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DISTRICT II

May 3, 2023

To:

Hon. L. Edward Stengel
Circuit Court Judge
Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

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Michael J. Herbert
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Braulio DeJesus Rios, #661644
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2022AP660-CRNM State of Wisconsin v. Braulio DeJesus Rios (L.C. #2021CF142)

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).

Braulio DeJesus Rios appeals a judgment of conviction for second-degree sexual assault of a child as a repeater. Rios's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Rios was advised of his right to file a response but has not done so. Upon consideration of the no-merit report and our independent review of the record as mandated by *Anders*, we conclude there is no

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

issue of arguable merit that could be raised on appeal. We therefore summarily affirm the judgment. *See* WIS. STAT. RULE 809.21(1).

Rios was charged with repeated sexual assault of a child and felony contributing to the delinquency of a child, both as a repeater. The criminal complaint alleged that the fifteen-year-old victim had sexual intercourse with Rios multiple times between October and December 2020. The victim told law enforcement that she and Rios used methamphetamine heavily, and while she was unconscious from the drug use she would awaken to find Rios having vaginal intercourse with her. Rios was taken into custody, waived his *Miranda*² rights, and admitted to frequently using methamphetamine with the victim and having intercourse with her on at least one occasion. Rios made an initial appearance, waived the preliminary hearing, and was arraigned.

Rios reached a global plea agreement resolving this case and Sheboygan County Circuit Court case No. 2020CF915.³ As relevant here, Rios agreed to plead no contest to an amended charge of second-degree sexual assault of a child under the age of sixteen, contrary to WIS. STAT. § 948.02(2), with the repeater penalty enhancer under WIS. STAT. § 939.62(1)(c). The delinquency charge would be dismissed and read in. The State agreed to recommend a twenty-year sentence, consisting of ten years' initial confinement and ten years' extended supervision, consecutive to any other sentence. The defense was free to argue at sentencing. Following a

² *See Miranda v. Arizona*, 384 U.S. 436 (1966).

³ The plea involving the other case was set for a different time, but Rios's attorney in that case appeared during the plea proceedings in this case. The circuit court conducted a joint sentencing hearing.

colloquy, the circuit court determined that Rios's no-contest plea was knowing, intelligent and voluntary, and it accepted the plea.⁴

At sentencing, the State abided by its promise to recommend a consecutive sentence consisting of ten years' initial confinement and ten years' extended supervision. The defense requested that the sentence be made concurrent with the sentence in 2020CF915 and an anticipated revocation sentence. The circuit court imposed an eighteen-year sentence consisting of nine years' each of initial confinement and extended supervision. The court ordered the sentence to run concurrently to the sentence in 2020CF915 and any revocation sentence.

The no-merit report first addresses the sufficiency of the plea colloquy and whether Rios's no-contest plea was made knowingly, intelligently and voluntarily. As relevant here, a circuit court's duties during a plea colloquy are as follows: (1) determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues; (2) ascertain whether any promises, agreements, or threats were made in connection with the anticipated plea; (3) establish the defendant's understanding of the nature of the charge and the range of punishments to which he or she is subject by entering a plea; (4) ascertain personally whether a factual basis exists to support the plea; (5) inform the defendant of the constitutional rights he or she waives by entering a plea and verify his or her understanding that these rights will be waived; (6) establish personally that the defendant understands the court is not bound by the terms of any plea agreement; (7) notify the defendant of the direct consequences of his or her plea; and (8) advise the defendant of the immigration

⁴ As part of the plea colloquy, the circuit court also obtained Rios's acknowledgment of the prior felony offense for purposes of the repeater enhancer.

consequences of the plea. *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

The no-merit report concludes there is no issue of arguable merit arising from the circuit court's plea colloquy. As to duties (3) through (8) above, the no-merit report concludes the court's on-the-record colloquy was sufficient to satisfy those obligations. We agree with this conclusion. However, as to duties (1) and (2), the no-merit report notes the colloquy was deficient because the court did not explicitly address Rios's capacity to understand the issues or establish that no promises or threats had been made in connection with the entry of the plea.

Nonetheless, the no-merit report concludes no issue of arguable merit exists because, after discussing the matter with Rios, there is no arguable basis upon which Rios could seek plea withdrawal. "A circuit court's failure to fulfill a duty at the plea hearing will necessitate an evidentiary hearing if a defendant's postconviction motion alleges he did not understand an aspect of the plea because of the omission." *Id.*, ¶36. Here, in addition to counsel's representation regarding Rios's knowledge and understanding, we note that the plea questionnaire and waiver of rights form contained both information relevant to Rios's ability to comprehend the proceedings and an acknowledgment that he was not forced to enter a plea by threats, promises or coercion. The circuit court questioned Rios about the plea questionnaire at the hearing, verifying that Rios had reviewed the information on the form with his attorney and understood the information provided. The plea colloquy, buttressed by the plea questionnaire and counsel's representations as to Rios's knowledge and understanding, sufficiently establish that no issue of arguable merit appears regarding the knowing, intelligent and voluntary nature of Rios's plea. See *State v. Hoppe*, 2009 WI 41, ¶¶30-33, 317 Wis. 2d 161, 765 N.W.2d 794.

The no-merit report also addresses whether a nonfrivolous issue exists regarding the circuit court's exercise of its sentencing discretion. The court considered the appropriate sentencing factors under *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. The imposed eighteen-year sentence was well within the statutory forty-six year maximum considering the repeater enhancer. *See* WIS. STAT. §§ 948.02(2); 939.50(2)(c); 939.62(1)(c). There can be no nonfrivolous claim that the sentence shocks public sentiment or violates the judgment of reasonable people concerning what is right and proper under the circumstances. *See State v. Stenzel*, 2004 WI App 181, ¶122, 276 Wis. 2d 224, 688 N.W.2d 20.

In all, we agree with the no-merit report's conclusion that no issue of arguable merit exists relating to the matters addressed in the no-merit report. Our independent review of the record has not disclosed any other nonfrivolous issues that could be raised on appeal.

Therefore,

IT IS ORDERED that the judgment is affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Michael J. Herbert is relived of responsibility for further representing Braulio DeJesus Rios in connection with this appeal. *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