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DISTRICT III

October 4, 2022

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Circuit Court Judge
Electronic Notice

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

2021AP2097-CRNM State of Wisconsin v. David M. Johnson
2021AP2098-CRNM (L. C. Nos. 2016CF51, 2016CF70, 2016CF588)
2021AP2099-CRNM

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).

In these consolidated appeals, counsel for David Johnson has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),[1] concluding that no grounds exist to challenge Johnson's convictions for multiple criminal offenses or to challenge the circuit court's denial of Johnson's postconviction motion for plea withdrawal. Johnson has filed a response to the no-merit report, arguing that the plea colloquy was defective because the court did not ascertain that Johnson understood the nature of the crimes to which he pled.

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

Upon our independent review of the records, 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. As explained below, we modify Johnson's judgments of conviction in Chippewa County case Nos. 2016CF51 and 2016CF70, in accordance with a postconviction order entered by the circuit court on November 13, 2018. We summarily affirm the judgments in those cases as modified, and we summarily affirm the judgment in Chippewa County case No. 2016CF588 and the order denying postconviction relief. *See* WIS. STAT. RULE 809.21.

In January 2016, the State filed a criminal complaint in Chippewa County case No. 2016CF51 charging Johnson with one count of sexual exploitation of a child. The complaint alleged that Johnson had asked a thirteen-year-old girl, K.K.J., to take naked pictures of herself. Johnson specifically requested photographs of K.K.J.'s breasts and buttocks and also photographs of her in a "doggie style" position. K.K.J. told law enforcement that she took approximately twenty-six pictures of herself using Johnson's phone, and in exchange Johnson paid her $100. It is undisputed that K.K.J. is Johnson's daughter.

In February 2016, the State filed a criminal complaint in Chippewa County case No. 2016CF70 charging Johnson with one count of repeated sexual assault of a child and eight counts of possession of child pornography. The complaint in case No. 2016CF70 alleged that law enforcement had discovered eight nude or partially nude photographs of K.R.G., a minor, during a search of Johnson's cell phone. Police made contact with K.R.G., who reported that she and Johnson had sexual intercourse approximately ten to fifteen times, beginning when K.R.G. was fourteen years old.

During a hearing in March 2016, Johnson's attorney in both Chippewa County cases raised an issue regarding Johnson's competency. The circuit court therefore ordered a competency evaluation. In May 2016, the examining psychologist submitted a report opining that Johnson was competent to proceed, even though Johnson suffered from a major depressive disorder and had sustained a traumatic brain injury as a child. After the psychologist submitted his report, the court failed to hold a competency hearing or make a formal determination regarding Johnson's competency.

Thereafter, the State filed a third criminal complaint against Johnson in Chippewa County case No. 2016CF588. The complaint alleged that in November 2016, while Johnson was released on bond in case Nos. 2016CF51 and 2016CF70, an officer found Johnson's vehicle abandoned in a ditch and followed a single set of footprints in the snow from the vehicle to Johnson's residence. The officer made contact with Johnson, who exhibited indicia of intoxication and admitted consuming alcohol. A subsequent test of Johnson's blood revealed a blood alcohol concentration of 0.202. Based on these events, the State charged Johnson with felony bail jumping, third-offense operating a motor vehicle while intoxicated (OWI), third-offense operating a motor vehicle with a prohibited alcohol concentration, operating a motor vehicle while revoked, and failure to install an ignition interlock device.

The parties ultimately reached a plea agreement. Under the agreement, Johnson pled no contest to a single count of causing mental harm to a child in case No. 2016CF51, amended from sexual exploitation of a child. In case No. 2016CF70, the State amended the Information to remove the repeated sexual assault of a child charge and replace it with one count of third-degree sexual assault and one count of child enticement. Johnson pled no contest to the third-degree

sexual assault and child enticement charges, and the eight child pornography charges in case No. 2016CF70 were dismissed and read in. Johnson also pled no contest to the third-offense OWI charge in case No. 2016CF588, and the remaining counts in that case were dismissed and read in. The plea agreement further provided that various uncharged matters would not be prosecuted. In addition, the plea agreement provided that the parties would jointly request a presentence investigation report and that both sides would be free to argue at sentencing.

