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September 14, 2016

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

2015AP1253-CRNM State of Wisconsin v. Lance Deondrea Booker
(L.C. #2014CF538)

Before Kessler, Brennan and Brash, JJ.

Lance Deondrea Booker pled guilty to three counts of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2013-14).¹ He now appeals from the judgment of conviction. Booker's postconviction/appellate counsel, Michael J. Backes, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, as

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

well as two supplemental no-merit reports. Booker filed a response.² We have independently reviewed the record, the no-merit report, the response, and the supplemental no-merit reports, as mandated by *Anders*, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

The complaint alleged that thirty-eight-year-old Booker had sexual intercourse with an eleven-year-old blood relative on three occasions. He was charged with eight felonies, including three counts of first-degree sexual assault of a child, three counts of incest, one count of child enticement, and one count of causing a child to view sexual activity. The abuse came to light after bumps appeared on the child's genitals and were subsequently determined to be caused by herpes. The complaint was based on statements the child made to law enforcement; Booker did not give a statement.

Booker entered a plea agreement with the State pursuant to which he pled guilty to three counts of second-degree sexual assault of a child, reduced from first-degree sexual assault. The five remaining felonies were dismissed and read in for sentencing purposes. The State agreed to recommend a global sentence of ten to fifteen years of initial confinement and fifteen to twenty years of extended supervision.

The trial court conducted a plea colloquy with Booker, accepted Booker's guilty pleas, and found him guilty. A presentence investigation (PSI) was ordered. The PSI writer's sentencing recommendation was significantly higher than that of the State; he recommended two

² Booker's two-page response was handwritten. Where we quote from his response, we have adjusted the capitalization of some words.

consecutive terms of twelve to twenty-five years of initial confinement and seven to eight years of extended supervision, plus an imposed and stayed sentence with probation for the third felony.

The State urged the trial court to follow its sentencing recommendation, noting that there were aggravating factors that supported the State's recommendation, including that the child was only eleven years old and Booker had infected the child with herpes, an incurable sexually transmitted disease that would have lifelong consequences for the child. At the same time, the State argued that it was important to give Booker credit for accepting responsibility "early on" and also noted that Booker "completely accepts his responsibility." The State urged the trial court to follow its recommendation rather than that of the PSI writer. Trial counsel also asked the trial court to follow the State's recommendation.

The trial court imposed a sentence on the lower end of the PSI writer's recommendation, but higher than that urged by the parties. Specifically, it sentenced Booker to two consecutive terms of fifteen years of initial confinement and ten years of extended supervision. For the third count, it imposed a concurrent sentence of five years of initial confinement and five years of extended supervision. This appeal follows.

The no-merit report analyzes three issues: (1) whether there would be any basis for Booker to challenge his guilty pleas; (2) whether the trial court imposed "an unduly harsh and unreasonable sentence"; and (3) whether there is a basis for Booker to seek sentence modification. (Capitalization and bolding omitted.) This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss the plea hearing and sentencing. We will also address

the issues Booker raised in his response, including the additional information provided in supplemental reports that postconviction/appellate counsel filed in response to orders from this court.

We begin with Booker's pleas. There is no arguable basis to allege that Booker's guilty pleas were not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents were the applicable jury instructions and an addendum signed by Booker and his attorney that outlined additional understandings, such as the fact that Booker was giving up certain defenses. The trial court conducted a thorough plea colloquy that addressed Booker's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* § 971.08; *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; *Bangert*, 131 Wis. 2d at 266-72.

The trial court referenced the guilty plea questionnaire and the jury instructions, and it also asked Booker to confirm that he understood the definition of sexual intercourse and "what the State would have to prove." The trial court confirmed with Booker that he knew the trial court was "not bound to accept the recommendation of either your attorney or the district attorney and the [c]ourt may impose whatever sentence it thinks appropriate under the circumstances." The trial court stated the maximum sentences and fines that could be imposed, which for each count was twenty-five years of initial confinement, fifteen years of extended supervision, and a \$100,000 fine. The trial court also discussed with Booker the constitutional

rights Booker was waiving, such as his right to a jury trial and his right to testify in his own defense.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Booker's conversations with his trial counsel, and the trial court's colloquy appropriately advised Booker of the elements of the crimes and the potential penalties he faced, and otherwise complied with the requirements of *Bangert* and *Hampton* for ensuring that the pleas were knowing, intelligent, and voluntary. The record does not suggest there would be an arguable basis to challenge Booker's pleas.

