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DISTRICT II

January 25, 2023

To:

Hon. Jennifer Dorow
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
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Winn S. Collins
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Michael S. Holzman
Electronic Notice

Benjamin J. Ekiss
36440 Lanson Ave.
Dade City, FL 33525

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

2022AP913-CRNM State of Wisconsin v. Benjamin J. Ekiss (L.C. #2019CF1104)

Before Neubauer, Grogan and Lazar, 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).

Benjamin J. Ekiss appeals a judgment of conviction entered upon his pleas of no-contest to one count of physically abusing a child with intent to cause bodily harm to the child and one count of false imprisonment. Appellate counsel, Attorney Michael S. Holzman, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Ekiss did not file a response after receiving notice of his right to do so, but Attorney Holzman advises that the no-merit report includes a discussion of the issues that Ekiss believes

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

should be pursued on his behalf. We have considered the no-merit report, and we have conducted an independent review of the record as mandated by ***Anders***. We conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State alleged in a criminal complaint that on August 1, 2019, Ekiss's wife Louise had a video call with the couples' two sons, Milton and Mark, while she was outside of Wisconsin fulfilling her obligations as a member of the United States Navy Reserve.[2] The sons, then age thirteen and eleven respectively, told Louise that earlier in the week, Ekiss had locked them in their bedroom and threatened to shoot them if they came out. The boys also said that Ekiss had physically abused them.

Police investigated the allegations a few days later and took statements from Milton and Mark.[3] The boys alleged that while Louise was away from their Pewaukee home, Ekiss struck Milton with a wooden plank and that Ekiss struck Mark with a piece of plastic and with window blinds that Ekiss threw at Mark after removing them from the boys' bedroom window. The boys also alleged that Ekiss had locked them in their bedroom for more than twelve hours without access to a washroom, food, or water, put an alarm on their bedroom door, forbade the boys to leave the room, and threatened to shoot them if they did. The boys went on to say that Ekiss displayed a gun and said that he would not need to aim because it was loaded with hollow-point

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86, we use a pseudonym for each victim in this case.

[3] The record shows that investigators also took statements from Louise's and Ekiss's two daughters. Those statements were not included in the criminal complaint but they corroborated Milton's and Mark's allegations against Ekiss.

bullets. The State charged Ekiss with two counts of physically abusing a child by intentionally causing bodily harm to the child, two counts of causing mental harm to a child, and two counts of false imprisonment.

Ekiss entered pleas of not guilty and special pleas of not guilty by reason of mental disease or defect as to all the charges. Two court-appointed psychologists separately examined Ekiss in regard to his special pleas. Each psychologist filed a report opining, to a reasonable degree of professional certainty, that there was no support for those pleas. Ekiss then decided to resolve the charges with a plea agreement. Pursuant to its terms, he entered a no-contest plea to one count of physically abusing a child by intentionally causing bodily harm to the child and one count of false imprisonment. The State agreed to recommend two evenly bifurcated concurrent six-year terms of imprisonment and further to recommend that the circuit court stay those sentences and impose a three-year term of probation. The agreement allowed the State to recommend time in jail as a condition of probation and did not limit the amount of jail time the State could recommend. The circuit court accepted Ekiss's no-contest pleas.

The matter proceeded to sentencing. For each conviction, Ekiss faced maximum penalties of a $10,000 fine and six years of imprisonment. *See* WIS. STAT. §§ 948.03(2)(b), 940.30, 939.50(3)(h). The State made the promised recommendation to impose and stay an aggregate six-year term of imprisonment in favor of a three-year term of probation. As allowed by the plea agreement, the State additionally recommended a year in jail as a condition of probation. Ekiss similarly requested an imposed and stayed sentence and a period of probation, but he left the lengths of those terms to the circuit court's discretion, and he urged the circuit court not to impose any time in jail as a condition of probation. The circuit court imposed and stayed two evenly bifurcated concurrent four-year terms of imprisonment, ordered Ekiss to serve

a three-year term of probation, and imposed six months in jail as a condition of probation. The circuit court also granted Ekiss the 125 days of sentence credit he requested. He appeals.

We first consider whether Ekiss could pursue an arguably meritorious claim for plea withdrawal on the ground that his no-contest pleas were not entered knowingly, intelligently, and voluntarily. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). At the outset of the plea hearing, the circuit court established that Ekiss was forty-two years old and that he had a high school education. The circuit court also established that Ekiss had signed a plea questionnaire and waiver of rights form and addendum and that he understood their contents. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶36-37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a colloquy with Ekiss that fully complied with the circuit court's obligations when accepting a plea other than not guilty. *See* ***id.***, ¶23; *see also* WIS. STAT. § 971.08(1). The record—including the plea questionnaire and waiver of rights form and addendum, the attached document describing the elements of the crimes to which Ekiss pled no contest, and the plea hearing transcript—demonstrates that Ekiss entered his no-contest pleas knowingly, intelligently, and voluntarily. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.[4]

We also conclude that Ekiss could not pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that punishment was the primary

[4] Although appellate counsel does not discuss the issue, we observe both that the circuit court did not conduct a personal colloquy with Ekiss regarding his withdrawal of his special pleas and that the absence of such a personal colloquy does not constitute an arguably meritorious basis for relief. *Cf.* ***State v. Francis***, 2005 WI App 161, ¶¶22, 26-27, 285 Wis. 2d 451, 701 N.W.2d 632 (holding that a defendant who is apparently competent may implicitly withdraw a plea of not guilty by reason of mental disease or defect by entering a guilty plea).

sentencing objective, and the circuit court discussed the sentencing factors that it considered in fashioning dispositions to achieve the sentencing goal. *See* ***id.***, ¶¶41-43. The circuit court's considerations were proper and relevant and included the mandatory sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The dispositions imposed were far less than the maximum penalties that the law allows, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and were not so excessive as to shock public sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.[5]

Appellate counsel advises that Ekiss believes he has grounds to seek plea withdrawal based on newly discovered evidence, namely, the disclosure by three of his children, including Mark, that Milton had sexually abused them. We agree with appellate counsel that this information does not constitute an arguably meritorious basis for seeking plea withdrawal.

