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DISTRICT IV

July 8, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Dane County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP252-CRNM State of Wisconsin v. McKayla R. Tracy (L.C. # 2018CF2260)

Before Blanchard, P.J., Kloppenburg, and Nashold, 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).

Attorneys Megan Elizabeth Lyneis and Frances Reynolds Colbert, appointed counsel for McKayla Tracy, have filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Tracy

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

was sent a copy of the report and filed a response, and counsel then filed a supplemental no-merit report. Upon consideration of the report, the response, the supplemental report, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

The State charged Tracy and two co-defendants with the felony murder of A.B. as party to a crime, identifying the underlying crime as substantial battery to A.B.[2] According to the complaint, while Tracy was at A.B.'s residence, she called some male friends, including the co-defendants, and told them that A.B. was cheating on her and had hit her. The co-defendants drove to A.B.'s residence, and Tracy led them inside. With Tracy's assistance, they broke into A.B.'s locked bedroom, and they then proceeded to severely beat A.B. in Tracy's presence. A.B. died a short time later.

Tracy pled no contest to the felony murder charge. The circuit court accepted Tracy's plea and sentenced her to a twelve-year term of imprisonment consisting of seven years of initial confinement and five years of extended supervision.

The no-merit report addresses whether Tracy's no-contest plea was knowing, intelligent, and voluntary. We agree with counsel that there is no arguable merit to this issue. With two possible exceptions that we discuss below, the circuit court's plea colloquy, including the court's references to the plea questionnaire and waiver of rights form, complied with the requirements of WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906,

[2] We use initials when referring to the victim to protect his and his family's identity.

relating to the nature of the charge, the constitutional rights Tracy was waiving, and other matters.

The first exception is that the court did not personally establish that it was not bound by any plea agreement, including any sentencing recommendation that was part of an agreement. However, there was no plea agreement in this case. Further, Tracy acknowledges in her response to the no-merit report that she understood that the court would not be bound by a plea agreement.

The circuit court also did not expressly inform Tracy of the maximum penalty when Tracy entered her plea. However, the court had already informed Tracy of the maximum penalty at a previous plea hearing, and Tracy stated at that time that she understood the maximum penalty she faced.[3] Additionally, the plea form that Tracy signed indicated that she understood the maximum penalty. Finally, Tracy does not now claim in her response to the no-merit report that she was unaware of the maximum penalty.

Tracy's response includes a number of assertions that relate to her plea. We conclude that these assertions raise three potential issues. We now discuss each of those issues and explain why each lacks arguable merit.

The first issue is whether there was a sufficient factual basis for Tracy's plea with respect to whether Tracy intentionally aided and abetted a substantial battery and whether she intended to cause bodily harm to the victim. The circuit court may fulfill its duty to establish a factual basis for a plea through a variety of methods, including by reference to the complaint allegations.

[3] At the previous plea hearing, Tracy sought to enter a guilty plea, but the court did not accept the plea because the parties could not agree at that time on a charging issue and the factual basis for the plea.

State v. Black, 2001 WI 31, ¶¶11-14, 242 Wis. 2d 126, 624 N.W.2d 363. Here, during the plea hearing, Tracy admitted to the complaint allegations, and those allegations support a reasonable inference that she had the requisite intent. Further, Tracy admitted that her actions were sufficient to show that she intended for her co-defendants to commit a substantial battery. Nothing more was required to establish a sufficient factual basis for intent because intent maybe be inferred from conduct. *See* ***State v. Payette***, 2008 WI App 106, ¶23, 313 Wis. 2d 39, 756 N.W.2d 423.

The second issue that Tracy's response raises is whether harassment of Tracy's friend or Tracy's mother by the victim's family provides a basis for Tracy to withdraw her plea as involuntary. Tracy alleges that the victim's mother harassed her friend online and came to her friend's work, causing her friend to consider seeking a restraining order. Tracy further alleges that members of the victim's family harassed her mother in a similar fashion online. In the supplemental no-merit report, counsel states that an investigation into Tracy's harassment allegations did not reveal any evidence of threats against Tracy, her friend, or her mother. Counsel concludes that there is no evidence of threats that rose to the level of coercion or inducement necessary to support a claim that Tracy's plea was involuntary.[4] We conclude that even if Tracy's allegations of harassment are true, and even if that harassment played some role in Tracy's decision to enter her plea, the harassment would not be sufficient to argue that Tracy's plea was involuntary. *See* ***Verser v. State***, 85 Wis. 2d 319, 329, 270 N.W.2d 241 (Ct. App. 1978) ("Unless the threats coerce or induce the plea to an extent that deprives the accused of

[4] During the plea hearing, Tracy agreed that she had not been threatened with anything to give up her rights to a trial and enter her plea.

understanding and free will, they provide no basis for rejection of the guilty plea or later withdrawal.").

The third issue that Tracy's response raises is whether her trial counsel was ineffective by failing to explain the constitutional rights she was waiving, resulting in a plea that was not knowing and intelligent. Tracy alleges that her trial counsel did not explain certain details regarding her trial rights, including that she would have been able to testify specifically as to her intent. She alleges that appellate counsel provided her with a more detailed explanation of her rights and that, if trial counsel had provided the same explanation, she would not have entered her plea.

To show ineffective assistance of counsel, a defendant must establish both (1) that counsel's performance was deficient; and (2) that the defendant was prejudiced by counsel's deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "[t]he defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

A defendant is not entitled to a hearing on a postconviction motion seeking plea withdrawal based on ineffective assistance of counsel if the defendant "fails to allege sufficient facts in [the] motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (quoted source omitted). To sufficiently allege prejudice in this context, the defendant "must allege facts to show 'that there is a reasonable

probability that, but for the counsel's errors, [the defendant] would not have pleaded guilty [or no contest] and would have insisted on going to trial." ***Id.*** at 312 (quoted source omitted.)

Here, we conclude that Tracy's allegations are not sufficient under these legal standards to support a non-frivolous motion for plea withdrawal based on trial counsel's alleged failure to explain the constitutional rights that Tracy was waiving. This is particularly so considering that, during Tracy's plea colloquy with the circuit court, the court informed Tracy of her constitutional rights, and Tracy agreed that she understood those rights. The plea form that Tracy signed also indicated that she understood each of the constitutional rights that she was waiving, and Tracy stated during the plea hearing that she had gone over those rights with her attorney.

We see no other arguable basis on which Tracy might challenge her plea. We turn to sentencing.

Counsel concludes in the no-merit report that there is no arguable basis to challenge the circuit court's exercise of its sentencing discretion. We agree. The court considered the required sentencing factors along with other relevant factors, and the court did not rely on any inappropriate factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence that Tracy received was within the maximum, and Tracy could not make a non-frivolous argument that her sentence was unduly harsh or so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no other basis on which Tracy could challenge her sentence.

Our review of the record discloses no other potential issues for appeal, and there are no further assertions in Tracy's response that raise any issues of arguable merit.

Therefore,

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

IT IS FURTHER ORDERED that Attorneys Megan Elizabeth Lyneis and Frances Reynolds Colbert are relieved of any further representation of McKayla Tracy 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