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DISTRICT I

January 31, 2023

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

2021AP164-CRNM State of Wisconsin v. Allen Lamont Jones, Jr.
(L.C. # 2017CF2435)

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).

Allen Lamont Jones, Jr., appeals from a judgment of conviction and from an order denying a motion for postconviction relief. Appellate counsel, Attorney David Malkus, 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). Jones was advised of his right to file a response, but he has not done so. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we

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

conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

Jones was originally charged with one count of first-degree sexual assault with a dangerous weapon, one count of strangulation or suffocation, and one count of false imprisonment. Victim K.D.W., who had known Jones for several years, alleged that she had gone to Jones's home after work on May 19, 2017. When K.D.W. picked up a photo of a child from a table and asked Jones about it, he became enraged and punched her three times in the face. K.D.W. also alleged that over the course of several hours, Jones hit her with a baseball bat, punched her until she lost consciousness, stretched a clear plastic bag over her nose and mouth, and pressed on her neck. He also pulled her to her knees, held her head to the floor, removed her pants and underwear, and inserted his erect penis into her vagina. K.D.W. further told police that she asked Jones to let her leave, but he refused, threatening to kill her and breaking her phone so she could not call for help. Jones eventually let K.D.W. leave in the early morning hours of May 20, 2017; she ran elsewhere and called police.

The case was ultimately resolved with a plea bargain. In exchange for guilty pleas, the State agreed to amend the collection of charges, and both sides would be free to argue the appropriate sentence. Jones agreed, and an amended information was filed, charging Jones with fourth-degree sexual assault, aggravated battery, false imprisonment, criminal damage to property under $2,500, and misdemeanor victim intimidation. The effect of the agreement was that the Class B felony of first-degree sexual assault was replaced with three Class A misdemeanors, reducing Jones's exposure from sixty years of imprisonment on a single count to twenty-seven months. Jones also faced two Class H felonies under both the original complaint and the amended information to which he pled.

The circuit court accepted Jones's pleas and ordered a presentence investigation report. At sentencing, the circuit court imposed the maximum of three years' initial confinement and three years' extended supervision on each felony, to be served consecutively. On the misdemeanors, the circuit court imposed nine months of confinement, stayed in favor of two years of probation. The misdemeanor sentences were made concurrent with each other but consecutive to any other sentence.

After sentencing, Jones filed a postconviction motion seeking sentence modification based on "inaccurate information [that] constitute[d] a new factor[.]" Specifically, Jones complained that the circuit court had commented that K.D.W.'s liver had ruptured, but her medical records showed no injury to her liver. The circuit court denied the motion, observing that Jones had focused on just four words ("Her liver was ruptured") from twelve pages of sentencing commentary. It explained:

> The defendant assigns too much significance to the court's statement. The court was merely commenting on the defendant and the victim's competing versions of the events. The court did not adopt the victim's impact statement that her liver was ruptured because the court understood that there were no medical records to support it. The court did not reference it [at] any other point [in] its lengthy sentencing analysis. Rather, the court considered the brutal beating the victim received. There was nothing inaccurate about that, even if there was no injury to her liver. Because this specific injury was not "highly relevant to the imposition of sentence," the court finds that it does not qualify as a new factor … and even assuming that it does, a sentence modification is not warranted for the very reasons the court set forth in its lengthy sentencing analysis (i.e. the gravity of the offense, the impact on the victim, the character of the defendant, and the need for punishment, deterrence and community protection).

Jones appeals.

The first potential issue appellate counsel discusses in the no-merit report is whether Jones should be allowed to withdraw his pleas as not knowing, intelligent, and voluntary. Our review of the record—including the plea questionnaire and waiver of rights form and addendum, attached jury instructions for each offense, and the plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Jones's pleas were anything other than knowing, intelligent, and voluntary.

The other potential issue appellate counsel discusses is whether the circuit court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider a variety of additional factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. The sentence imposed is within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so

excessive as to shock public sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to challenging the circuit court's sentencing discretion.

Relatedly, appellate counsel also discusses whether there is any arguable merit to challenging the circuit court's denial of Jones's postconviction motion or bringing some other sentencing-related motion. Jones's postconviction motion sought sentence modification based on "inaccurate information [that] constitute[d] a new factor[.]"[2]

As an initial matter, we observe that the postconviction argument actually merges two distinct concepts that have different remedies: while a successful new factor motion will earn a defendant sentence modification, a successful claim that the defendant was sentenced on inaccurate information warrants full resentencing. Postconviction counsel had relied, in part, on ***State v. Norton***, 2001 WI App 245, 248 Wis. 2d 162, 635 N.W.2d 656, *abrogated by* ***State v. Harbor***, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828, to claim inaccurate information as a new factor. In ***Norton***, however, the inaccuracy that was deemed a new factor—the fact that Norton's probation was revoked in another case despite the sentencing court relying on a representation that it would not be—did not exist until Norton's probation was actually revoked subsequent to his sentencing hearing. *See* ***id.***, ¶14. Nevertheless, Jones's motion was appropriately denied under either a new factor or an inaccurate information analysis.

A new factor is a fact or set of facts that is "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, even though it was then in existence, it was unknowingly overlooked by

[2] Attorney Malkus was not postconviction counsel.

all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see also* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. If the circuit court determines that a new factor exists, the circuit court determines, in its exercise of discretion, whether modification of the sentence is warranted. *See* ***Harbor***, 333 Wis. 2d 53, ¶37. A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy in the sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (quoting ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

The circuit court's explanation in its order, as quoted above, reflects its conclusion that even if Jones had shown a new factor, sentence modification was not warranted in light of all the sentencing considerations. The same explanation reveals that the circuit court did not rely on any one specific injury as a basis for the sentence; rather, the "brutal beating" itself justified the sentences imposed, regardless of any particular injury. Accordingly, there is no arguable merit to challenging the circuit court's denial of the postconviction motion or otherwise bringing an additional postconviction motion relating to whether K.D.W. sustained a liver injury.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of further representation of Jones 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