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DISTRICT I

October 25, 2022

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

2021AP442-CRNM State of Wisconsin v. Erick V. Rodgers (L.C. # 2019CF4373)
2021AP1757-CRNM State of Wisconsin v. Erick V. Rodgers (L.C. # 2019CF5006)

Before Donald, 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).

Erick V. Rodgers pled guilty to two counts of second-degree sexual assault of a child. As to each count, he faced maximum penalties of a $100,000 fine, forty years of imprisonment, or both. *See* WIS. STAT. §§ 948.02(2), 939.50(3)(c) (2019-20).[1] The circuit court imposed two concurrent forty-year terms of imprisonment, each bifurcated as twenty-five years of initial confinement and fifteen years of extended supervision. The circuit court awarded Rodgers the

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

246 days of sentence credit that he requested and found that he did not owe any restitution. Rodgers appeals.

Attorney Bradley J. Lochowicz, appellate counsel for Rodgers, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. In that report, Attorney Lochowicz addressed whether there would be arguable merit to a claim that Rodgers did not knowingly, intelligently, and voluntarily enter his guilty pleas and whether the circuit court properly exercised its sentencing discretion. Rodgers filed a response, and Attorney Lochowicz filed a supplemental no-merit report in reply. Following consideration of the no-merit reports and Rodgers's response, and upon an independent review of the records as mandated by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint filed in Milwaukee County Circuit Court case No. 2019CF4373, which underlies appeal No. 2021AP442-CRNM, Rodgers's fifteen-year-old biological female relative, A.R., reported on April 17, 2019, that Rodgers had sexually assaulted her. According to A.R., she had been estranged from Rodgers for several years, but in the spring of 2019, she had contact with him through social media and then met with him three times at her home. During their interaction on April 15, 2019, he touched her vagina. The next day, he returned to her home, put his mouth on her vaginal area, put his finger in her anus, and engaged in penis to vagina intercourse with her. Investigators retrieved clothing and a washcloth from A.R.'s home on April 18, 2019, and A.R. also submitted to a sexual assault exam. DNA testing revealed that Rodgers was the source of the sperm found on A.R.'s underwear and washcloth. Testing further revealed that A.R.'s vaginal swabs and *mons pubis* swabs contained a two-person DNA mixture that included a male individual with a DNA profile consistent with Rodgers's.

DNA analysis determined that the probability of randomly selecting a male with the profile detected on the vaginal swabs was one in one trillion and the probability of randomly selecting a male with the DNA profile detected on the *mons pubis* swabs was one in 449 billion. The State charged Rodgers with two counts of second-degree sexual assault of a child younger than sixteen years old.

According to the criminal complaint in Milwaukee County Circuit Court case No. 2019CF5006, which underlies appeal No. 2021AP1757-CRNM, Rodgers's twelve-year-old biological female relative, Z.R., reported in October 2019 that Rodgers had sexually assaulted her on multiple occasions during the previous three years. Z.R. described two occasions when she awoke because Rodgers had his mouth on her genital area and a third occasion when she awoke because Rodgers was touching her thighs. The State charged Rodgers with one count of first-degree sexual assault of a child younger than thirteen years old.

Rodgers entered pleas of not guilty and special pleas of not guilty by reason of mental disease or defect. A court-appointed psychologist examined him in connection with his special pleas and filed a report stating that she could not support them. Rodgers then decided to resolve the charges with a plea agreement. Pursuant to its terms, the State moved to dismiss and read in one of the two counts of second-degree sexual assault of a child alleged in case No. 2019CF4373. As to case No. 2019CF5006, the State filed an amended information charging Rodgers with one count of second-degree sexual assault of a child. Rodgers then pled guilty to the two counts of second-degree sexual assault of a child, and the State agreed to recommend a global disposition of twelve to fifteen years of initial confinement and ten years of extended supervision. The circuit court accepted Rodgers's guilty pleas, and the matters proceeded to sentencing.

