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DISTRICT II

July 19, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
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David A. Drummond, #682618
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You are hereby notified that the Court has entered the following opinion and order:

2021AP555-CRNM State of Wisconsin v. David A. Drummond (L.C. #2018CF564)

Before Gundrum, P.J., Neubauer and Grogan, 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).

David A. Drummond appeals a judgment of conviction for multiple sex offenses. 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), and Drummond has filed a response to the report. Upon consideration of the report, Drummond's response, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the

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

judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Drummond was initially charged with thirteen offenses: two counts of soliciting an intimate representation from a minor, ten counts of possession of child pornography, and one count of failing to comply with the sex-offender-registration statute. The State amended the Information twice, charging Drummond with ten additional offenses: three counts of soliciting an intimate representation of a minor, three counts of possession of child pornography, and four counts of sexual exploitation of a minor.

Pursuant to a plea agreement, Drummond pled guilty to two counts of soliciting an intimate representation from a minor, one count of possession of child pornography, one count of failing to comply with the sex-offender-registration statute, and four counts of sexual exploitation of a minor.[2] The remaining counts were dismissed and read in for sentencing purposes. The circuit court imposed consecutive prison sentences on each count, resulting in a total global sentence of thirty-five years of initial confinement and thirty-five years of extended supervision.

The no-merit report first addresses whether Drummond's guilty pleas could be withdrawn because they were not knowing, intelligent, and voluntary. We agree with counsel that there is no arguable merit to this issue. With one potential exception that we discuss in the next paragraph, the circuit court's plea colloquy with Drummond, including the court's references to

[2] The counts to which Drummond pled guilty were counts one through three, thirteen and fourteen, sixteen, nineteen, and twenty-three in the second Amended Information.

the plea questionnaire and waiver of rights form, complied with the requirements of WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

The potential exception relates to the circuit court's duty to ascertain whether a factual basis exists to support a defendant's guilty plea. *See* ***id.*** Here, the court relied on the complaint to support a factual basis for Drummond's guilty pleas. However, as counsel states in the no-merit report, the complaint did not include allegations to support four of the charges to which Drummond pled guilty. Those charges (counts fourteen, sixteen, nineteen, and twenty-three) were added by Amended Information, without further substantive allegations. Regardless, we agree with counsel that Drummond could not seek plea withdrawal on this ground because other parts of the record clearly establish a factual basis for each of the charges. "[A] court may look at the totality of the circumstances when reviewing a defendant's motion to withdraw a guilty plea to determine whether a defendant has agreed to the factual basis underlying the guilty plea." ***State v. Thomas***, 2000 WI 13, ¶18, 232 Wis. 2d 714, 605 N.W.2d 836; *see also* ***id.*** ("The totality of the circumstances includes the plea hearing record, the sentencing hearing record, as well the defense counsel's statements concerning the factual basis presented by the state, among other portions of the record.").

The no-merit report next addresses whether the circuit court misused its sentencing discretion. We agree with counsel that there is no arguable merit to this issue. The court considered the required sentencing factors along with other relevant factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. Drummond's sentences were within the allowed maximum and could not be challenged as unduly harsh or so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In his response to the no-merit report, Drummond raises twenty-one separate points relating to sentencing that he labels as "issues." Although he does not frame these issues in terms of cognizable legal claims, we will construe his response liberally, and in doing so, we conclude that he is seeking to raise three categories of claims relating to the circuit court's exercise of its sentencing discretion. We discuss each category in turn.[3]

The first category of claims raised by Drummond's response consists of claims that the circuit court sentenced him based on inaccurate information. To prevail on such a claim, the defendant must satisfy a two-part test, proving "by clear and convincing evidence, both [(1)] that the information is inaccurate and [(2)] that the [circuit] court relied upon it." ***State v. Payette***, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423.

