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May 29, 2013

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

2013AP396-CRNM State of Wisconsin v. Titus A. Harper (L.C. #2009CF347)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Titus A. Harper appeals from a judgment of conviction for attempted first-degree intentional homicide, for which he received a sentence of thirteen years' initial confinement and six years' extended supervision. Harper's appellate counsel has filed a no-merit report pursuant

to WIS. STAT. RULE 809.32 (2011-12),¹ and *Anders v. California*, 386 U.S. 738 (1967). Harper received a copy of the report and was advised of his right to file a response. He has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Harper stabbed his girlfriend and then cut his own throat. Harper would not allow the victim to leave the house and told the victim they would die together. After about an hour the victim was able to leave, and she survived the stabbing. Harper was charged with attempted first-degree intentional homicide by use of a dangerous weapon and false imprisonment by use of a dangerous weapon. Harper's competency to proceed was evaluated, and eventually it was determined that he was competent.² Although Harper initially entered a not guilty by reason of mental disease or defect (NGI) plea, he entered a no-contest plea to the charge of attempted first-degree intentional homicide, with the dangerous weapon enhancer dropped. The false imprisonment charge was dismissed as a read in at sentencing.

At sentencing, pursuant to the plea agreement, the prosecution recommended substantial prison time but did not suggest a specific number of years. One of the conditions of extended supervision imposed on Harper is that he have no contact with his two minor children unless

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² At a hearing in June 2009, Harper effectively stipulated to having been restored to competency. However, no findings were made at the time. Harper's competency to proceed was retroactively determined at a hearing held in June 2011.

approved by his agent and the children's mother, the victim. Harper was also ordered to pay restitution for lost wages in a stipulated amount.

The no-merit report addresses the potential issues of whether Harper was properly determined to be competent to proceed, whether Harper's plea was freely, voluntarily and knowingly entered, and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

We note that it was not necessary for the trial court to engage in a personal colloquy with Harper about his decision to forego his NGI plea. See *State v. Francis*, 2005 WI App 161, ¶1, 285 Wis. 2d 451, 701 N.W.2d 632. Harper faced a maximum sentence of sixty years and the nineteen-year sentence imposed is well within the maximum and cannot be considered excessive. See *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). Also, it is acceptable that Harper was not physically present at two short status hearings. Harper's absence from status conferences at which no substantive matters were conducted does not implicate either his constitutional right to be present at critical stages of the prosecution, see *State v. Carter*, 2010 WI App 37, ¶19, 324 Wis. 2d 208, 781 N.W.2d 527, or his statutory right to be present under WIS. STAT. § 971.04.

We have considered whether there is arguable merit to a claim that the trial court erroneously exercised its discretion by imposing a condition of supervision prohibiting Harper from contact with his own children. We conclude such a claim lacks merit. Under WIS. STAT.

§ 973.049(2), the trial court may prohibit contact with the victim of a crime considered at sentencing. The trial court has discretion to determine who is a victim of a crime considered at sentencing. *State v. Campbell*, 2011 WI App 18, ¶23, 331 Wis. 2d 91, 794 N.W.2d 276. The couple's older son was just a baby when the crime occurred and was in the house. The victim was pregnant with the couple's younger son when the crime occurred. Both children are properly considered victims of the crime and the no-contact condition is proper.

Further, a claim that the no-contact condition impinges on Harper's parental rights also lacks merit. Whether a condition of extended supervision infringes on a constitutional right is a question of law and we review the constitutionality of the provision de novo. *State v. Oakley*, 2001 WI 103, ¶8, 245 Wis. 2d 447, 629 N.W.2d 200. Strict scrutiny is not applied. *Id.*, ¶16 n.23. "[G]iven that a convicted felon does not stand in the same position as someone who has not been convicted of a crime ... 'conditions ... may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person's rehabilitation.'" *Id.*, ¶19 (quoted source omitted). The trial court expressed its concern that Harper's conduct exposed his children to risk of harm and that others had expressed concerns for the children in the future. It indicated that the long period of supervision was necessary to make certain that Harper was in control of his anger and aggressiveness so as not to present a danger to others in the future. The no-contact condition is reasonably related to the need to protect the children until such time that it is certain that Harper has achieved rehabilitative goals. The no-contact provision is not overbroad since it permits contact with approval of his agent and the children's mother.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Harper further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Eileen A. Hirsch is relieved from further representing Titus A. Harper in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals