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June 23, 2020

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

2019AP1180-CRNM State of Wisconsin v. Triston T. Welch (L.C. # 2017CF1647)

Before Brash, P.J., Dugan and White, 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).

Triston T. Welch appeals from a judgment, entered upon his guilty plea, convicting him on one count of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1)(e) (2017-18).[1] Appellate counsel, Carl W. Chesshir, has filed a no-merit report, pursuant to ***Anders***

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

v. California, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Welch was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Then ten-year-old J.T.W. disclosed at school that Welch, whom she considered to be her stepfather, had sexually assaulted her. In the forensic interview that followed, J.T.W. said she had been taking a bath when Welch ordered her out of the tub and began fondling her chest, buttocks, and vagina. Welch began to take off his clothes, and J.T.W. left the bathroom to put on her pajamas. Welch called her back into the bathroom, and J.T.W. complied. Welch then put her on the sink, spread her legs, and began rubbing his penis on her vagina before inserting his penis into her vagina. J.T.W. reported that this hurt, and that when Welch stopped there was "nasty and gooey" "white stuff on the sink."

Welch was on electronic monitoring, so he was located and arrested. In a search incident to arrest, police recovered cocaine from Welch's pocket. He was charged with one count of first-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(1)(b), by sexual intercourse with a child who had not yet attainted the age of twelve, and one count of possession of cocaine.

After the circuit court granted the State's motion to admit other-acts evidence against Welch, he agreed to resolve his case with a plea. In exchange for his guilty plea, the State would amend the sexual assault charge to one count of first-degree sexual assault of a child by sexual contact with a child who had not yet attained the age of thirteen, a violation of WIS. STAT. § 948.02(1)(e), thus eliminating Welch's exposure to a mandatory minimum sentence of twenty-five years initial confinement. *See* WIS. STAT. § 939.616(1g)-(2). The State also agreed to

dismiss and read in the cocaine charge. The circuit court accepted Welch's guilty plea and later sentenced him to twenty-five years' initial confinement and twenty years' extended supervision.

Appellate counsel addresses four potential issues in the no-merit report. The first of these is whether the circuit court "properly accepted Welch's guilty plea." We view this as a discussion of whether the circuit court properly complied with its obligations for accepting a plea, which are in place to ensure that a defendant's plea is knowing, intelligent, and voluntary.

Our review of the record confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Therefore, there is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Welch's plea was anything other than knowing, intelligent, and voluntary.[2]

The second issue that appellate counsel discusses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a 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 determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270

[2] We observe that Welch's trial attorney relied on copies of jury instructions to explain the elements of the offenses. For the definition of sexual contact, counsel used WIS JI—CRIMINAL 1200A ("Sexual Contact—§ 940.225(5)(b)") even though applicable assault instruction directs that WIS JI—CRIMINAL 2101A ("Sexual Contact—§ 948.01(5)") should have been used. However, the two "sexual contact" instructions are identical in all aspects relevant to this case, so there is no arguable merit to a claim that Welch did not know or understand the definition of sexual contact.

Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several additional factors. *See* ***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 circuit court's discretion. *See* ***id.*** We will sustain the circuit court's exercise of discretion if the conclusion reached by the circuit court was one a reasonable judge could reach, even if this court might have reached a different conclusion. *See* ***id.***, ¶8.

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. The forty-five-year sentence imposed is well within the sixty-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

The third issue appellate counsel discusses is whether the circuit court "inappropriately sentenced Welch." This issue reflects appellate counsel's consideration of whether the circuit court, which imposed twenty-five years of initial confinement, may have erroneously sentenced Welch under the assumption that the offense to which he pled carried a mandatory minimum sentence of twenty-five years of initial confinement like the original charge did. This can be viewed as a question of whether the circuit court relied on inaccurate information at sentencing.

"[A] criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who seeks resentencing based on the circuit court's use of inaccurate information must

show that the information was inaccurate and that the circuit court actually relied on the inaccuracy in the sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "[W]hether the court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, or that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (quoting ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

We agree with appellate counsel's analysis that although the sentence imposed matches the mandatory minimum, nothing in the record supports a claim that the circuit court erroneously believed that a mandatory minimum applied. Rather, the record reflects that the circuit court was well aware that the mandatory minimum was not applicable in this case. Welch had moved to adjourn the original sentencing date, in part because the presentence investigation writer had erroneously relied upon the mandatory minimum in crafting the sentence recommendation. The circuit court expressly referenced this reason on the record and even discussed possible resolutions for the error short of adjourning the hearing. Thus, there is no arguable merit to a claim that Welch was sentenced on inaccurate information.

Finally, appellate counsel discusses whether the circuit court's "decision to allow other[-]acts evidence to be admissible at trial can be appealed." However, appellate counsel correctly notes that Welch's otherwise valid guilty plea waives further challenges to this issue. *See* ***State v. Nelson***, 108 Wis. 2d 698, 702-03, 324 N.W.2d 292 (Ct. App. 1982). Moreover, the record reflects the circuit court's examination of the relevant facts and application of proper legal standards to reach a reasonable conclusion through a demonstrated rational process. *See* ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998) (discussing framework for admissibility of other-acts evidence); ***State v. Hammer***, 2000 WI 92, ¶23, 236 Wis. 2d 686, 613

N.W.2d 629 (explaining greater latitude rule); ***State v. Muckerheide***, 2007 WI 5, ¶17, 298 Wis. 2d 553, 725 N.W.2d 930 (stating appellate standard of review for circuit court's discretionary decisions). The circuit court's decision in this case was particularly clear and methodical in discussing each factor it was required to consider under the ***Sullivan*** and greater latitude rules, and our review of the circuit court's decision on this matter satisfies us that discretion was properly exercised.

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 Carl W. Chesshir is relieved of further representation of Welch in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals