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DISTRICT II

May 4, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Washington County Courthouse
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Mark Bensen
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Brian Borkowicz
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Jack F. Jordan, #677314
Stanley Correctional Inst.
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You are hereby notified that the Court has entered the following opinion and order:

2020AP933-CRNM State of Wisconsin v. Jack F. Jordan (L.C. #2018CF140)

Before Gundrum, P.J., Neubauer 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).

Attorney Brian Borkowicz, appointed counsel for Jack F. Jordan, 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). Counsel provided Jordan with a copy of the report, and Jordan filed a response. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21.

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

After our independent review of the record, the no-merit report, and Jordan's response, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Jordan was charged with two counts of second degree sexual assault of a child. Count One alleged sexual contact with a child, and Count Two alleged that Jordan performed oral sex on the same child. Pursuant to a negotiated plea agreement, Jordan pled guilty to Count One, and Count Two was dismissed outright. The circuit court imposed a sentence of five years of initial confinement and ten years of extended supervision.

The no-merit report addresses (1) whether there are grounds for plea withdrawal; (2) whether the circuit court complied with the sentencing requirements of ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197; (3) whether the circuit court based its sentence on inaccurate information or an improper factor; (4) whether Jordan received ineffective assistance of trial counsel; and (5) whether the COVD-19 pandemic is a new factor warranting sentence modification. This court is satisfied that the no-merit report correctly analyzes these issues as without merit.

As noted, Jordan filed a response to the no-merit report. In it, he argues that the circuit court relied on inaccurate information at sentencing and that he received ineffective assistance of trial counsel. These issues are addressed by the no-merit report, and we will not discuss them further. In addition, Jordan argues that the prosecutor breached the plea agreement, and that a letter from Jordan's psychologist constitutes a new factor warranting sentence modification. As discussed below, we conclude that these issues are without arguable merit.

Jordan argues that the prosecutor breached the plea agreement in two instances, once at the plea hearing and once at sentencing. The party asserting a breach of a plea agreement must

"show, by clear and convincing evidence, not only that a breach occurred, but also that it was material and substantial." ***State v. Jorgensen,*** 137 Wis. 2d 163, 168, 404 N.W.2d 66 (Ct. App. 1987). As discussed below, Jordan has not met this burden as to the prosecutor's comments in either instance.

Jordan asserts that the prosecutor breached the plea agreement at the beginning of the plea hearing, before any plea was entered. When the parties' attorneys were reciting the terms of the negotiated agreement, the court asked if Count Two would be a read-in or an outright dismissal. The prosecutor stated, "The State believes that happened. I understand that legally and ethically if the Defendant doesn't recall or doesn't—can't admit to that or stipulate to that." Jordan argues that this comment by the prosecutor constituted a breach of the plea agreement. The argument is without merit. Immediately after making the comment, the prosecutor confirmed for the court that the State was agreeing to dismiss Count Two outright. The court then proceeded to dismiss Count Two on the State's motion. Jordan thus received what he had negotiated—an outright dismissal of Count Two.

Jordan also argues that the prosecutor breached the plea agreement when she made the following remark in her sentencing arguments: "Page 4 of the PSI says he does not recall the oral sex with her, which is hard to fathom, but he doesn't recall that type of sexual contact." Jordan argues that this comment constituted an attempt by the prosecutor to do an "end run" around the plea agreement by referencing details about Count Two, which had been dismissed. *See* ***State v. Williams***, 2002 WI 1, ¶42, 249 Wis. 2d 492, 637 N.W.2d 733, *quoting* ***State v. Hanson***, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278 ("'End runs' around a plea agreement are prohibited."). We reject Jordan's argument as without merit. Despite her remark about the reference to oral sex in the PSI, the prosecutor's sentencing recommendation of seven

and a half years of initial confinement followed by ten years of extended supervision was consistent with the terms of the plea agreement. The court went on to impose a shorter sentence than what the State recommended. There is no merit to a claim that the prosecutor's remarks deprived Jordan of the benefit of his bargain or that a material breach of the plea agreement occurred. *See* ***State v. Lichty***, 2012 WI App 126, ¶¶22, 24, 344 Wis. 2d 733, 823 N.W.2d 830.

In the response to the no-merit report, Jordan also argues that a letter sent by his psychologist, William Drankiewicz, to his trial counsel on February 5, 2019, constitutes a new factor warranting sentence modification. A new sentencing factor is a fact or set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of sentencing, either because it was not then in existence or because it was unknowingly overlooked by all the parties. ***State v. Harbor***, 2011 WI 28, ¶¶40, 42, 48, 333 Wis. 2d 53, 797 N.W.2d 828. The Drankiewicz letter does not constitute a new factor under the ***Harbor*** standard because it was in existence prior to sentencing and, presumably, Jordan's trial counsel knew about the letter because it was addressed to him.

To the extent Jordan is arguing that his trial counsel was ineffective for failing to make the letter available to the circuit court, this argument is without merit. To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer performed deficiently and that this deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). The circuit court was aware, based on information in the presentence investigation report (PSI), of Jordan's trauma as a youth and its impact on his mental health. The PSI summarizes Jordan's work in therapy with Drankiewicz, based on records from Drankiewicz that had been requested and received for preparation of the PSI. Thus, any argument that his counsel was deficient for failing to provide the circuit court with a copy of

Drankiewicz's February 5, 2019 letter, or that the letter would have made any difference in Jordan's sentencing, is without merit.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment of conviction, and discharges appellate counsel of the obligation to represent Jordan further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Brian Borkowicz is relieved of further representation of Jack F. Jordan in this appeal. *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