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DISTRICT IV

December 1, 2022

To:

Hon. Robert F. Dehring
Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Jefferson County Courthouse
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Corey A. Keeling 323792
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P.O. Box 2000
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1314-CRNM State of Wisconsin v. Corey A. Keeling (L.C. # 2019CF291)
2021AP1319-CRNM State of Wisconsin v. Corey A. Keeling (L.C. # 2020CF158)

Before Blanchard, P.J., Kloppenburg, and Fitzpatrick, 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 Kathilynne Grotelueschen, as appointed counsel for Corey Keeling, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Keeling filed a response to the report, and counsel filed a supplemental no-merit report and supporting affidavit. We conclude that this case is appropriate for summary

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

disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Keeling was charged in Jefferson County Circuit Court Case No. 2019CF291 with two counts of second-degree sexual assault. In Case No. 2020CF158, Keeling was charged with one count of incest with a child by a stepparent. Keeling entered into a negotiated plea agreement encompassing both cases. Pursuant to the plea deal, Keeling pled no contest to one count of second-degree sexual assault in Case No. 2019CF291, and the State agreed to dismiss but read in the remaining count. In Case No. 2020CF158, the State agreed to amend the incest charge to one count of causing mental harm to a child, and Keeling entered a no contest plea to the amended charge. The State agreed to cap its global sentencing recommendation at fifteen years of imprisonment, and further agreed not to prosecute Keeling for any offense related to his possession of child pornography that may be found on his computer as a result of the investigation in the two cases. The circuit court ultimately imposed a sentence of four years of initial confinement and four years of extended supervision in Case No. 2019CF291, and three years of initial confinement and three years of extended supervision in Case No. 2020CF158, to be served consecutively.

The no-merit report addresses whether Keeling's pleas were entered knowingly, voluntarily, and intelligently. This court's independent review of the record reveals that the plea colloquy sufficiently complied with the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 255-73, 389 N.W.2d 12 (1986) and WIS. STAT. § 971.08 relating to the nature of the charges, Keeling's understanding of the proceedings and the voluntariness of the plea decision, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being

waived. The parties stipulated on the record that there was a factual basis for the pleas. The record shows no other arguably meritorious ground for plea withdrawal.

Keeling raises several arguments in his no-merit response related to the strength of the State's evidence and possible defenses that could have been presented at trial. However, because Keeling entered valid pleas, the pleas operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10). The record reveals that no suppression motion was filed in this case.

Potentially, Keeling could claim that trial counsel was ineffective for failing to pursue a pretrial motion to suppress evidence discovered on Keeling's computer, which was seized without a warrant. There would be no arguable merit to such a claim. A Fort Atkinson police officer obtained the computer from Keeling's marital home with the consent of Keeling's wife on July 18, 2019, shortly after Keeling's arrest. Consent is an exception to the warrant requirement. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 219 (1973). A third party may consent to a search of another's property when the third party shares "common authority" over that property. ***State v. Abbott***, 2020 WI App 25, ¶14, 392 Wis. 2d 232, 944 N.W.2d 8. Here, Keeling told Detective Lisa Hefty that the computer was mostly his but that his wife also used it. Any suppression motion challenging the seizure of Keeling's computer would have been meritless, in light of the fact that Keeling's wife had common authority over the computer and consented to turn it over to law enforcement. Keeling's trial counsel therefore was not ineffective for failing to pursue a meritless suppression motion. *See* ***State v. Harvey***, 139 Wis. 2d 353, 380, 407 N.W.2d 235 (1987).

The majority of Keeling's response to the no-merit report focuses on comments, made by the prosecutor at sentencing, related to the fact that child pornography was found on Keeling's computer. Keeling asserts that neither he nor his counsel had been made aware, prior to the sentencing hearing, that child pornography had been found. In the supplemental no-merit report, counsel explains that she investigated the child pornography issue prior to filing the no-merit report in this case. Specifically, counsel asserts that she obtained reports from the Fort Atkinson Police Department.[2] The police reports state that, on the date of his arrest, Keeling admitted to law enforcement that there had been child pornography on his computer at one time, but that the images had been erased. The reports also reveal that it was not until there had been discussion about returning the computer to Keeling that the Fort Atkinson Police Department contacted the Division of Criminal Investigation (DCI) for a forensic analysis to verify that the computer did not contain child pornography and could be returned. The computer's hard drive was transported to the DCI on August 6, 2020, and returned to the police department on October 22, 2020. On November 4, 2020, Detective Lisa Hefty reviewed the forensic examination report created by the DCI, which indicated that multiple images of child pornography depicting unidentified children had been found on the computer, as well as nude and partially nude images of one of the victims in these cases.

Keeling could argue that the State committed a discovery violation contrary to WIS. STAT. § 971.23(1) by failing to turn over to the defense, prior to sentencing, the evidence obtained from his computer. Such an argument would be without merit. Section 971.23(1)

[2] Counsel attached copies of relevant portions of the police reports as an exhibit to her sworn affidavit filed with the supplemental no-merit report.

specifies what a district attorney must disclose to a defendant within a reasonable time before trial. In these cases, no trial was held. Keeling entered his pleas on September 22, 2020. The police department did not receive the report detailing evidence obtained from the forensic examination of Keeling's computer until a month later. Because the evidence was obtained after Keeling entered his pleas, there would be no merit to an argument that the State violated § 971.23(1) by failing to turn the evidence over to the defense.

Similarly, there would be no arguable merit to a claim that the State violated its discovery obligations under ***Brady v. Maryland***, 373 U.S. 83 (1963). The State has a duty under ***Brady*** to disclose evidence, favorable to the accused, which is material to either guilt or punishment. ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. It would be wholly frivolous to argue that the child pornography evidence discovered in this case was favorable to Keeling and, thus, Keeling cannot state any arguably meritorious claim based upon ***Brady***.

Keeling asserts that the prosecutor's mention of child pornography at sentencing threw defense counsel "off his game" and also caused Keeling to forget what he had planned to say in his own defense. Keeling states that the information contained in his no-merit response is a summary of what he had planned to say at the sentencing hearing until the prosecutor "brought up child porn and messed up [his] tra[i]n of thought." To the extent Keeling might argue that the information in the no-merit response constitutes a new factor entitling him to sentence modification, such an argument would be without merit. A new 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 original sentencing, either because it was not then in existence or because … it was unknowingly overlooked by all of the parties." ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828 (citation omitted). The defendant has the burden of showing by clear and

convincing evidence that a new factor exists. ***Id.***, ¶36. Here, Keeling cannot meet that burden. He fails to point to any highly relevant information that either he or his trial counsel would have presented at sentencing if the issue of child pornography had not come up. The information raised in the no-merit response, therefore, does not provide arguably meritorious grounds for sentence modification.

Keeling also asserts that the circuit court was affected by the prosecutor's comments regarding child pornography. However, the record is devoid of any indication that the circuit court's sentencing decision was affected by those comments. To the contrary, the court made an explicit statement that it was going to "give the benefit of the doubt" to Keeling and "focus on the main allegations for the sentencing." Further, even if the court had relied upon the prosecutor's comments regarding the child pornography evidence, the court was within its discretion to do so. Under the terms of the plea agreement, the State agreed to read in and dismiss any potential allegations of possession of child pornography. A circuit court may consider read-in charges when imposing sentence. ***State v. Straszkowski***, 2008 WI 65, ¶93, 310 Wis. 2d 259, 750 N.W.2d 835. Any argument that the circuit court improperly relied upon the prosecutor's comments about child pornography is without arguable merit.

Any other challenge to the circuit court's exercise of sentencing discretion also would be without arguable merit. The standards for the circuit court and this court on discretionary sentencing issues are well established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result well within the statutory penalty ranges for each count. This court's independent review of the record discloses no other potential issues for appeal.

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kathilynne Grotelueschen and Attorney Suzanne Hagopian are relieved of any further representation of Corey Keeling 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