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DISTRICT IV

August 1, 2024

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Circuit Court Judge
Electronic Notice

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

2022AP1946-CRNM State of Wisconsin v. Gregory T. Simmons
2022AP1947-CRNM (L.C. ## 2018CF176 and 2018CF1181)

Before Kloppenburg, P.J., Graham, and Nashold, 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 Kelsey Loshaw, appointed counsel for Gregory Simmons, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Simmons was sent a copy of the report and filed a response, and counsel then filed a supplemental no-merit report pursuant to this court's request that counsel provide further input. Upon consideration of the report, the response, the

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

supplemental report, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Simmons was charged with multiple offenses relating to an incident in which he was alleged to have physically and sexually assaulted the victim, trapped her in his car, and strangled and suffocated her. He was also charged with felony bail jumping.

Pursuant to a negotiated plea agreement, Simmons pled guilty to one count of second-degree sexual assault as a repeater and to the felony bail jumping count. The State agreed that a number of other charges would be dismissed and read in for sentencing purposes. These included the above-mentioned charges for false imprisonment, strangulation and suffocation, and battery, as well as a charge in a separate case for repeated sexual assault of a child. The circuit court accepted Simmons' guilty pleas and dismissed all charges that the State had agreed to dismiss.

The circuit court sentenced Simmons to maximum, concurrent prison terms. This resulted in a total sentence of thirty-one years of initial confinement and fifteen years of extended supervision.

Simmons filed a postconviction motion in which he argued that the circuit court erroneously exercised its sentencing discretion by failing to consider the protection of the public, one of the primary factors that sentencing courts are required to consider under *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court denied the motion. The court concluded that although it may not have specifically “use[d] those words” at sentencing, its sentencing remarks as a whole and the length of the overall sentence made clear that the court had considered protection of the public.

The no-merit report first addresses whether Simmons' guilty pleas were knowing, intelligent, and voluntary. We agree with counsel that there is no arguable merit to this issue. The circuit court's plea colloquy, including the court's references to 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, relating to the nature of the charges, the constitutional rights that Simmons was waiving, and other matters. We see no other arguable basis for plea withdrawal.²

The no-merit report next addresses whether Simmons could challenge the circuit court's sentencing decision as an erroneous exercise of discretion. We agree with counsel that there is no arguable merit to this issue. The court sentenced Simmons consistent with the requirements of *Gallion*, 270 Wis. 2d 535, ¶¶37-49. We agree with the court's postconviction ruling in which it concluded that the sentencing transcript as a whole makes clear that the court considered protection of the public, as required by *Gallion*. The requirements of *Gallion* are not intended to be "a semantic trap for circuit courts" or "a call for more 'magic words.'" See *id.*, ¶49.

As noted, the circuit court imposed maximum, concurrent prison terms. We are satisfied that Simmons could not reasonably argue under the circumstances that this was 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). When the court imposed sentence, it acknowledged that it was imposing a maximum prison term, and it considered, among other aggravating circumstances, the trauma

² Prior to sentencing, Simmons moved to withdraw his guilty pleas, but he then withdrew the motion voluntarily after further consultation with counsel. The record reveals no issue of arguable merit relating to Simmons' withdrawn motion for plea withdrawal.

that Simmons had caused his victims, the seriousness of the charges that were dismissed and read in for sentencing purposes, Simmons' criminal history, and the fact that he had committed new crimes despite previous interventions ranging from probation to federal prison.

We now discuss one additional sentencing issue and explain why we agree with counsel that it lacks arguable merit. The issue is whether the circuit court violated Simmons' right to due process by sentencing him based on inaccurate information.

A defendant has a constitutionally protected due process right to be sentenced based on accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To succeed on a claim for sentencing based on inaccurate information, the defendant must prove, by clear and convincing evidence, both that there was inaccurate information at sentencing and that the sentencing court relied on that information. *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. Reliance in this context means that “the court gave ‘explicit attention’ or ‘specific consideration’ to” the inaccurate information such that “the misinformation ‘formed part of the basis for the sentence.’” *Tiepelman*, 291 Wis. 2d 179, ¶14 (quoted source omitted).