The circuit court conducted a personal colloquy with Johnson regarding his pleas, which was supplemented by a signed plea questionnaire and waiver of rights form. Following the colloquy, the court accepted Johnson's pleas, concluding that they were knowingly, intelligently, and voluntarily entered. Johnson stipulated that there was an adequate factual basis for his pleas, and the court found that a factual basis for the pleas existed.

The circuit court subsequently imposed concurrent sentences in case No. 2016CF70 totaling ten years of initial confinement followed by five years of extended supervision. In case No. 2016CF51, the court sentenced Johnson to five years of initial confinement followed by five years of extended supervision, consecutive to his sentences in case No. 2016CF70. On the third-offense OWI charge in case No. 2016CF588, the court sentenced Johnson to 110 days in jail, concurrent to his sentence in case No. 2016CF51.

Johnson filed a postconviction motion seeking to amend his conditions of extended supervision in case Nos. 2016CF51 and 2016CF70 to allow him to have contact with his minor son, A.J. The circuit court granted Johnson's motion, and amended judgments of conviction were entered in case Nos. 2016CF51 and 2016CF70 permitting contact with A.J. Johnson then filed a supplemental postconviction motion in case Nos. 2016CF51 and 2016CF70 seeking to

amend his conditions of extended supervision to permit contact with two of his other minor children, J.J. and G.J. The court granted that motion in an order dated November 13, 2018, and ordered the clerk of court to "prepare amended judgments of conviction in Case Nos. 16 CF 51 and 16 CF 70." The appellate records do not, however, contain amended judgments of conviction permitting contact with J.J. and G.J.

Johnson's appointed attorney subsequently filed a no-merit report, seeking to withdraw as appellate counsel. On August 11, 2021, this court issued an order questioning whether there would be arguable merit to a claim for plea withdrawal based on the circuit court's failure to make a formal finding that Johnson was competent to proceed. We therefore ordered appellate counsel to file a supplemental no-merit report explaining, "with supporting documentation, if available, the proceedings surrounding Johnson's competency, and to further address why it would be frivolous to challenge Johnson's pleas based on a lack of competency." Rather than filing a supplemental no-merit report, appellate counsel filed a motion to withdraw the no-merit report, dismiss the no-merit appeal, and extend the time for Johnson to file a postconviction motion for plea withdrawal. We granted that motion in an order dated August 20, 2021.

Johnson then filed a postconviction motion seeking to withdraw his pleas in case Nos. 2016CF51 and 2016CF70. The motion did not, however, assert that Johnson should be permitted to withdraw his pleas because he was not competent to enter them, nor did the motion allege that Johnson's pleas were invalid because the circuit court never made a formal determination regarding his competency. Instead, Johnson asserted that his pleas were not knowing, intelligent, and voluntary because he did not understand when he entered them that his daughter, K.K.J., was the victim of the amended charge of causing mental harm to a child in case

No. 2016CF51. Johnson contended that he "would not have [pled] to that charge and accepted the plea agreement" had he known that K.K.J. was the victim of that offense.

The circuit court held an evidentiary hearing on Johnson's motion for plea withdrawal, at which both Johnson and his trial attorney testified. After considering the witnesses' testimony, the court denied Johnson's motion. The court found Johnson's testimony that he did not understand that K.K.J. was the victim of the amended charge in case No. 2016CF51 to be incredible. Instead, the court credited trial counsel's testimony that counsel had explained the charges to Johnson and that Johnson understood the charges to which he pled.

Appellate counsel has now filed a second no-merit report, asserting that no grounds exist to challenge Johnson's convictions or the order denying his postconviction motion for plea withdrawal. As an initial matter, the no-merit report addresses whether the circuit court conducted an adequate plea colloquy before accepting Johnson's no-contest pleas. We agree with counsel's description, analysis, and conclusion that there would be no arguable merit to a claim for plea withdrawal based upon any defects in the plea colloquy.

In his response to the no-merit report, Johnson contends that the plea colloquy was defective because the circuit court failed to establish Johnson's understanding of the crimes to which he pled, as required by ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The plea hearing transcript shows, however, that during the plea colloquy, the court expressly referred to Johnson's signed plea questionnaire and waiver of rights form, which contained an attachment listing the elements of each of the offenses to which Johnson pled. The court confirmed that Johnson had gone over those elements with his trial attorney "line by line."