Here, it would be frivolous for Drummond to argue that he could satisfy his burden on this two-part test. With respect to most of his potential claims, it is clear that he could not even satisfy the first part of the test. For example, Drummond appears to claim that the prosecutor provided inaccurate information to the circuit court at sentencing by asserting that he had committed a "repeat offense," when in fact he was not charged as a repeater. However, in context, it is clear that the prosecutor was referring to his prior record, not asserting that he was charged as repeater. Most of Drummond's claims alleging inaccurate information similarly misconstrue the record. In other instances, Drummond appears to ignore information in the record that defeats his claim. For example, he contends that there was no evidence to support the

[3] Drummond's response also includes a twenty-second "[i]ssue" in which he asserts that counsel failed to act diligently in seeking sentence credit to which he was entitled. However, he ultimately received the credit, and there is no basis to conclude that any delay in seeking the credit deprived him of the benefit of the credit.

prosecutor's assertion that he distributed images of child pornography. However, the presentence investigation report includes evidence supporting this assertion.

In the few instances in which Drummond might be able to argue that there was inaccurate information, it would be frivolous to argue that the circuit court relied on the information. For example, Drummond appears to contend that the prosecutor provided the court with inaccurate information by characterizing an app that Drummond used as "commonly used by young girls," when in fact the app is commonly used by all age groups. Even if the prosecutor's characterization of the app could be viewed as inaccurate, the court's sentencing remarks do not show that the court relied on this characterization.

We turn to the second category of potential claims that Drummond's response raises. This category consists of claims that the circuit court sentenced him based on an improper factor. These claims also lack arguable merit.

All but one of these potential claims relate to uncharged conduct, including Drummond's possession of additional images of child pornography for which he was not charged. Drummond appears to contend that the circuit court was not permitted to consider this uncharged conduct. The law states the contrary. The court may properly consider uncharged conduct relating to valid sentencing factors, such as the defendant's character, the need for incarceration and rehabilitation, or a pattern of conduct. ***State v. McQuay***, 154 Wis. 2d 116, 126, 452 N.W.2d 377 (1990). That is what the court did here.

Drummond's remaining potential claim for sentencing based on an improper factor relates to statements made at sentencing by the father of one of the victims. Several of the father's statements were troubling.[4] However, the circuit court's sentencing remarks made clear that the court was not condoning, let alone relying on, any improper statements by the victim's father.

The third and final category of claims that Drummond's response raises consists of challenges to the circuit court's factual findings, including factual inferences that the court drew from the evidence. Appellate courts will uphold a circuit court's factual findings as long as "they do not go 'against the great weight and clear preponderance of the evidence.'" ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (citation omitted). Drummond's challenges to the court's factual findings lack arguable merit under this standard of review.

The closest that Drummond comes to presenting an arguably meritorious challenge to the circuit court's factual findings is his challenge to the court's finding that he was a "severe risk" to reoffend. However, even this challenge lacks arguable merit. Although the results of two risk assessments indicated that Drummond was at low or moderate risk to reoffend, the court was not required to adopt the risk assessment results, and the court could rely on other evidence in the record to find that Drummond was a "severe risk." *See* ***State v. Loomis***, 2016 WI 68, ¶99, 371 Wis. 2d 235, 881 N.W.2d 749 (explaining that a risk assessment tool was "only one of many

[4] Perhaps most troubling among the statements, the victim's father appeared to make implied if not express threats to Drummond's life or safety. These statements included an instance in which the victim's father appeared to suggest that he could ask members of the Aryan Brotherhood to harm Drummond in prison.

factors that may be considered and weighed at sentencing"). The record includes evidence to support the court's finding, including Drummond's own admission that he masturbated to child pornography to alleviate his post-traumatic stress disorder, in the same way that other people might use drugs or alcohol.

Based upon our independent review of the record, we have found no other arguable basis to pursue further appellate proceedings. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Lauren Jane Breckenfelder is relieved from further representing David A. Drummond in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals