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DISTRICT III

August 29, 2023

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

2021AP298-CRNM State of Wisconsin v. Benjamin P. Gossens
2021AP299-CRNM (L. C. Nos. 2018CF558, 2019CF70)

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).

In these consolidated appeals, counsel for Benjamin Gossens has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),[1] concluding that no grounds exist to challenge Gossens' judgments of conviction and an order denying Gossens' motion for postconviction relief. Gossens has filed a response to the no-merit report, challenging the denial of his postconviction motion. Upon our independent review of the appellate records as mandated by

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

Anders v. California, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction and the order denying postconviction relief. *See* WIS. STAT. RULE 809.21.

In June 2018, the State charged Gossens with thirteen counts of possession of child pornography in Outagamie County case No. 2018CF558. The criminal complaint alleged that law enforcement had received information that a computer with an IP address registered to Gossens was downloading and/or sharing child pornography on the internet. Law enforcement executed a search warrant at Gossens' residence and found "numerous" videos containing child pornography on one of Gossens' computers. During an interview with law enforcement, Gossens admitted to downloading "numerous" videos of children under the age of eighteen engaging in sexually explicit conduct. The criminal complaint identified and described thirteen specific videos found on Gossens' computer, which formed the basis for the thirteen charges against Gossens.

The conditions of Gossens' bond in case No. 2018CF558 prohibited him from using or possessing a computer or any device that could access the internet. In January 2019, while Gossens was released on bond in case No. 2018CF558, he was observed at a public library using a laptop computer to access Facebook. Gossens was therefore arrested for bail jumping, and during a search incident to arrest, law enforcement discovered a cellphone with internet capabilities on his person. At the library table where Gossens had been working, law enforcement found a notepad with the heading "Need Pictures of Girls!" and a list of fifty to sixty female names. (Formatting altered.) There was a small box to the left of each name, and some of the boxes had slashes through them. Based on these events, the State charged Gossens

with two counts of felony bail jumping in Outagamie County case No. 2019CF70—apparently based on his use and/or possession of the laptop and phone.

Pursuant to a plea agreement, Gossens entered no-contest pleas to one count of possession of child pornography in case No. 2018CF558 and one count of felony bail jumping in case No. 2019CF70. In exchange for Gossens' pleas, the State agreed that the remaining charges would be dismissed and read in for sentencing purposes. The State agreed to cap its sentence recommendation at five years' initial confinement, but it was free to argue as to the length and conditions of extended supervision. The defense was free to argue at sentencing.

Following a plea colloquy, supplemented by a signed plea questionnaire and waiver of rights form, the circuit court accepted Gossens' no-contest pleas, finding that they were freely, voluntarily, and intelligently made. The court also found that the criminal complaint in each case set forth an adequate factual basis for Gossens' pleas.

The circuit court later sentenced Gossens to five years' initial confinement followed by five years' extended supervision on the child pornography count, with a concurrent sentence of one year of initial confinement followed by one year of extended supervision on the bail jumping count. The court also ordered Gossens to register as a sex offender for a period of fifteen years. *See* WIS. STAT. § 301.45(5)(a)1. Gossens did not oppose the State's request for $5,000 in restitution to an individual depicted in one of the videos found on Gossens' computer, and the court awarded restitution in that amount. The court declined to impose the $500 child pornography surcharge authorized by statute, *see* WIS. STAT. § 973.042(2), stating it would prefer that Gossens' funds be used to pay restitution.

Thereafter, the State asked the circuit court to amend Gossens' judgment of conviction in case No. 2018CF558 to include the child pornography surcharge. Based on the plain language of WIS. STAT. § 973.042(2) and our supreme court's decision interpreting a similar statute in ***State v. Cox***, 2018 WI 67, 382 Wis. 2d 338, 913 N.W.2d 780, the State argued that the court was required to impose the surcharge and had no authority to decline to do so. Following a hearing, the court agreed with the State and amended Gossens' judgment of conviction to include the $500 surcharge.

Gossens subsequently filed a postconviction motion, arguing that a psychosexual evaluation that was completed early in the case but not presented during his sentencing hearing was a new factor warranting sentence modification. Alternatively, Gossens argued that he was entitled to resentencing because his trial attorney was constitutionally ineffective by failing to present the psychosexual evaluation at sentencing. The circuit court denied Gossens' motion, following a ***Machner***[2] hearing. The court concluded that the psychosexual evaluation did not constitute a new factor because it was not highly relevant to the imposition of Gossens' sentences and that, even if it was a new factor, sentence modification was not warranted. The court also concluded that Gossens' trial attorney did not perform deficiently by failing to present the psychosexual evaluation at sentencing and that, regardless, counsel's failure to do so was not prejudicial.

The no-merit report addresses whether Gossens' no-contest pleas were knowing, intelligent, and voluntary and whether the circuit court erroneously exercised its sentencing

[2] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

discretion. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit, and we therefore do not address them further. Although not addressed in the no-merit report, we also conclude that there would be no arguable merit to a claim that the court erred by amending Gossens' judgment of conviction in case No. 2018CF558 to include the child pornography surcharge.

Both the no-merit report and Gossens' response address whether the circuit court erred by denying Gossens' postconviction motion. We agree with appellate counsel that this issue lacks arguable merit. Gossens' motion first sought sentence modification based on the existence of a new factor. To prevail on a motion for sentence modification, a defendant "must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence." ***State v. Harbor***, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is a fact or set of facts that is highly relevant to the imposition of the defendant's sentence but was not known to the court at the time of the original sentencing, either because it was not then in existence or because it was unknowingly overlooked by all of the parties. ***Id.***, ¶40. Whether a fact or set of facts qualifies as a new factor is a question of law that we review independently. ***Id.***, ¶33. The determination of whether a new factor justifies sentence modification, however, is committed to the circuit court's discretion. ***Id.***

In denying Gossens' postconviction motion, the circuit court concluded that the psychosexual evaluation was not a new factor because it was not highly relevant to the imposition of Gossens' sentences. The court explained that the facts in the bail jumping case "were extremely troubling to this Court and a very significant reason why this Court felt this

wasn't a minimum offense."[3] The court also noted that it was not required to accept an expert witness's opinion and that "there are points of the psychosexual eval[uation] that, in this Court's opinion, would have made me more concerned and are contradictory on Mr. Gossens' part." The court acknowledged that the psychosexual evaluation contained some positive information—namely, that Gossens' performance on various tests indicated that he was not attracted to prepubescent children. The court explained, however, that this fact did not alter the court's concerns regarding "the number of files he had, what I consider to be his lack of remorse, rehabilitation concerns, because he was still minimizing," and "[t]he fact of what he did in the bail jumping while the child porn cases were pending." Given the factors emphasized by the court during its original sentencing remarks, we agree with the court's conclusion that the psychosexual evaluation was not a new factor because it was not highly relevant to the imposition of Gossens' sentences.

As noted above, the circuit court also concluded that even if the psychosexual evaluation qualified as a new factor, it did not warrant modification of Gossens' sentences. The court explained that the psychosexual evaluation "does not change and would not have changed this Court's opinion in terms of factors [the court] considered to be most important" when sentencing Gossens. Having independently reviewed the records, we cannot conclude that the court erroneously exercised its discretion in this regard. In particular, the psychosexual evaluation would not have affected the troubling facts surrounding the bail jumping offense or the court's perception that Gossens was minimizing his own culpability, both of which the court emphasized

[3] The child pornography count carried a mandatory minimum term of three years' initial confinement. *See* WIS. STAT. § 939.617(1).

during its original sentencing remarks. Under these circumstances, there would be no arguable merit to a claim that the court erred by denying Gossens' motion for sentence modification.

To prevail on his ineffective assistance claim, Gossens needed to show that his trial attorney performed deficiently by failing to present the psychosexual evaluation at sentencing and that counsel's failure to do so prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficient performance, Gossens needed to show that counsel's failure to introduce the psychosexual evaluation was "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To establish prejudice, Gossens needed to show a reasonable probability that, but for counsel's alleged error, the result of the proceeding would have been different. *See* ***id.*** at 694.

At the ***Machner*** hearing, Gossens' trial attorney testified that he made a strategic decision not to present the psychosexual evaluation at sentencing based on what he perceived to be negative information in the report. Trial counsel noted that on page two of the evaluation, it appeared that Gossens was "not accepting responsibility for his actions," which counsel believed "might harm [Gossens] in the Court's evaluation at sentencing." Trial counsel also cited a statement on page four of the evaluation, where Gossens denied looking at child pornography, which was inconsistent with a statement on page two that Gossens had admitted masturbating to child pornography. Based on this testimony, the circuit court concluded that trial counsel made a reasonable strategic decision not to present the psychosexual evaluation at sentencing and, therefore, did not perform deficiently. Strategic choices made after a thorough investigation of the relevant law and facts are virtually unchallengeable on appeal. ***Strickland***, 466 U.S. at 690.

In his response to the no-merit report, Gossens asserts that when his first postconviction attorney reached out to trial counsel to ask why he did not present the psychosexual evaluation at sentencing, trial counsel "responded over a voicemail that he had made a mistake and overlooked [the psychosexual evaluation], forgetting to submit it." Gossens notes that his trial attorney later confirmed this information in an email to postconviction counsel and agreed to sign an affidavit stating the same. Trial counsel then "changed his mind," however, and claimed that he had a strategic reason for not presenting the psychosexual evaluation. In light of trial counsel's initial statement that he had overlooked the psychosexual evaluation, Gossens contends that counsel's later claim to have had a strategic reason for not presenting the evaluation was a "lie" that trial counsel told "to protect himself."

At the ***Machner*** hearing, Gossens introduced an email exchange between his initial postconviction attorney and his trial counsel. During the email exchange, trial counsel initially stated that he was "not sure" why he did not submit the psychosexual evaluation at sentencing and that "[i]t may have been an oversight." In a subsequent email, Gossens' postconviction attorney asked whether trial counsel would sign an affidavit stating "that you didn't submit the report, you had no reason not to, and that doing so was an oversight." Trial counsel responded, "I will sign an affidavit. Please prepare one and forward to me."

Trial counsel conceded during the ***Machner*** hearing that he did not sign the affidavit that Gossens' postconviction attorney sent to him. Trial counsel explained that after he agreed to sign the affidavit, he reviewed Gossens' file again in more detail and remembered that he had decided not to present the psychosexual evaluation at sentencing because of what he perceived to be damaging information on pages two and four.

The circuit court clearly found this explanation to be credible, as it concluded that trial counsel had a valid strategic reason for not presenting the psychosexual evaluation at sentencing. *See* ***State v. Quarzenski***, 2007 WI App 212, ¶23, 305 Wis. 2d 525, 739 N.W.2d 844 ("If the court does not make express findings on credibility, we assume it made implicit findings to that effect when analyzing the evidence."). "[W]hen a circuit court's conclusions are based on the court's credibility findings, we accept those determinations." ***Id.*** Here, given the court's determination that Gossens' trial attorney had a strategic reason not to present the psychosexual evaluation at sentencing, Gossens' claim that trial counsel performed deficiently lacks arguable merit.

In any event, even assuming that Gossens' trial attorney performed deficiently by failing to present the psychosexual evaluation at sentencing, the circuit court also determined that counsel's failure to do so did not prejudice Gossens' defense. The court explained that a court is not required to agree with an expert witness's report, and psychosexual evaluations in particular "don't examine and analyze all of the sentencing factors that a court can and needs to consider." The court further explained that the psychosexual evaluation in this case would not have made a difference to the court's sentencing decision because it did not override the factors that were most important to the court when it imposed Gossens' sentences. Given the factors that the court emphasized during its original sentencing remarks, we agree that it is not reasonably probable that Gossens would have received shorter sentences if his trial attorney had presented the psychosexual evaluation at sentencing. Accordingly, Gossens failed to establish that he was prejudiced by his trial counsel's failure to do so. Any argument that the court erred by rejecting Gossens' ineffective assistance claim would therefore lack arguable merit.

Our independent review of the records discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgments and order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Susan E. Alesia is relieved of any further representation of Benjamin Gossens in these matters. *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