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April 26, 2022

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

2020AP1614-CRNM State of Wisconsin v. Lee J. Stokes (L. C. No. 2018CF139)

Before Stark, P.J., Hruz and Gill, 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).

Lee Stokes' appellate attorneys have filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),¹ concluding that no grounds exist to challenge Stokes' convictions for child enticement and attempted second-degree sexual assault of a child, or to challenge the order denying Stokes' postconviction motion for sentence modification. Stokes was informed of his right to file a response to the no-merit report, and he has responded. Upon our independent

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction and the order denying Stokes' postconviction motion. *See* WIS. STAT. RULE 809.21.

The State charged Stokes with four counts: (1) use of a computer to facilitate a child sex crime; (2) child enticement; (3) attempted second-degree sexual assault of a child; and (4) attempted exposing a child to harmful material. The criminal complaint alleged that Stokes had communicated by email and text message with a police officer who was posing as a fifteen-year-old girl named Lyla. In the text messages, Stokes and Lyla discussed meeting up to engage in sexual activity, even after Lyla repeatedly represented to Stokes that she was fifteen years old. During the course of their communications, Stokes also sent Lyla two pictures of a man's erect penis. Stokes and Lyla ultimately agreed that she would come to his residence to engage in sexual activity. They arranged to meet at a local middle school. Police then apprehended Stokes in the middle school's parking lot. After he was taken into custody, Stokes admitted that he went to the middle school to meet a fifteen-year-old girl named Lyla for "foreplay," "oral sex" and possibly sexual intercourse.

During a colloquy regarding Stokes' waiver of his preliminary hearing, the circuit court raised a concern about Stokes' competency. After finding that there was reason to doubt that Stokes was competent to proceed, the court ordered a competency examination. The examiner subsequently filed a report concluding, to a reasonable degree of professional certainty, that Stokes did not "lack the substantial capacity to understand his charges or to assist his attorney in his defense." The examiner therefore concluded that Stokes was competent to stand trial. During a subsequent competency hearing, Stokes' attorney stated that Stokes was not

challenging the examiner's conclusions. Counsel further stipulated that Stokes was competent to stand trial. The court then found, based on the examiner's report, that Stokes was competent.

Stokes ultimately entered no-contest pleas to the charges of child enticement and attempted second-degree sexual assault of a child, pursuant to a plea agreement. The remaining charges were dismissed and read in. Following a lengthy plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Stokes had completed, the circuit court accepted Stokes' no-contest pleas, concluding that they were freely, intelligently and voluntarily made. The court also found, based on Stokes' stipulation, that the criminal complaint and additional discovery materials provided by the State set forth an adequate factual basis for Stokes' pleas. The court subsequently imposed concurrent sentences of five years' initial confinement and five years' extended supervision.

In June 2020, Stokes filed a postconviction motion for sentence modification based on a new factor—specifically, the COVID-19 pandemic and the spread of COVID-19 throughout the Wisconsin prison system. In his motion, Stokes alleged that COVID-19 was particularly prevalent in the institution where he was housed. He further alleged that COVID-19 posed a “grave threat” to him due to his age and preexisting health conditions, which included chronic obstructive pulmonary disease, chronic artery disease, asthma, and sleep apnea. In addition, Stokes asserted that he had already been forced to quarantine in prison on two occasions, which had “exacerbated his heart condition and bipolar disorder, necessitating the use of medical socks to control swelling in his legs and the increase of his dose of bipolar medication.” Stokes therefore asked the court to modify his sentence by converting the remainder of his initial confinement to extended supervision.

Following a hearing, the circuit court denied Stokes' motion for sentence modification. The court first stated that it was "not convinced or satisfied" that the COVID-19 pandemic qualified as a new factor for purposes of sentence modification. The court then explained, however, that even if the pandemic did constitute a new factor, the court would nevertheless exercise its discretion to deny Stokes' request for sentence modification because converting the balance of Stokes' initial confinement to extended supervision "would unduly depreciate the seriousness of the conduct that Mr. Stokes was sentenced for."