In any event, in order to obtain an evidentiary hearing based on a claimed defect in the plea colloquy, a defendant must allege that he or she "did not know or understand the information that should have been provided at the plea hearing." ***Id.***, ¶39. In his response to the no-merit report, Johnson does not allege that he did not understand the nature of the charges to which he pled. He merely asserts that the circuit court's colloquy did not adequately establish his understanding of the nature of the charges. Furthermore, the court held an evidentiary hearing on Johnson's motion to withdraw his no-contest pleas, during which trial counsel expressly testified that: (1) he reviewed the plea questionnaire and waiver of rights form with Johnson before Johnson entered his pleas, including the elements of the charges; and (2) he had no doubt that Johnson understood the plea questionnaire and waiver of rights form. The court found trial counsel's testimony to be credible, and based on that testimony, the court specifically found that Johnson "understood the elements and that the plea was voluntarily made." Under these circumstances, there would be no arguable merit to a claim that Johnson is entitled to withdraw his pleas because the court did not adequately explain the nature of the charges during the plea colloquy.[2]

[2] In his response to the no-merit report, Johnson also asserts that his trial attorney was constitutionally ineffective by allowing Johnson to enter no-contest pleas without objecting to the circuit court's failure to ensure that Johnson understood the nature of the crimes. We reject this argument because, as discussed above, the appellate records do not support an arguably meritorious claim that Johnson did not understand the nature of the crimes to which he pled. As such, Johnson cannot show that he was prejudiced by his trial attorney's failure to object to the court's acceptance of Johnson's pleas. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (holding that to prevail on an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense); ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994) (holding that a defendant is not prejudiced by counsel's failure to raise a legal challenge that would have been properly denied).

The no-merit report also addresses whether there would be arguable merit to a claim that Johnson was not competent to enter his pleas. As discussed above, after appellate counsel filed the initial no-merit report in these matters, we asked counsel to file a supplemental no-merit report explaining why it would be frivolous to challenge Johnson's pleas based upon a lack of competency. Instead of filing a supplemental no-merit report, however, counsel moved to withdraw the no-merit report and filed a postconviction motion for plea withdrawal without challenging Johnson's competency to enter his pleas.

In the current no-merit report, appellate counsel asserts that after this court gave Johnson the opportunity to file a motion for plea withdrawal based upon his lack of competence, Johnson instead "chose only to challenge his plea based in part on his mental condition" by arguing that he did not understand that his daughter was the victim of one of the offenses to which he pled. Stated differently, the no-merit report asserts that Johnson "decided … not to challenge his competency but [instead] to challenge the validity of his pleas" on other grounds. In his response to the no-merit report, Johnson does not dispute appellate counsel's assertion that Johnson chose not to challenge his competency to enter his pleas. In addition, Johnson does not assert in his response to the no-merit report that he was not, in fact, competent to enter no-contest pleas.

Under these circumstances, we conclude that Johnson has forfeited any argument that his pleas are invalid because he was not competent to enter them. Moreover, although the circuit court never made an express determination regarding Johnson's competency, we note that the examining psychologist filed a report opining that Johnson was competent, and there is no evidence in the record to dispute the psychologist's conclusion in that regard.

The no-merit report also addresses whether the circuit court erred by denying Johnson's postconviction motion for plea withdrawal and whether the court erroneously exercised its sentencing discretion. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit. Accordingly, we do not address them further.[3]

Finally, as discussed above, on November 13, 2018, the circuit court granted Johnson's supplemental postconviction motion to modify his conditions of extended supervision in case Nos. 2016CF51 and 2016CF70 to permit contact with J.J. and G.J. The court ordered the clerk of court to prepare amended judgments of conviction in those cases. No such amended judgments are present in the appellate records, however. Because this omission appears to be the result of an administrative oversight, upon remittitur, the court shall enter amended judgments of conviction in case Nos. 2016CF51 and 2016CF70 modifying Johnson's conditions of extended supervision in those cases to permit contact with J.J. and G.J., consistent with the court's November 13, 2018 order.

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

Therefore,

IT IS ORDERED that the judgments in Chippewa County case Nos. 2016CF51 and 2016CF70 are modified and, as modified, are summarily affirmed; the judgment in

[3] We note that Johnson's valid no-contest pleas forfeited his right to raise other nonjurisdictional defects and defenses, including claimed violations of his constitutional rights. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *see also* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Chippewa County case No. 2016CF588 is summarily affirmed; and the order denying Johnson's postconviction motion for plea withdrawal is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved of his obligation to further represent David Johnson in these matters. *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