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DISTRICT III

July 26, 2022

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

2019AP1729-CRNM State of Wisconsin v. Monte Elmer McKercher
(L. C. No. 2016CF296)

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).

Counsel for Monte McKercher has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),[1] concluding that no grounds exist to challenge McKercher's convictions for first-degree sexual assault of a child, by sexual contact with a person under age thirteen, and repeated sexual assault of the same child, with at least three violations of first- or second-degree sexual assault, contrary to WIS. STAT. §§ 948.02(1)(e) and 948.025(1)(e), respectively.

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

McKercher has filed a response raising several challenges to his convictions and sentences, and counsel filed a supplemental no-merit report. For the reasons discussed below, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged McKercher with first-degree sexual assault by sexual contact with Tracy, a child under age thirteen; repeated sexual assault of Melissa, who was between six and seven years old at the time of the alleged assaults; and two counts of felony intimidation of a witness, based on McKercher's attempts to dissuade Melissa's mother and grandmother from cooperating with law enforcement.[2] The parties filed and litigated several pretrial motions. The State moved to admit certain statements McKercher made during phone calls from jail on the ground that they constituted evidence of consciousness of guilt. Although McKercher objected, the motion was granted subject to any trial objection McKercher might make to cumulative evidence under WIS. STAT. § 904.03.

Over McKercher's objections, the circuit court also granted the State's motions to admit: (1) audiovisual recordings of the children's statements under WIS. STAT. § 908.08; (2) other-acts evidence consisting of testimony by Dawn, who was allegedly sexually assaulted by McKercher multiple times when she was between the ages of five and eighteen; and (3) statements McKercher made to police before invoking his right to counsel. The court denied the State's motion for Melissa to testify via closed-circuit audiovisual equipment under WIS. STAT. § 972.11(2m). The court also denied McKercher's motion to sever the sexual assault counts.

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use pseudonyms instead of the victims' names.

During pretrial proceedings, the State filed two new cases against McKercher. In Douglas County case No. 2017CM158, the State charged McKercher with one count of misdemeanor witness intimidation. In Douglas County case No. 2017CF187, the State charged McKercher with fifteen counts of sexual assault against Dawn, based on the allegations that the State successfully sought to admit as other-acts evidence in the instant case. Ultimately, McKercher entered into a global plea agreement resolving all of the aforementioned cases.

In exchange for McKercher's no-contest pleas in this case to first-degree child sexual assault and repeated sexual assault of the same child, the State agreed to recommend that the remaining two counts from this case be dismissed outright. The State also agreed to recommend outright dismissal of the single count in Douglas County case No. 2017CM158 and fourteen of the fifteen counts in Douglas County case No. 2017CF187. With respect to the remaining count in case No. 2017CF187, the State recommended that the circuit court dismiss and read in that count for purposes of sentencing in this case. In addition, the State agreed to cap its sentencing recommendation at twenty years' initial confinement. Out of a maximum possible 100-year sentence, the court imposed consecutive sentences resulting in an aggregate sentence of twenty-five years' initial confinement followed by fifteen years' extended supervision.

Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we disagreed with counsel's conclusion in the no-merit report that there was no arguable basis for challenging McKercher's pleas. The no-merit report recognized that at the plea hearing, the circuit court failed to personally inform McKercher that the court was not bound by the plea agreement, as is required under ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. Although the no-merit report noted that the court advised McKercher it could impose the maximum possible penalties, similar warnings in addition to

what is included in the plea questionnaire form were found to be insufficient in ***Hampton***. *See* ***id.***, ¶¶8, 14. Because the court ultimately departed from the sentencing recommendation made under the plea agreement, a potential issue could arise if McKercher claimed he did not know the court was free to impose a sentence greater than that recommended under the plea agreement.

In his response to the no-merit report, McKercher claimed that he "agreed" to a ten-year sentence and he felt he was "forced" into the plea agreement by the State using a "bait and switch." If McKercher was claiming he was unaware that the circuit court was not bound by the parties' recommendations under the plea agreement, McKercher would be entitled to a hearing at which the State would have the opportunity to prove that McKercher was in fact aware that the court was not bound by the terms of the plea agreement. *See* ***id.***, ¶72. We therefore directed counsel to file either a supplemental no-merit report or a motion to dismiss the appeal and to extend the time for filing a postconviction motion. We noted that any supplemental no-merit report would have to include a written statement by McKercher either conceding he understood that the circuit court was not bound by the plea agreement or waiving any challenge to the pleas on this basis, adding that if McKercher did not agree to submit the aforementioned written statement, counsel would be required to file a motion for plea withdrawal in the circuit court. Counsel filed a supplemental no-merit report with an attached statement by McKercher wherein he knowingly waived any challenge to his pleas based on the circuit court's failure to personally inform him that it was not bound by the plea agreement.

The no-merit report addresses whether: (1) the circuit court properly ruled on pretrial motions, including the decisions to admit other-acts evidence and McKercher's statements made to police prior to invoking his right to counsel and the decision to deny the motion to sever charges; (2) McKercher's trial counsel was ineffective with respect to the pretrial motions;

(3) McKercher knowingly, intelligently, and voluntarily entered his no-contest pleas; and (4) the court properly exercised its sentencing discretion. Upon reviewing the record, and in light of McKercher's decision to waive any challenge to his pleas based on a ***Hampton*** violation, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit. The no-merit report sets forth an adequate discussion of these potential issues to support the no-merit conclusion, and we need not address them further.

In his response to the no-merit report, McKercher appears to challenge the sufficiency of the evidence of his crimes, claiming there was no damage to Melissa's hymen; there was no evidence that his DNA was found in the victims' underwear; Melissa has an "active imagination"; and he did not abuse other children for whom he babysat. A valid guilty plea, however, waives all nonjurisdictional defects and defenses. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. Moreover, physical evidence, such as DNA or documented injuries to a victim, is not a prerequisite for conviction. *See* ***State v. Holt***, 128 Wis. 2d 110, 120, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*. Additionally, that McKercher may not have abused other children under his care does not establish his innocence in the present matter. Thus, to the extent McKercher is attempting to challenge the factual basis for his pleas, the claim lacks arguable merit.

McKercher also asserts a "conflict of interest" because his appellate counsel "knows the judge." This general allegation does not establish an arguable conflict. To the extent McKercher alleges prosecutorial misconduct and judicial bias generally, nothing in our review of the record would support a nonfrivolous challenge to his convictions on these grounds.

Next, McKercher claims his trial counsel was ineffective by failing to fully investigate his case, prepare for trial, or call a DNA expert. To establish ineffective assistance of counsel, McKercher must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice in this case, McKercher must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). McKercher fails to show how additional investigation would have altered his decision to enter no-contest pleas.

Further, any claim that trial counsel was deficient in failing to prepare for trial or to call a DNA expert does not establish prejudice where no trial was held. The no-merit report recounts that the trial was rescheduled three times. The first adjournment was jointly requested; the second trial date was adjourned at McKercher's request, without objection by the State; and the third trial date was adjourned for a month at the request of defense counsel, who had tried two other cases recently and needed additional time to prepare. Nothing in the record suggests that McKercher's counsel would not have been prepared for the rescheduled trial, had it proceeded. Because nothing in the record suggests that McKercher was prejudiced by any claimed deficiency on the part of his trial counsel, there is no basis for challenging trial counsel's performance and no grounds for McKercher's appellate counsel to request a ***Machner*** hearing.[3]

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Finally, McKercher appears to argue that his sentence is unduly harsh because he had no prior serious criminal record. A defendant's character, however, is only one of the factors considered by a sentencing court. Here, the circuit court considered the seriousness of the offenses, McKercher's character, the need to protect the public, and the mitigating factors McKercher raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. In discussing these factors, the court acknowledged McKercher's "insignificant" prior criminal history (consisting of one count of operating with a prohibited alcohol concentration as a second offense and operating while revoked). Nevertheless, the court emphasized the "profound gravity of [the present] crimes," describing them as "some of the most serious crimes in the criminal code," and noting that they showed "a pattern of threats, intimidation, deviant sexual behavior and the ultimate betrayal of trust." Further, there is a presumption that McKercher's aggregate sentence, which is well within the maximum allowed by law, is not unduly harsh or unconscionable, nor "so excessive and unusual" as to shock public sentiment. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507; *see also* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jefren E. Olsen is relieved of any obligation to further represent Monte McKercher 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