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DISTRICT III

March 29, 2022

To:

Hon. Timothy A. Hinkfuss
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Susan E. Alesia
Electronic Notice

Winn S. Collins
Electronic Notice

David L. Lasee
Electronic Notice

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

2019AP320-CRNM State of Wisconsin v. Terry Allen Siehr
(L. C. No. 2016CF71)

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).

Counsel¹ for Terry Siehr has filed a no-merit report concluding that no grounds exist to challenge Siehr's convictions for five counts of possessing child pornography, contrary to WIS. STAT. § 948.12(1m) (2019-20).² Counsel has likewise concluded that no grounds exist to challenge the order denying Siehr's postconviction motion for plea withdrawal. Siehr has filed responses raising several challenges to his pleas and sentences, and counsel filed a supplemental

¹ The no-merit report and supplemental no-merit report were filed by Attorney Kathilynne A. Grotelueschen, who has been replaced by Attorney Susan E. Alesia as Siehr's appellate counsel.

² All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

no-merit report. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment and order. See WIS. STAT. RULE 809.21.

The State charged Siehr with ten counts of possessing child pornography. The complaint alleged that a Brown County sheriff's detective identified an IP address "possessing and contributing or offering to contribute to the distribution of child pornography." After obtaining a search warrant for subscriber information, the detective learned that the IP address was associated with Siehr. Law enforcement subsequently executed a search warrant at Siehr's home and located child pornography on Siehr's computer. During a noncustodial interview that was recorded by law enforcement, Siehr confessed to watching child pornography on his computer.

In exchange for Siehr's no-contest pleas to five of the charged offenses—each carrying a mandatory minimum term of three years' initial confinement pursuant to WIS. STAT. § 939.617(1)—the State agreed to recommend that the circuit court dismiss and read in the remaining counts. The State also agreed to recommend six years' initial confinement and ten years' extended supervision. Defense counsel remained free to argue at sentencing. Out of a maximum possible aggregate sentence of 125 years, the court followed the State's recommendation and imposed concurrent sixteen-year terms for each count, consisting of six years' initial confinement and ten years' extended supervision. The court also determined that Siehr was entitled to 778 days of sentence credit.

Siehr filed a postconviction motion for plea withdrawal alleging his pleas were not knowingly, intelligently and voluntarily entered because he did not understand that he had to

serve at least three years of confinement for the charged offenses. Specifically, Siehr asserted that although he was aware that the law required a minimum of three years' confinement for the crimes charged,³ his counsel informed him that the court could impose a time-served sentence if Siehr was not a threat or danger to the public, and he relied on counsel's representations when entering his pleas. After a *Machner*⁴ hearing, the circuit court denied the motion. This appeal follows.

The no-merit report addresses whether: (1) there is any basis for challenging Siehr's no-contest pleas; (2) the circuit court properly exercised its sentencing discretion; and (3) Siehr should have been allowed to withdraw his pleas after sentencing. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit. Although the no-merit report does not address the possibility of a pretrial suppression motion, nothing in the record supports a nonfrivolous claim that Siehr's trial counsel was ineffective by failing to pursue a pretrial motion to suppress evidence discovered during the execution of the search warrant.

In response to the no-merit report, Siehr argues that the child pornography images were found only in his "recycle bin" and that he had no knowledge of any "shared folder." Siehr adds that a computer analyst could have "proved that the videos/pictures weren't open[ed] or viewed but deleted." To the extent Siehr claims he is innocent of the crimes charged, his valid no-contest pleas waive all nonjurisdictional defects and defenses. See *State v. Lasky*, 2002 WI App

³ The record reflects that during the plea colloquy, the circuit court confirmed Siehr's understanding that the crimes each carried a mandatory minimum term of three years in prison.

⁴ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. Moreover, the record shows that during law enforcement’s forensic examination of Siehr’s computer, three images and thirty-five videos of child pornography were found. Attached to counsel’s supplemental no-merit report is a spreadsheet detailing the images; their locations on Siehr’s computer; and the dates they were last accessed.⁵ The forensic examination revealed that Siehr sought out child pornography using specific search terms, and that the images and videos found on his computer were accessed. Further, Siehr admitted to law enforcement that he watched child pornography on his computer.

In his response, as in his postconviction motion, Siehr contends that his trial attorney informed him that a “time served” sentence was possible despite the minimum confinement term required by statute. In the order denying Siehr’s postconviction motion, the circuit court recounted that during the motion hearing, trial counsel testified that he did not, at any time, tell Siehr that he was eligible for a time-served sentence rather than the presumptive minimum. The court added that after hearing all of the witnesses testify, including Siehr and his mother, it found trial counsel’s hearing testimony to be credible. The circuit court is the ultimate arbiter of the credibility of trial counsel and all other witnesses at a *Machner* hearing. See *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). Nothing in the record would support a nonfrivolous challenge to the court’s credibility determination.

Siehr also asserts that the circuit court had a conflict of interest at the *Machner* hearing because trial counsel “was or is a Family Court Commissioner in some form for the Brown

⁵ If an attorney is aware of facts outside the record that rebut allegations made in the defendant’s response to a no-merit report, the attorney may file a supplemental no-merit report and an affidavit or affidavits, including matters outside the record. See WIS. STAT. RULE 809.32(1)(f).

County Courthouse.” This assertion, however, does not support a nonfrivolous claim that Siehr was denied his right to an impartial judge. As the supplemental no-merit report notes, trial counsel is not a family court commissioner but, rather, a supplemental court commissioner for Brown County—a position that has only limited authority under WIS. STAT. § 757.675. The court and trial counsel, in his capacity as a supplemental court commissioner, did not work together on a daily basis. Ultimately, trial counsel’s relationship with the circuit court was no different than that of any other attorney practicing before the court. Ultimately, there is nothing in the record to suggest judicial bias or prejudice against Siehr.

Siehr additionally challenges the length of the sentences imposed, claiming his aggregate sixteen-year sentence is excessive when compared to a defendant convicted of possessing child pornography in another case. At the sentencing hearing, Siehr’s trial counsel informed the circuit court of a case held before a different judge in which that defendant received concurrent six-year sentences despite that defendant possessing 150,000 images or recordings; viewing the images over a twenty-year period; and engaging in “peer-to-peer” sharing of the images. According to counsel, this information was provided as a “yard stick” for the sentencing court in Siehr’s case. In his response to the no-merit report, Siehr emphasizes that his case involved possession of thirty-eight images or recordings; he viewed the images over a two-week period; and he did not voluntarily share the images.

Siehr’s argument, however, is based on selecting individual characteristics of the other defendant’s crimes and comparing them to himself and his crimes. Siehr fails to establish that the other defendant and his crimes, taken as a whole, are appropriate to compare to his own character and his crimes. By its very nature, the exercise of discretion dictates that different judges will have different opinions as to what should be the proper sentence in a particular

case.” *Ocanas v. State*, 70 Wis. 2d 179, 187-88, 233 N.W.2d 457 (1975). Thus, “[t]his court will sustain a trial court’s exercise of discretion if the conclusion reached by the trial court was one a reasonable judge could reach, even if this court or another judge might have reached a different conclusion.” *State v. Odom*, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. As discussed in the no-merit report, Siehr’s concurrent sentences were appropriately tailored to his individual circumstances after the court considered the proper sentencing factors. *See State v. Gallion*, 2004 WI 42, ¶¶23, 59-61, 270 Wis. 2d 535, 678 N.W.2d 197. Any challenge to the length of Siehr’s sentences based on a disparity with another defendant’s sentence would therefore lack arguable merit.

Siehr claims his trial counsel was ineffective by failing to fully emphasize at sentencing Siehr’s good character, including his charitable works, his jury service, his thirty years as a respected restaurant manager, his sobriety, and his “remarkable behavior” during his arrest and incarceration in the Brown County jail. To establish ineffective assistance of counsel, Siehr must show that his counsel’s performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of his case. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). At sentencing, defense counsel focused on the motivations behind Siehr’s “sudden” and brief turn to child pornography, noting how his social isolation led him to view pornography rather than pursue personal relationships. Defense counsel also noted that Siehr had a “minimal” criminal record and referenced the alternate presentence investigation (“PSI”) report, which outlined Siehr’s biographical information. Defense counsel stated: “Essentially what we’ve got is ... a person who worked all his life, worked low-level management jobs, essentially isolated himself and did what ... he did, he spent two weeks and he accessed things that he shouldn’t have.”

Siehr's present claim of ineffectiveness is necessarily based on speculation that additional information regarding Siehr's character would have affected the outcome of the sentencing hearing. While the sentencing court acknowledged Siehr's character, including that he did not have much of a criminal record, that his demeanor to staff had been "very good," that he expressed remorse, and that he cooperated, the court ultimately focused on the seriousness of the crimes, describing the videos as "terrible, terrible, terrible." The court further emphasized that by viewing these images and recordings, Siehr helped create "the market" for this behavior. Thus, even were we to assume counsel was somehow deficient when discussing Siehr's character at sentencing, speculation about what the result of the proceeding might have been is insufficient to establish prejudice. *See State v. Erickson*, 227 Wis. 2d 758, 774, 596 N.W.2d 749 (1999). Our review of the record discloses no arguable basis for challenging the effectiveness of Siehr's trial counsel.

Siehr argues that the circuit court relied upon inaccurate information at sentencing, thus warranting resentencing. Every criminal defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Here, Siehr asserts that the court was given inaccurate information regarding his reasons for looking at child pornography. Specifically, the PSI noted that when asked why he viewed child pornography, Siehr stated that "he is angry at women for the way he has been treated in the past, which is why he now looks at child pornography." The PSI's recitation of Siehr's explanation for looking at child pornography, however, is consistent with the explanation he gave to law enforcement. Because Siehr has not identified any inaccurate information relied on by the sentencing court, any claim for resentencing on this ground lacks arguable merit.

Finally, Siehr contends that his postconviction attorney was ineffective in examining trial counsel at the *Machner* hearing. Siehr asserts that his postconviction counsel should have better examined his trial counsel about Siehr's reaction to the final plea offer, suggesting that his reaction was relevant to his claimed misunderstanding of the plea agreement, including his purported belief that he could be sentenced to time served. Even assuming postconviction counsel was somehow deficient in failing to question trial counsel about Siehr's reaction to the plea agreement, Siehr's reaction does not undermine trial counsel's testimony that "at no time" did counsel represent that there was "anything other than a mandatory three year minimum," which the circuit court found to be credible.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Susan E. Alesia is relieved of her obligation to further represent Terry Siehr 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