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DISTRICT II

September 27, 2023

To:

Hon. Mark F. Nielsen
Circuit Court Judge
Electronic Notice

Amy Vanderhoef
Clerk of Circuit Court
Racine County Courthouse
Electronic Notice

Philip J. Brehm
Electronic Notice

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Patricia J. Hanson
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Tarence D. Gary, #499213
Wisconsin Secure Program Facility
P.O. Box 1000
Boscobel, WI 53805-1000

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

2020AP1973-CRNM State of Wisconsin v. Tarence D. Gary (L.C. #2017CF701)

Before Gundrum, P.J., Neubauer 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).

Attorney Philip J. Brehm, as appointed counsel for Tarence D. Gary, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Gary received a copy of the report and filed a response. Upon consideration of the report and the response, and after an independent review of the record, we conclude that there are

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

no issues with arguable merit for appeal. We summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Gary was convicted, following no contest pleas, of one count of first-degree sexual assault of a child under the age of twelve and one count of felony intimidation of a victim. On the sexual assault count, the circuit court sentenced Gary to twenty-seven years of initial confinement and thirteen years of extended supervision. On the intimidation of a victim count, the circuit court sentenced Gary to two years of initial confinement and five years of extended supervision, to run consecutively to the sentence on the other count.

The no-merit report first addresses whether Gary's pleas were knowingly, voluntarily, and intelligently entered. This court is satisfied that the no-merit report correctly analyzes this issue as without merit, and we will not discuss it further.

The no-merit report next addresses whether the circuit court erred in denying Gary's motion to withdraw his pleas prior to sentencing. "[T]he criterion for withdrawal of a guilty plea prior to sentencing is whether defendant has shown a fair and just reason for withdrawal." *State v. Shanks*, 152 Wis. 2d 284, 288, 448 N.W.2d 264 (Ct. App. 1989). A circuit court's decision on whether to grant a motion for plea withdrawal prior to sentencing is discretionary, and we will uphold the decision if the record shows a process of reasoning dependent on the facts of record and a conclusion based on a logical rationale founded upon proper legal standards. *Id.* at 288-89.

After taking sworn testimony from Gary, the circuit court denied his motion for plea withdrawal on the basis that he had failed to show a fair and just reason. The court applied the proper legal standard, stating that, although a defendant should be allowed freely to withdraw his plea before sentencing for any fair and just reason, the record did not support Gary's assertion

that he wanted to withdraw his plea because he was confused. The court did not find Gary's testimony that he was confused to be credible. On the contrary, the court found that Gary had expressed a clear understanding of the plea and sentencing process. Generally, this court will not disturb a circuit court's credibility determination on appeal. *See State v. Turner*, 114 Wis. 2d 544, 550, 339 N.W.2d 134, (Ct. App. 1983). The record and no-merit report provide no basis for doing so here. The record reflects that the court applied the relevant facts to the proper standard of law, such that any argument that the circuit court erroneously exercised its discretion in denying Gary's motion for plea withdrawal would be wholly frivolous within the meaning of *Anders*, 386 U.S. at 744.

The no-merit report and the response also addresses whether the circuit court erroneously exercised its sentencing discretion. As explained in the no-merit report, the sentences imposed are within the legally permissible penalty ranges. The standards for the circuit court and this court on discretionary sentencing issues are well-established and need not be repeated here. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. Any argument that the circuit court erroneously exercised its sentencing discretion is without arguable merit on appeal. Additionally, we agree with appellate counsel that nothing in the record, no-merit report, or response would support an arguably meritorious motion for sentence modification based on a new factor.

Finally, the no-merit report discusses whether Gary could raise a claim of ineffective assistance of trial counsel. We agree with appellate counsel's conclusion in the no-merit report that any such claim would be without arguable merit. To establish ineffective assistance of counsel, Gary must establish that his trial counsel's actions constituted deficient performance,

and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In reviewing trial counsel’s performance, “every effort is made to avoid determinations of ineffectiveness based on hindsight ... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms.” *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). This court’s review of the record and the no-merit report discloses no arguably meritorious basis for challenging trial counsel’s performance.

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

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

IT IS FURTHER ORDERED that Attorney Philip J. Brehm is relieved of any further representation of Tarence D. Gary in this matter. *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