocence were known to him before he entered his pleas.

Finally, Flores has not identified anything counsel could have discovered by visiting the scene of the crimes that would have changed Flores' decision to enter his pleas. Flores was certainly aware of the layout of his own house prior to entering his pleas.

Our independent review of the record discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders*. Accordingly, counsel shall be allowed to withdraw, and the judgment and order will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Melissa Petersen is relieved of any further representation of Andrew Flores in this matter pursuant to 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