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DISTRICT III

February 21, 2023

To:

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Circuit Court Judge
Electronic Notice

Sharon Jorgenson
Clerk of Circuit Court
Polk County Justice Center
Electronic Notice

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Jefren E. Olsen
Electronic Notice

Blake S. Reber 498463
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1697-CRNM State of Wisconsin v. Blake S. Reber (L. C. No. 2018CF182)

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).

Blake Reber appeals from a judgment convicting him of two counts of first-degree sexual assault of a child and two counts of sexual exploitation of a child. Attorney Jefren Olsen has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2021-22).[1] The no-merit report sets forth the procedural history of the case and addresses the denial of a suppression motion and the validity of Reber's pleas and sentences. Reber has filed a

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

response to the no-merit report alleging: (1) Reber's trial counsel provided ineffective assistance by not advising Reber about the option of entering pleas of not guilty by reason of mental disease or defect (NGI); (2) the circuit court sentenced Reber based upon inaccurate information and "emotions"; (3) the court improperly considered the amount of Reber's pretrial confinement as a factor in sentencing; and (4) the sentences were unduly harsh. Having independently reviewed the entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that counsel will be allowed to withdraw and the judgment shall be summarily affirmed.

The National Center for Missing and Exploited Children forwarded to the Wisconsin Department of Justice four CyberTipLine reports regarding multiple images of child pornography uploaded from an IP address linked to an account holder in Polk County. The images included depictions of Reber engaged in sexual activity with two minor females. Based upon the ensuing investigation, the State charged Reber with two counts of sexual assault of a child under the age of thirteen, twelve counts of sexual exploitation of a child, thirty-two counts of possession of child pornography, two counts of causing a child to view sexual activity, and two counts of exposing a child to harmful materials—each as a repeat offender.

Reber moved to suppress statements he made to police in a squad car following his arrest. Reber alleged that police continued to question him after he invoked his Fifth Amendment right to remain silent. The circuit court found that, several minutes into the interrogation, Reber twice stated, "I do not want to talk," while he was crying. The interrogating officer then stopped asking questions, believing that Reber might just need time to compose himself. After a pause of seven to eight seconds, however, Reber made unprompted statements saying, "I fucked up" and "I am nasty, I am bad, I'm a bad person." The interrogating officer then resumed asking questions. The court concluded that the interrogating officer's interpretation that Reber just

needed a moment to compose himself was a reasonable interpretation under the circumstances and that Reber's statement that he did not want to talk was therefore ambiguous and insufficient to trigger the Fifth Amendment protections.

After the circuit court denied the suppression motion, Reber pled guilty to the two sexual assault charges and two of the sexual exploitation charges, without the penalty enhancers. In exchange, the State agreed to recommend the dismissal of the remaining forty-six counts as read-in offenses, with both parties free to argue at sentencing. The court accepted Reber's pleas after reviewing and correcting a plea questionnaire, conducting a plea colloquy, and ascertaining that the complaint provided a sufficient factual basis for the pled-to counts.

The circuit court subsequently held a sentencing hearing at which both a presentence investigation report (PSI) and an alternate PSI with an accompanying psychological evaluation were submitted. After hearing from the parties, the court imposed consecutive terms of twenty years' initial confinement followed by fifteen years' extended supervision on each of the two sexual assault counts. It also imposed terms of five years' initial confinement followed by ten years' extended supervision on each of the two exploitation counts, to run concurrently to each other, but consecutively to the two sexual assault counts.

Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that the suppression motion was properly denied and the plea colloquy was adequate. We will therefore not discuss those issues further. We will briefly address why the additional issues Reber raises in his response to the no-merit report also lack arguable merit.

First, Reber claims his trial counsel provided ineffective assistance by not advising him about the option of entering NGI pleas pursuant to WIS. STAT. § 971.06(1)(d). In her report filed

at sentencing, Dr. Lakshmi Subramanian recounted Reber's long history of cognitive and behavioral issues, which included multiple prior diagnoses of Mild Mental Retardation, as well as his receipt of Social Security Disability Income benefits based upon a learning disability. Subramanian diagnosed Reber with Other Unspecified Neurodevelopmental Disorder, Persistent Depressive Other Unspecified Neurodevelopmental Disorder, Persistent Depressive Disorder with Anxious Features, Stimulant Use Disorder, and Opioid Use Disorder (by history).

We note that Dr. Subramanian did not produce her report until after Reber had entered his pleas. Therefore, Reber's trial counsel could not have relied upon the report to advise Reber regarding an NGI plea. Moreover, there is nothing in Subramanian's report stating that, at the time the crimes were committed, Reber lacked the substantial capacity to appreciate the wrongfulness of his conduct or was unable to conform his conduct to the requirements of law—the standard required to establish an NGI plea. *See* WIS. STAT. § 971.15(1). To the contrary, Subramanian noted that Reber admitted his behavior was wrong and that he was disgusted with himself. Subramanian also observed that Reber did not exhibit any psychotic symptoms. Additionally, Reber himself told the circuit court that although he did not understand why he did what he did, he thought the offenses arose from his "traumatic past" and "drug addiction," not his intellectual disability. Finally, the court stated that it had not observed any level of cognitive impairments or behaviors that would lead it to question Reber's competency or warrant NGI pleas. In sum, we see no basis for Reber's trial counsel to have advised Reber that he had a viable NGI defense.

Second, Reber claims the circuit court sentenced him based upon inaccurate and "emotional" information. Specifically, he asserts that the court "down-played" his mental health problems and "use[d] a lot of opinions." We do not deem information to be "inaccurate" merely

because it was contested, however. Rather, the defendant must demonstrate the information was "extensively and materially false." ***State v. Travis***, 2013 WI 38, ¶18, 347 Wis. 2d 142, 832 N.W.2d 491.

Reber has not identified any fact relied upon by the circuit court that was false, and he does not explain what he means by emotional information. Instead, he merely challenges the weight that the court gave to the gravity of the offenses in comparison to his mental health issues. The weight given to each sentencing factor, however, was entirely within the court's discretion to determine. *See* ***State v. Schrieber***, 2002 WI App 75, ¶8, 251 Wis. 2d 690, 642 N.W.2d 621. Here, the record shows that the court considered relevant factors, such as the gravity of the offenses and the character of the offender, and related those factors to identified sentencing objectives, such as the need for punishment, protection of the public, general deterrence, and rehabilitation. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court acknowledged that Reber had "a substantial mental health history" intertwined with the use of controlled substances. However, given the seriousness of the offenses and the failure of past treatment efforts, the court concluded that substantial prison time was necessary to protect the public. The court's extensive discussion of the relevant factors demonstrates a reasoned and rational decision, not an emotional one.

Third, Reber claims the circuit court improperly considered the amount of Reber's pretrial confinement as a factor in sentencing. However, the record plainly shows that the court properly considered Reber's pretrial confinement in order to calculate the amount of sentence credit to which he was entitled. The court did not adjust the length of the sentences imposed to account for the pretrial confinement.

Fourth, Reber contends that his sentences were unduly harsh. A sentence may be considered unduly harsh or unconscionable only when it is "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶¶31-32. The eighty-five years of total imprisonment the circuit court imposed here was less than half of the maximum 200 years that Reber faced. Although lengthy, the sentences are not excessive when taking into account the seriousness of sexual offenses against children and the number of read-in offenses.

Our independent review of the record discloses no other potential issues for appeal.[2] We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders***. Accordingly, counsel shall be allowed to withdraw, and the judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Therefore,

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

[2] We note that with Reber's pleas, he forfeited the right to raise other nonjurisdictional defects and defenses, including claimed violations of constitutional rights other than a double jeopardy issue that could be resolved based upon the record. *See* ***State v. Kelty***, 2006 WI 101, ¶¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *see also* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

IT IS FURTHER ORDERED that Attorney Jefren E. Olsen is relieved of further representation of Blake Reber 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