In his response to the no-merit report, Booker raised two issues related to his guilty pleas that were not reflected in the record. The first relates to his expectations concerning his sentence. As noted, the plea agreement provided that the State would recommend a global sentence of ten to fifteen years of initial confinement and fifteen to twenty years of extended supervision. The trial court, however, imposed a total sentence of thirty years of initial confinement and twenty years of extended supervision. In his response to the no-merit report, Booker contends that before he pled guilty, trial counsel told him "that he would be able to get me a plea barg[a]in in which [he] would be 'g[u]aranteed' 10-15 years in prison." Booker asserts trial counsel told him that even though the trial court would ask Booker at the plea hearing whether he "understand[s] that [the court] is not [bound] to go with any plea barg[a]in," that question would be "only a formality that the judge has to say by law" and the trial court would, in fact, follow the plea bargain.

In his first supplemental no-merit report, postconviction/appellate counsel notes that Booker acknowledged at the plea hearing that he was aware the trial court was not bound by the

plea agreement. Postconviction/appellate counsel also states that Booker never raised this issue with him when they reviewed the case. In his second supplemental no-merit report, postconviction/appellate counsel provided an affidavit in which he explained that in February 2016 he spoke with trial counsel, who said that he told Booker “that the ‘Judge would have the final word’ on any sentence.” Trial counsel also told postconviction/appellate counsel that he never told Booker “that he could ignore what was being said by the Judge or that it was just a formality.”

Postconviction/appellate counsel’s investigation of Booker’s allegations has not revealed any facts that would support Booker’s bald allegations that: (1) he was guaranteed a sentence of ten to fifteen years in prison—an allegation that directly contradicts what he told the trial court in open court and in the signed plea questionnaire; and (2) trial counsel told Booker he could ignore the trial court’s statements during the plea hearing. We also note that there is nothing in the PSI report or in the sentencing transcript that suggests Booker believed he was “guaranteed” a specific sentence. For instance, after the PSI report recommended a total period of initial confinement of twenty-four to fifty years, Booker did not file any motions or tell the trial court at sentencing that he believed he had a guaranteed sentence. In his allocution, Booker implicitly recognized that he could be given a sentence that would keep him in prison for the remainder of his life, stating: “I throw myself at the mercy of this [c]ourt. And I just ask that I don’t spend the rest of my life in prison.” In short, there is nothing in the record or in postconviction/appellate counsel’s investigation that suggests there would be merit to bringing a postconviction motion challenging the voluntariness of Booker’s guilty pleas on the ground that he thought he had a guaranteed sentence.

The second issue Booker appears to be raising in his response is whether he is actually guilty of the crimes. Booker admitted the crimes to the trial court at the plea hearing and at sentencing.³ He also told the PSI writer that he was “responsible for what happened” and that the child “did nothing wrong.” Further, according to the no-merit report, Booker acknowledged his responsibility for the crimes when he spoke with postconviction/appellate counsel. Nonetheless, Booker’s response to the no-merit report indicates that he “did not plea[d] guilty because it [was] true,” but instead “because I was scared of what my lawyer said would happen if I had not ... [a]nd because he said I was for sure to get 10-15 years in prison because of the global plea agreement.” He claims that his trial counsel “misle[d] me into pleading guilty.”

In response to Booker’s statements, postconviction/appellate counsel’s supplemental no-merit report notes that Booker “never claimed he was innocent or informed [me] of any evidence which would establish his innocence.” We have carefully examined the record. We have identified nothing that would support Booker’s suggestion that the allegations against him were untrue. Not only did Booker admit the allegations on numerous occasions, including in open court, it is undisputed that the eleven-year-old child contracted herpes as a result of the sexual activity with Booker. There is nothing in the record or in postconviction/appellate counsel’s investigation that suggests there would be merit to bringing a postconviction motion challenging Booker’s guilty pleas on the ground that he was innocent of the crimes.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see State v. Gallion*,

³ For instance, during his allocution, Booker said: “I would like to say that, first of all, I apologize to [the child]. And I know that what I did was wrong, sir.... And I’m sorry.”

2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, see *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, *Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. See *Gallion*, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. Its sentencing comments—which spanned over nine pages of the transcript—addressed Booker's prior criminal history, which included crimes in New York and Wisconsin, such as the sale of a controlled substance, second-degree attempted burglary, third-degree murder, and armed robbery. It also said that Booker's behavior on supervised release “obviously was poor,” noting that Booker's release was revoked four times in the past. The trial court recognized the need to protect the public, stating that “not to confine [Booker] would result in harm and danger to the community.”

The trial court also discussed the crimes against the child and recognized that the child was suffering both mentally and physically. The trial court noted that the fact the child now has herpes, as well as “the nature of the contact, the conduct, [and] the degree of the contact” were

aggravating factors. The trial court said the charges were “serious offenses” and recognized that Booker originally faced 277 years of incarceration and was still facing 120 years after pleading guilty to reduced charges.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court’s compliance with *Gallion*. Further, there would be no merit to assert that the sentences were excessive. See *Ocanas*, 70 Wis. 2d at 185. The trial court could have imposed a total of seventy-five years of initial confinement and forty-five years of extended supervision. The total sentence, which will require Booker to serve thirty years of initial confinement and twenty years of extended supervision, was well within the maximum total sentence, and we discern no erroneous exercise of discretion. See *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 (“A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.”). This is especially true where Booker benefitted from the dismissal of five additional felonies, all of which were read in for sentencing purposes.

In reviewing the sentencing transcript, we identified one additional issue that requires brief discussion. The PSI report included a COMPAS report.⁴ Our supreme court recently rejected a defendant’s claim that using a COMPAS report at sentencing violates due process. See *State v. Loomis*, 2016 WI 68, ¶8, ___ Wis. 2d ___, 881 N.W.2d 749. *Loomis* concluded: “[I]f used properly, observing the limitations and cautions set forth herein, a [trial] court’s

⁴ “‘COMPAS’ stands for ‘Correctional Offender Management Profiling for Alternative Sanctions.’” *State v. Loomis*, 2016 WI 68, ¶4 n.10, ___ Wis. 2d ___, 881 N.W.2d 749.

consideration of a COMPAS risk assessment at sentencing does not violate a defendant's right to due process." *Id.*

Loomis held that "a sentencing court may consider a COMPAS risk assessment at sentencing," as long as it abides by several limitations. *Id.*, ¶98. Risk scores in a COMPAS report "may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence." *Id.* "Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community." *Id.* *Loomis* added: "A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing." *Id.*, ¶99.

In this case, the COMPAS report noted several important "cautions and limitations" for using the COMPAS report, which *Loomis* indicated was important. *See id.*, ¶100 n.60. For instance, the COMPAS report indicated that "COMPAS is an actuarial assessment tool which has been validated on a national norming population" and which "does not ... attempt to predict specifically the likelihood that an individual offender will commit a certain type of particular offense."

At the sentencing hearing, after discussing the crimes and Booker's criminal history, the trial court briefly discussed the COMPAS report, stating:

The COMPAS evaluation reflects that you have probable risk factors with family criminality highly probable and socialization failure. Your vocational/education skills, you do have an HSED that you've obtained but not much of a work history. Your companions, criminal associates is highly probable. You denied ever being a victim of sexual abuse, but you're willing to impose that upon [the child]. Your criminal personality is ... a risk in the probable category. Cognitive behavior is highly probable.

After making those observations, the trial court turned to a discussion of the PSI writer's recommendation and then discussed the sentence it believed was appropriate. Our review of the trial court's comments on the COMPAS report leads us to conclude there would be no arguable merit to assert that the trial court's use of the COMPAS report was improper or denied Booker due process. The trial court commented on the report only briefly, and its comments implied that the report was one of many factors it was considering. *See id.*, ¶99. We discern no basis to reject the no-merit report to pursue further proceedings based on the trial court's reference to the COMPAS report at sentencing.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Michael J. Backes is relieved of further representation of Booker in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals