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**DISTRICT I**

December 1, 2020

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

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2019AP819-CRNM State of Wisconsin v. Alfonso Lowe (L.C. # 2017CF3673)

Before Brash, P.J., Dugan and Donald, 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).**

Alfonso Lowe appeals from a judgment of conviction for two felonies and two misdemeanors, including false imprisonment, false imprisonment as an act of domestic abuse, fourth-degree sexual assault, and misdemeanor battery. *See* WIS. STAT. §§ 940.30, 968.075(1)(a)1., 940.225(3m), 940.19(1) (2017-18).[1] Lowe's appellate counsel, Pamela

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

Moorshead, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32. Lowe filed a response that identified several errors in the no-merit report and raised an additional issue. Around the same time, appellate counsel filed a corrected no-merit report. Lowe was given an opportunity to file a response to the corrected no-merit report, but he did not file one. We have independently reviewed the record, the corrected no-merit report, and Lowe's response, as mandated by ***Anders***. We conclude there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm the judgment.

The State filed a criminal complaint alleging that over the course of six hours, Lowe sexually assaulted, strangled, and falsely imprisoned a woman with whom he had a romantic relationship. He was charged with one count of second-degree sexual assault, one count of strangulation and suffocation, and one count of false imprisonment as an act of domestic abuse.

Lowe entered into a plea agreement with the State. Pursuant to that agreement, the second-degree sexual assault charge was amended to fourth-degree sexual assault (a misdemeanor), the strangulation and suffocation count was amended to false imprisonment, and a fourth count, misdemeanor battery, was added. The third count, false imprisonment as an act of domestic abuse, remained the same. Lowe's original exposure of fifty-two years was reduced to thirteen and one-half years. Lowe agreed to plead guilty to the four counts in the amended information, and both parties were free to argue for an appropriate sentence.

The trial court conducted a thorough plea colloquy with Lowe. It accepted the amended information and Lowe's guilty pleas. The parties stipulated that the trial court could use the facts in the criminal complaint as the factual basis for the charges, and the trial court found Lowe guilty of each charge.

At sentencing, the State urged the trial court to impose the maximum sentence on each count, while trial counsel argued for a one-year jail sentence. For the two felonies, the trial court imposed consecutive sentences of two and one-half years of initial confinement and three years of extended supervision. For the two misdemeanors, the trial court imposed concurrent sentences of seven months in the House of Correction, but it ordered that those sentences be served consecutive to the felony sentences.

The corrected no-merit report addresses three issues: (1) whether Lowe's pleas were intelligently, knowingly, and voluntarily entered; (2) whether there was a sufficient factual basis for his pleas; and (3) whether the trial court erroneously exercised its sentencing discretion. The no-merit report thoroughly discusses those issues, including references to relevant statutes, case law, transcripts, and other court documents. This court is satisfied that the no-merit report properly analyzes the issues it raises.

With respect to Lowe's guilty pleas, the no-merit report analyzes the trial court's compliance with WIS. STAT. § 971.08; ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906; and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986). For instance, the no-merit report notes that the trial court, among other things, discussed with Lowe the elements of the crimes and the potential penalties. Appellate counsel concludes that there would be no arguable merit to asserting that Lowe's pleas were not knowingly, voluntarily, and intelligently entered. Having reviewed the record, including the plea hearing transcript, we agree with appellate counsel's conclusion.

Appellate counsel also concludes that there would be no arguable merit to challenging the adequacy of the factual basis for each plea. *See* WIS. STAT. § 971.08(1)(b) (requiring a trial court

accepting a guilty or no-contest plea to "[m]ake such inquiry as satisfies it that the defendant in fact committed the crime charged"). The facts in the criminal complaint, which appellate counsel details in the no-merit report, support Lowe's convictions for second-degree sexual assault, false imprisonment, and battery. However, the no-merit report identified a potential issue with the number of counts of false imprisonment. Appellate counsel explains:

> There is a question whether the allegations in the complaint would satisfy the elements of two separate false imprisonment charges. However, even if falsely imprisoning the victim in different rooms in the residence was not sufficient to support two separate charges, undersigned counsel cannot argue that there is a basis for plea withdrawal. Based on discussions with Mr. Lowe, it appears that the plea to two counts of false imprisonment was negotiated by Mr. Lowe's attorney on Mr. Lowe's behalf because he wanted the benefit of a plea agreement that amended the second degree sexual assault count to fourth degree sexual assault, but he was absolutely unwilling to plead guilty to the strangulation & suffocation count that was originally charged.
>
> Undersigned counsel has concluded that these facts preclude a successful motion for plea withdrawal. In ***State v. Harrell***, 182 Wis. 2d 408, 513 N.W.2d 676 (Ct. App. 1994), the [c]ourt held that in a plea bargain context, the factual basis requirement is met when a factual basis is shown for either the offense to which the plea is offered or to a more serious charge reasonably related to the offense to which the plea is offered. Here, the criminal complaint had facts in it that established a factual basis for a second degree sexual assault and a strangulation. Those charges were related to the charges Mr. Lowe pled guilty to as they all came out of the same incident. Under ***Harrell***, undersigned counsel cannot argue that the court could not accept that agreement between Mr. Lowe and the State, which reduced the charges against Mr. Lowe.

In his response, Lowe asserts that the plea hearing colloquy does not reflect that he pled guilty to a second false imprisonment charge in order to plead to something other than strangulation. He further asserts that the strangulation charge was amended "as a tactic by the [S]tate to soften him up and make him amenable [to] pleading guilty to all charges in the

amended information." He complains that "no one ever explain[ed] to him the significance of the requirement of a factual basis for the second false imprisonment charge."

The motivations of each party for entering the plea agreement do not affect the crucial issue: whether there was a factual basis to support the second count of false imprisonment. *See* WIS. STAT. § 971.08(1)(b). ***Harrell*** held that in cases involving a plea agreement, the statutory plea colloquy requirements "are met if the trial court satisfies itself that the plea is voluntary and understandingly made and that a factual basis is shown for either the offense to which the plea is offered or to a more serious charge reasonably related to the offense to which the plea is offered." *See* ***id.***, 182 Wis. 2d at 419.

We have already concluded there would be no arguable merit to assert that Lowe did not intelligently, knowingly, and voluntarily plead guilty to the four charges in the amended information, consistent with his plea agreement with the State. Further, the false imprisonment charge is "reasonably related" to the more serious second-degree sexual assault charge that was alleged to have occurred during the same six-hour assault at Lowe's home. *See* ***id.*** Finally, we agree with appellate counsel that the facts alleged in the criminal complaint established a factual basis for second-degree sexual assault as defined in WIS. STAT. § 940.225(2)(a). Specifically, the complaint alleged that Lowe hit the victim "several times with a dark colored belt" and "forced her to take her clothes off and then had penis to vagina sexual intercourse with her without her consent." Those factual allegations demonstrate that Lowe had "sexual intercourse with another person without consent of that person by use or threat of force or violence." *See* ***id.*** Under these circumstances, the statutory plea colloquy requirements were satisfied. *See* ***Harrell***, 182 Wis. 2d at 419. Therefore, there would be no arguable merit to seeking plea withdrawal based on an insufficient factual basis for the second false imprisonment charge.

Next, we turn to the sentencing. The no-merit report addresses the sentences that were imposed, providing citations to the sentencing transcript and analyzing the trial court's compliance with ***State v. Gallion***, 2004 WI 42, ¶¶9, 41-43, 270 Wis. 2d 535, 678 N.W.2d 197. Appellate counsel concludes that there would be no arguable merit to assert that the trial court erroneously exercised its sentencing discretion, *see* ***id.***, ¶17, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree. Not only did the trial court adequately explain the sentences, each sentence imposed was less than the maximum, and the two jail sentences were concurrent to each other. Therefore, there would be no arguable merit to challenge the sentences.

Finally, we turn to Lowe's response to the no-merit report. As noted, the response identifies several errors in the original no-merit report, including a heading that referred to attempted first-degree intentional homicide and multiple references to a different defendant. Lowe asks this court to discharge appellate counsel and appoint new counsel. We decline to do so. The corrected no-merit report that appellate counsel filed has corrected those errors, which counsel referred to as "cut-and-paste errors in the report." Appellate counsel promptly corrected the errors, and we conclude that there is no basis to discharge her and appoint new counsel.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the convictions, and discharges appellate counsel of the obligation to represent Lowe 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 Pamela Moorshead is relieved from further representing Alfonso Lowe in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*