Here, the record shows that the circuit court referred to a handful of dismissed charges in two of Simmons' numerous previous criminal cases as convictions. In the supplemental no-merit report, counsel acknowledges that this was inaccurate information but contends that Simmons would be unable to show that the court relied on it. We agree.

The circuit court's sentencing remarks as a whole make clear that the court was not focusing on the number of Simmons' prior convictions or on any prior conviction in particular. Rather, the court was focusing on Simmons' overall criminal history as demonstrating that

Simmons had continued to commit crimes despite prior sentences ranging from probation to federal prison. The court explained: “[M]y point in going through that whole litany with you, Mr. Simmons, is we have tried. We’ve tried incarceration. We tried stayed time. We’ve tried probation. We’ve tried—we tried hard time [be]cause federal time is not easy time, and yet we find ourselves today with a litany of [additional] cases.”³ Given this context, we conclude that it would be frivolous for Simmons to argue that he could satisfy his burden to show that the court relied on its inaccurate statements about prior convictions.

We turn next to the issues that Simmons raises in his response to the no merit report. He raises three issues. Counsel has addressed each of these issues in the supplemental no-merit report. In the discussion that follows, we explain why we agree with counsel that each of the issues lacks arguable merit.

The first issue is whether drug-related evidence against Simmons obtained pursuant to a search warrant should have been suppressed because the police exceeded the scope of the warrant. According to Simmons, the police exceeded the scope of the warrant by searching for drug-related evidence that was not in plain view. Counsel contends that there are multiple reasons why this issue lacks arguable merit. We conclude that the issue lacks arguable merit for at least one of those reasons, namely, the scope of the warrant was not limited to drug-related evidence in plain view. Although the warrant indicated that there might be controlled substances

³ The circuit court similarly prefaced its discussion of Simmons’ criminal history by stating that “it is hard to believe that at the young age of your mid[-]thirties you have amassed a ... record that ... quite frankly, demonstrates that you have been offered almost every available intervention.”

in plain view present in the living room of the premises to be searched, the warrant did not limit the search and seizure of items to only those items in plain view.

The second issue that Simmons raises is whether evidence obtained as a result of his arrest should have been suppressed because his arrest was unconstitutional. This issue relates back to the previous issue insofar as Simmons appears to be contending that the probable cause for his arrest was based on evidence that was unlawfully obtained pursuant to the warrant. However, for the reasons already discussed, this evidence was not unlawfully obtained. Moreover, as counsel explains in the supplemental no-merit report, there was probable cause to arrest Simmons regardless of the evidence obtained pursuant to the warrant. For these reasons, we conclude that the second issue Simmons raises lacks arguable merit.

The third and final issue that Simmons raises is whether the circuit court lacked personal jurisdiction over him or lacked competency to proceed based on alleged defects in the filing or service of the complaint. In raising this issue, Simmons relies, at least in part, on rules of civil procedure that do not apply here. Regardless, the issue lacks arguable merit because neither the record nor Simmons' response shows that there was any defect relating to the complaint that was not waived by Simmons' guilty pleas. *See State v. Asmus*, 2010 WI App 48, ¶4, 324 Wis. 2d 427, 782 N.W.2d 435 (“[A] defense of lack of personal jurisdiction is waived by pleading to the information.”); *State v. Kazee*, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995) (“The general rule is that a plea, whether denominated as a ‘guilty plea,’ a ‘no contest plea,’ or an ‘*Alford* plea,’ waives all nonjurisdictional defects and defenses.” (quoted source omitted)).

Our independent review of the record reveals no other issues of arguable merit.

Therefore,

IT IS ORDERED that the judgments of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kelsey Loshaw is relieved of any further representation of Gregory Simmons 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