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DISTRICT I

June 14, 2022

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

2021AP890-CRNM State of Wisconsin v. Albert Jerome Payne (L.C. # 2016CF1139)

Before Donald, P.J., Dugan and White, 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).

Albert Jerome Payne appeals a judgment of conviction entered after a jury found him guilty of human trafficking. He also appeals an order denying postconviction relief. Payne's appellate counsel, Attorney John T. Wasielewski, filed a no-merit report in this court. *See* WIS. STAT. RULE 809.32 (2019-20).¹ Payne did not file a response. Upon consideration of the no-merit report and an independent review of the record as mandated by *Anders v. California*, 386

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

U.S. 738 (1967), we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm.

The State alleged in a criminal complaint that Payne knowingly trafficked T.B. in February 2015. Specifically, the State alleged that Payne, by causing or threatening to cause bodily harm to T.B., recruited and enticed her to travel with him to “make a lot of money,” then transported her from Milwaukee, Wisconsin, to Oshkosh, Wisconsin, and to Las Vegas, Nevada, where he provided her to others for the purpose of engaging in commercial sex acts, all without her consent. The State subsequently filed an information clarifying that the time frame of the offense was October 2014 through March 2016.

Payne entered a not guilty plea and requested a trial. The case proceeded to a jury trial, and the jury found Payne guilty as charged.

At sentencing, Payne faced maximum penalties of twenty-five years of imprisonment and a \$100,000 fine. *See* WIS. STAT. §§ 940.302(2)(a), 939.50(3)(d).² The circuit court imposed an evenly bifurcated sixteen-year term of imprisonment. The circuit court awarded Payne the 435 days of sentence credit that he requested and found that he did not owe any restitution.

Payne filed a postconviction motion to reconstruct a portion of the trial proceedings. Specifically, he sought to reconstruct a sidebar conference that addressed his objections to a police report documenting T.B.’s 911 call in 2015. Payne also sought to modify the condition of his extended supervision that required him to maintain absolute sobriety. A successor circuit

² Although the charge in this case first arose in October 2014, the applicable statutes defining the crime and establishing the penalty were not affected by any subsequent statutory revisions, and we therefore cite the current version of those statutes.

court judge held an evidentiary hearing, found that Payne had objected to the police report on hearsay and Confrontation Clause grounds, and determined that the original circuit court properly overruled the objections. The successor circuit court further denied the motion to modify Payne's conditions of extended supervision.

In the no-merit report, appellate counsel first addresses whether the State presented sufficient credible evidence at trial to support the jury's guilty verdict. Appellate counsel explains the applicable standard of review set forth in *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990), and counsel describes the evidence that the State presented to prove each element of the crime of human trafficking. Appellate counsel also examines the circuit court's colloquy with Payne regarding his waiver of the right to testify and explains why that colloquy satisfied the requirements established in *State v. Weed*, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. We agree with appellate counsel's analysis, and we independently conclude both that the evidence was sufficient to support the verdict and that Payne validly waived his right to testify. Further pursuit of these issues would be frivolous within the meaning of *Anders*.

Appellate counsel next examines the successor circuit court's postconviction reconstruction of the sidebar conference addressing admissibility of a police report documenting T.B.'s 911 call on September 17, 2015. The sidebar followed Payne's objection, made on the record, opposing admission of the report on both hearsay and Confrontation Clause grounds, but at the conclusion of the sidebar, the parties did not make a record regarding the specifics of the discussion. At the postconviction hearing, Payne's trial counsel and the prosecutor both testified about the sidebar conference. Based on their testimony, the successor circuit court found that the sidebar was brief and did not add anything of substance to the record. Further, the successor

circuit court found that the “transcript ... captures the essence of everything that happened during that [sidebar].” In reconstructing the record, the successor circuit court considered proper factors, including the brevity of the sidebar conference, the availability and credibility of the two lawyers who participated in and testified about that conference, and the extent to which the trial transcript corroborated their testimony. *See State v. DeFilippo*, 2005 WI App 213, ¶11, 287 Wis. 2d 193, 704 N.W.2d 410. We agree with appellate counsel that further pursuit of this issue would be frivolous within the meaning of *Anders*.

Appellate counsel next considers whether Payne could pursue an arguably meritorious challenge to the admission of the police report documenting T.B.’s 911 call. The circuit court admitted the report at trial under WIS. STAT. § 908.03(6), an exception to the hearsay rule permitting admission of certain records of regularly conducted activity. *See id.* Whether to admit a hearsay statement rests in the circuit court’s discretion, and a reviewing court will not reverse the circuit court’s decision “unless the record shows that the ruling was manifestly wrong and an erroneous exercise of discretion.” *State v. Ballos*, 230 Wis. 2d 495, 504, 602 N.W.2d 117 (Ct. App. 1999)(citation and brackets omitted). Here, neither the record nor the postconviction hearing reveals any basis to challenge the authenticity, accuracy, or reliability of the police report at issue, and the circuit court therefore properly exercised its discretion in overruling Payne’s hearsay objection to that report. *See id.* at 508 (citation omitted) (explaining that “[u]nder circumstances assuring the reliability of the records, the § 908.03(6) ‘business records exception’ may include police records”). Further, as appellate counsel explains, the police report reflected nontestimonial statements and therefore its admission did not run afoul of the Sixth

Amendment's Confrontation Clause.³ See *Crawford v. Washington*, 541 U.S. 36, 59-60 (2004) (holding that the Confrontation Clause prohibits admission of a declarant's testimonial statement unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant); *Michigan v. Bryant*, 562 U.S. 344, 377-78 (2011) (holding that statements made primarily to assist police in addressing an ongoing emergency were not testimonial statements and therefore their admission did not violate the Confrontation Clause). Moreover, T.B. testified at trial, described the incident documented in the report of her 911 call, and was available for cross-examination. Appellate counsel concludes that Payne could not pursue an arguably meritorious claim of either a hearsay or a Confrontation Clause violation. We agree that further pursuit of this issue would be frivolous within the meaning of *Anders*.

Appellate counsel next examines the pretrial proceedings and concludes that Payne could not pursue an arguably meritorious challenge to the circuit court's determination that he was competent to proceed. "[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." *State v. Byrge*, 2000 WI 101, ¶27, 237 Wis.2d 197, 614 N.W.2d 477. Payne's trial counsel raised a concern about Payne's competency early in the litigation, and a court commissioner ordered a competency examination. At a subsequent hearing, the circuit court reviewed the examining psychiatrist's report. The report, which neither Payne nor the State challenged, set forth the psychiatrist's opinion that Payne was competent to proceed and the reasons for that opinion. The report supported the circuit court's conclusion that Payne understood the proceedings against him and could assist his counsel in preparing a

³ See U.S. CONST. amend VI.

defense. This court will uphold a circuit court's competency determination unless that determination is clearly erroneous. *See State v. Garfoot*, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the psychiatrist's report and the standard of review, we agree with appellate counsel that any further proceedings in regard to Payne's competency would lack arguable merit.

Appellate counsel further examines whether Payne could mount an arguably meritorious challenge to the order denying his second judicial substitution request after his first such request was granted. We agree with appellate counsel that such a challenge would lack arguable merit. *See WIS. STAT. § 971.20(2)* (providing that, with an exception not relevant here, a defendant in a criminal action has a right to only one substitution of a judge).

Finally, appellate counsel considers whether Payne could pursue an arguably meritorious challenge either to the circuit court's exercise of sentencing discretion or to the postconviction order denying modification of the requirement that he maintain absolute sobriety during his term of extended supervision. We agree with appellate counsel's conclusions that Payne could not do so. The record reflects that, at sentencing, the circuit court identified appropriate sentencing goals and considered proper factors in fashioning a sentence to meet those goals. *See State v. Gallion*, 2004 WI 42, ¶¶41-43, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence imposed was well within the maximum sentence allowed by law and therefore was "presumptively not unduly harsh or unconscionable." *See State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (emphasis omitted). Further, as the successor circuit court explained in denying Payne's motion for sentence modification, the requirement of absolute sobriety during Payne's term of extended supervision constituted a reasonable exercise of sentencing discretion because the condition will assist Payne in maintaining self-control and will allow him to keep a clear head while pursuing treatment in the community. There is no arguably meritorious basis to

challenge these conclusions. *See State v. Davis*, 2017 WI App 55, ¶¶11-12, 14, 377 Wis. 2d 678, 901 N.W.2d 488 (explaining that conditions of supervision are measured by how well they serve the objectives of rehabilitation and protection of state and community interests; and upholding a circuit court order imposing a condition of absolute sobriety because alcohol consumption may impair judgment and lead to antisocial behavior). Further pursuit of these issues would be frivolous within the meaning of *Anders*.

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney John T. Wasielewski is relieved of any further representation of Albert Jerome Payne. *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