The no-merit report addresses whether Stokes' no-contest pleas were knowing, intelligent and voluntary; whether the circuit court erroneously exercised its discretion when sentencing Stokes; and whether the court erred by denying Stokes' postconviction motion for sentence modification. Having independently reviewed the record, we agree with counsel's description, analysis and conclusion that these potential issues lack arguable merit, and we therefore do not address them further.

The no-merit report does not address whether there would be any arguable basis to challenge the circuit court's competency determination. Our independent review of the record, however, confirms that such a claim would lack arguable merit. To determine legal competency, a circuit court must consider whether the defendant has the present mental capacity to understand the proceedings and to assist his or her attorney. *State v. Byrge*, 2000 WI 101, ¶31, 237 Wis. 2d 197, 614 N.W.2d 477. The court's competency determination will be reversed only if it is clearly erroneous. *Id.*, ¶45. Here, the court's competency determination was based on the examiner's report, which concluded, to a reasonable degree of professional certainty, that Stokes was competent to stand trial because he did not "lack the substantial capacity to understand his charges or to assist his attorney in his defense." Stokes did not dispute the examiner's

conclusions. Instead, Stokes stipulated that he was competent to stand trial. On this record, there would be no arguable basis to claim that the court’s competency determination was clearly erroneous.

In his response to the no-merit report, Stokes appears to contend that his postconviction attorneys were ineffective with respect to his motion for sentence modification. Specifically, he asserts that his postconviction attorneys used “old” medical records in support of the motion. He also appears to claim that his attorneys did not inform the circuit court of all of the medications that he was then taking.

Any claim that Stokes’ postconviction attorneys were ineffective on these grounds would lack arguable merit. In support of Stokes’ motion for sentence modification, his attorneys informed the circuit court of Stokes’ various health conditions and explained that, because of those conditions and Stokes’ age, COVID-19 posed a heightened risk to Stokes’ health. In its oral ruling denying Stokes’ motion, the court did not indicate that it disbelieved Stokes’ claim that his preexisting conditions put him at an increased risk of illness or death from COVID-19. Instead, the court concluded that even if the COVID-19 pandemic qualified as a new factor under the test set forth in *State v. Harbor*, 2011 WI 28, ¶40, 333 Wis. 2d 53, 797 N.W.2d 828, the court would nevertheless exercise its discretion to deny Stokes’ request for sentence modification because granting his motion would unduly depreciate the seriousness of his offenses.² On this record, there would be no arguable basis to claim that the court’s decision would have been

² Although we independently review whether a fact or set of facts constitutes a new factor for purposes of sentence modification, “[t]he determination of whether that new factor justifies sentence modification is committed to the discretion of the circuit court, and we review such decisions for erroneous exercise of discretion.” *State v. Harbor*, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828.

different had Stokes' attorneys presented the court with updated medical records or informed the court of all of the medications Stokes was taking. As such, any claim that Stokes' attorneys were ineffective on these grounds would lack arguable merit, as Stokes would be unable to establish that he was prejudiced by his attorneys' alleged errors. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (stating that a defendant must establish both deficient performance and prejudice to prevail on an ineffective assistance claim).

Stokes also contends in his response to the no-merit report that he is now taking thirty medications per day and has become "more ill" since the circuit court denied his motion for sentence modification. Stokes' reliance on these factual allegations is misplaced. Any new factual developments that have occurred since the court denied Stokes' motion for sentence modification were not before the court when it considered his motion. Consequently, such factual developments would not create any arguable basis to claim that the court erred by denying Stokes' motion. Stated differently, there would be no arguable merit to a claim that the court erred by denying Stokes' motion under review here based on facts that were not yet in existence when the court made its decision.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorneys Susan Alesia and Laura Force are relieved of further representing Lee Stokes 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