A defendant seeking to withdraw a plea after sentencing must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. Newly discovered evidence

[5] For the sake of completeness, we observe that the circuit court found Ekiss eligible for the Wisconsin substance abuse program (SAP) and ineligible for the challenge incarceration program (CIP) in the event that his probation is revoked and he is required to serve his terms of imprisonment. *See* WIS. STAT. §§ 973.01(3g)-(3m), 302.05, 302.045. We do not consider the propriety of finding Ekiss eligible for SAP because he is not aggrieved by that finding and therefore could not challenge it on appeal. *See* WIS. STAT. RULE 809.10(4) (providing that an appeal brings before this court rulings adverse to the appellant). As to the finding of ineligibility for CIP, no arguably meritorious basis exists to challenge that finding because Ekiss is statutorily excluded from that program on multiple grounds. *See* § 302.045(2)(b)-(c) (providing that a person is excluded from CIP if the person has reached the age of forty years old before participation would begin; if the person is serving a sentence for a crime codified in WIS. STAT. ch. 940; or if the person is serving a sentence for a crime codified in WIS. STAT. § 948.03).

may create a manifest injustice. *See* ***State v. Krieger***, 163 Wis. 2d 241, 255, 471 N.W.2d 599 (Ct. App. 1991). To obtain relief based on newly discovered evidence, however, a convicted person must establish, among other matters, that "'the evidence was discovered after conviction.'" *See* ***State v. Love***, 2005 WI 116, ¶43, 284 Wis. 2d 111, 700 N.W.2d 62 (citations omitted).

Here, the record shows that Ekiss was aware of his children's sexual abuse allegations well before he entered his no-contest pleas on April 30, 2021. Specifically, the record reflects that, by letter dated and filed on April 28, 2020, one of the psychologists appointed to evaluate Ekiss in regard to his special pleas notified the circuit court that she met with Ekiss on April 27, 2020. At that time, he claimed to be too distraught to proceed with the interview because he had learned from a detective "a few days previously ... that one of his ... children was accused of repeatedly sexually assaulting the others." Because Ekiss learned about the sexual abuse allegations more than a year before he resolved the instant case with no-contest pleas, the allegations do not constitute newly discovered evidence. *See* ***id.***

Appellate counsel also advises that, according to Ekiss, his children's delayed disclosures of sexual abuse show that "[the children's] accusations against him in this case were incredible." We agree with appellate counsel that this allegation does not suggest an arguably meritorious ground for relief. Pursuant to Wisconsin's rape shield law—WIS. STAT. § 972.11—evidence of a victim's sexual history is normally excluded from trial because the legislature has determined that such evidence "has low probative value and a highly prejudicial effect." *See* ***State v. Sarfraz***, 2014 WI 78, ¶38, 356 Wis. 2d 460, 851 N.W.2d 235 (citation omitted). These determinations include an assessment that a complainant's sexual history "bears no logical correlation to the complainant's credibility." *See* ***State v. Bell***, 2018 WI 28, ¶63, 380 Wis. 2d

616, 909 N.W.2d 750 (citation omitted). Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Finally, appellate counsel advises that, according to Ekiss, he is entitled to relief because the circuit court judge was biased against him. In support, Ekiss alleges that, at some point in time, the circuit court judge's husband employed Louise at his "security business." As appellate counsel notes, nothing in the record supports this allegation. Assuming that the allegation is true, however, we agree with appellate counsel that it does not suggest an arguably meritorious ground on which Ekiss could pursue postconviction or appellate relief.

WISCONSIN STAT. § 757.19(2) specifies situations in which a judge "shall disqualify himself or herself" from the proceedings. The first six subsections of the statute, §757.19(2)(a)-(f), describe objective situations requiring disqualification. *See* ***State v. American TV and Appliance of Madison, Inc.***, 151 Wis. 2d 175, 181-82, 443 N.W.2d 662 (1989). Ekiss's allegation does not fit within any of those objective bases for recusal. The seventh subsection sets out a subjective basis for disqualification. *See* ***id.*** at 182. The provision requires recusal "[w]hen the judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." *See* § 797.19(2)(g). A determination of whether a subjective basis for recusal exists under § 797.19(2)(g) is left to each judge personally. *See* ***State v. Harrell***, 199 Wis. 2d 654, 663, 546 N.W.2d 115 (1996). When, as here, the judge was not asked to consider the matter of personal bias, we assume that, by presiding, the judge implicitly determined that she could act impartially. *See* ***State v. Carprue***, 2004 WI 111, ¶62, 274 Wis. 2d 656, 683 N.W.2d 31.

We add that nothing in the record supports an inference of bias. The circuit court granted motions that Ekiss filed—including for modification of his bail—and the circuit court ultimately crafted a disposition that was more lenient than the State requested. Moreover, the record does not suggest that the judge had any familiarity with Louise outside of her role in the instant case. Accordingly, assuming that Louise worked for the judge's husband at some point, any claim of judicial bias stemming from that employment 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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael S. Holzman is relieved of any further representation of Benjamin J. Ekiss 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