We begin by considering an issue that appellate counsel does not discuss, namely, whether Rodgers could raise an arguably meritorious claim that he was not competent to proceed with the criminal litigation. A court commissioner referred Rodgers for a competency evaluation early in the proceedings at his trial counsel's request. The examining psychologist, Dr. Deborah L. Collins, filed a report stating that Rodgers displayed both "the capacity to understand the essentials of pleas of guilty and not guilty" and "the capacity to acquire information about pleas of no contest and not guilty by reason of mental disease or defect." He also displayed familiarity with the concept of plea bargaining and with the functions of the prosecutor, the defense attorney, the judge, and the jury. He was able to discuss the steps already taken in his case and the ways that he might assist his lawyer. Dr. Collins noted that Rodgers had a history of depression, anxiety, and emotional adjustment problems, but his statements "were consistently coherent and relevant," and he was "appropriately concerned about his legal predicament." Based on his "performance strengths," she concluded "to a reasonable degree of professional certainty that Mr. Rodgers is presently competent to proceed." Neither the State, nor Rodgers disputed her conclusions. The circuit court found that Rodgers was competent to proceed.

"[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. This court will uphold a circuit court's competency determination unless that determination is clearly erroneous. *See* ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the psychologist's report and the standard of review, any further proceedings in regard to Rodgers's competency would lack arguable merit.

We next consider whether Rodgers could pursue an arguably meritorious claim that he did not knowingly, intelligently, and voluntarily enter his guilty pleas. We conclude that he could not do so. The circuit court determined that, although Rodgers was thirty-five years old, he had not completed the ninth grade, and the circuit court therefore, questioned him near the outset of the plea hearing about his understanding of the proceedings. Rodgers told the circuit court that his reading skills were "okay," and in addition, he confirmed that his trial counsel had read the criminal complaints to him and that he understood them. Rodgers also told the circuit court that he had signed the plea questionnaire and waiver of rights forms only after his trial counsel read those documents to him and answered his questions about them. The circuit court found that Rodgers understood the forms and their attachments. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶37-38, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a colloquy with Rodgers that fully complied with the circuit court's obligations when accepting a plea other than not guilty. *See* ***id.***, ¶23; *see also* WIS. STAT. § 971.08. The records—including the plea questionnaire and waiver of rights forms and their addenda, the attached jury instructions defining the elements of second-degree sexual assault of a child, and the plea hearing transcript—demonstrate that Rodgers entered his guilty pleas knowingly, intelligently, and voluntarily. *See* ***Pegeese***, 387 Wis. 2d 119, ¶21. Further pursuit of this issue would lack arguable merit.[2]

[2] No arguably meritorious basis exists to disturb Rodgers's decision to abandon his special pleas and to plead guilty instead. *See* ***State v. Francis***, 2005 WI App 161, ¶¶26-27, 285 Wis. 2d 451, 701 N.W.2d 632 (holding that a defendant who is apparently competent may withdraw a plea of not guilty by reason of mental disease or defect by entering a valid guilty plea).

We next consider whether Rodgers could pursue an arguably meritorious challenge to the sentencing proceedings. In this regard, we have independently considered whether Rodgers could make an arguably meritorious claim that the State breached the plea agreement at sentencing when, in response to requests for maximum sentences urged by the victims' guardians, the prosecutor commented: "I think the State's recommendation is appropriate. But again, the victims can have their own opinions and I'm glad they were able to express them and, of course, it's ultimately up to Your Honor."[3]

"A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement[,]" ***State v. Howard***, 2001 WI App 137, ¶13, 246 Wis. 2d 475, 630 N.W.2d 244, and "'[e]nd runs' around a plea agreement are prohibited. 'The State may not accomplish by indirect means what it promised not to do directly[.]'" ***State v. Williams***, 2002 WI 1, ¶42, 249 Wis. 2d 492, 637 N.W.2d 733 (citation and footnote omitted). We are satisfied that Rodgers could not pursue an arguably meritorious claim that the prosecutor's remark about the victims' requests constituted an "end run" around the plea agreement. *See* ***id.*** Because victims' rights are an important component of the criminal justice system, the prosecutor may acknowledge and comment upon the victim's wishes, and the prosecutor's reference to those wishes "will not automatically operate as a breach of the plea agreement." *See* ***State v. Bokenyi***, 2014 WI 61, ¶¶63-64, 355 Wis. 2d 28, 848 N.W.2d 759. The prosecutor's comment here was thus not precluded, and the prosecutor additionally reiterated that the State's recommendation—for twelve to fifteen years of initial confinement and ten years of extended supervision—was in fact

[3] The parent, guardian, or legal custodian of a child victim is also a victim. *See* WIS. STAT. § 950.02(1), (4)(a)2.

the appropriate disposition. *Cf.* ***State v. Stewart***, 2013 WI App 86, ¶19, 349 Wis. 2d 385, 836 N.W.2d 456 (observing that a prosecutor may, but is not required, to disavow a victim's recommendation when it differs from the plea agreement).

We next conclude that Rodgers could not pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that punishment and protection of the community were the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The circuit court's discussion included the mandatory sentencing factors of "the gravity of the offense[s], the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The aggregate forty-year term of imprisonment that the circuit court imposed was significantly less than the aggregate eighty years of imprisonment and $200,000 in fines that Rodgers faced upon conviction of the two offenses here. Accordingly, Rodgers cannot mount an arguably meritorious claim that his sentences are excessive or shocking. *See* ***State v. Mursal***, 2013 WI App 125, ¶¶24, 26, 351 Wis. 2d 180, 839 N.W.2d 173. We conclude that a challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

We also agree with appellate counsel that Rodgers could not pursue an arguably meritorious challenge to the circuit court's determination that he is ineligible for the Wisconsin substance abuse program and the challenge incarceration program. A circuit court imposing a bifurcated sentence normally exercises its sentencing discretion when determining a defendant's

eligibility for these programs. *See* WIS. STAT. § 973.01(3g)-(3m).[4] However, a person is statutorily disqualified from participating in either program if serving a sentence for a crime specified in WIS. STAT. § 948.02. *See* WIS. STAT. §§ 302.045(2)(c), 302.05(3)(a)1. Accordingly, further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Rodgers raised many claims in his response to the no-merit report, and his appellate counsel filed a supplemental no-merit report addressing Rodgers's allegations. To ensure that Rodgers understands the outcome of these proceedings, we will also discuss the concerns that he emphasizes.

Rodgers asserts that he was denied the right to confront the witnesses against him because the child victims did not appear for sentencing. Rodgers's guilty pleas, however, constituted a waiver of the right to confront his accusers. *See* ***State v. Albright***, 96 Wis. 2d 122, 130, 291 N.W.2d 487 (1980). Further pursuit of this claim would be frivolous within the meaning of ***Anders***.

Rodgers next asserts that, because he received sentences harsher than the aggregate term recommended by the prosecutor, the circuit court was biased against him. A reviewing court presumes that a judge has acted fairly, impartially, and without bias. *See* ***Miller v. Carroll***, 2020 WI 56, ¶16, 392 Wis. 2d 49, 944 N.W.2d 542. A party asserting bias must rebut that presumption by a preponderance of the evidence. *See* ***id.*** The records do not rebut the presumption here. Indeed, "judicial rulings alone almost never constitute a valid basis for a bias

[4] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05, 973.01(3g).

or partiality motion." ***Liteky v. United States***, 510 U.S. 540, 555 (1994). As we have already explained, the records show that the circuit court considered appropriate factors and properly exercised its sentencing discretion when imposing Rodgers's sentences. Further pursuit of a claim that the circuit court was biased would be frivolous within the meaning of ***Anders***.

Rodgers next asserts that the prosecutor and A.R.'s grandmother misstated the facts of the crimes during the sentencing proceeding, there was "no proof" of the facts alleged against him, and the circuit court "never looked into [it] or asked." The factual allegations that Rodgers points to, however, are reflected in the criminal complaints. Rodgers admitted at the plea hearing that the complaint in case No. 2019CF4373 accurately described his criminal activity; he disputed only the allegation that he called A.R. to apologize after assaulting her on April 15, 2019. Similarly, in regard to case No. 2019CF5006, Rodgers told the circuit court during the guilty plea colloquy that he stipulated to the facts in the criminal complaint. Further proof of the allegations was not required. "[T]he circuit court is not required to satisfy the defendant that he or she committed the crime charged. Indeed, the defendant evidenced his or her own satisfaction by entering a plea and thereby waiving his or her right to a jury trial." ***State v. Black***, 2001 WI 31, ¶12, 242 Wis. 2d 126, 624 N.W.2d 363. There is no merit to this issue.

Rodgers also suggests that his trial counsel was ineffective in multiple ways. A defendant claiming ineffective assistance of counsel is required to show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show that counsel's actions or omissions "fell below an objective standard of reasonableness." *See* ***id.*** at 688. To demonstrate prejudice, "[t]he 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. If the defendant fails to satisfy one prong of the analysis, a reviewing court need not address the other. *See* ***id.*** at 697.

Rodgers states that his trial counsel was ineffective for advising him that a trial "was not a good idea" and might lead to maximum sentences. His concerns do not suggest an arguably meritorious claim that trial counsel performed deficiently. "Once the lawyer has concluded that it is in the best interests of the accused to enter a guilty plea, [the lawyer] should use reasonable persuasion to guide the client to a sound decision." ***State v. Rock***, 92 Wis. 2d 554, 564, 285 N.W.2d 739 (1979) (citation omitted). Further pursuit of this claim would be frivolous within the meaning of ***Anders***.

Rodgers next asserts that his trial counsel did not say anything in his defense at sentencing and did not assist Rodgers in speaking on his own behalf. The sentencing transcript refutes these assertions. It shows that Rodgers personally told the circuit court that he wished only to apologize and did not otherwise want to speak at sentencing. Trial counsel, however, did speak and discussed, among other matters, Rodgers's remorse, the rehabilitative steps that Rodgers planned to take, and his employment prospects. Trial counsel also emphasized that, according to the findings in the presentence investigation report, Rodgers was unlikely to reoffend or to contact his family in the future. Further pursuit of this claim would be frivolous within the meaning of ***Anders***.

Rodgers next complains that his trial counsel did not explore the ways in which his medications affected his judgment, did not sufficiently consider the statements that he made to trial counsel denying certain aspects of A.R.'s allegations, and did not question the statements

that the witnesses provided to the police. We understand these complaints as a broad allegation that trial counsel did not properly investigate these cases.

A lawyer is required to pursue only a reasonable investigation. *See* ***Strickland***, 466 U.S. at 690-91. The records here show that trial counsel ensured that Rodgers had two psychological examinations, one to determine whether he could assist in his own defense and the other to determine whether his mental health could serve as a defense to his crimes. Nothing available to us suggests that these investigative steps were unreasonable or inadequate to explore how his mental health affected his judgment. As to trial counsel's response to statements made by A.R., by the witnesses, and by Rodgers himself, the records do not suggest any basis for us to conclude that Rodgers suffered prejudice as a consequence of his trial counsel's investigative choices. Absent any indication of prejudice, we need not consider whether trial counsel's performance was deficient. *See* ***State v. Kuhn***, 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993). Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Finally, Rodgers complains that his trial counsel did not provide transcripts. A defendant normally obtains transcripts in a criminal case after conviction and sentencing. *See* WIS. STAT. RULE 809.30(2)(e)-(f). Nothing in the records here suggest that the defense required transcripts prior to sentencing in these matters. Accordingly, no arguably meritorious claims exist that trial counsel performed deficiently by not obtaining transcripts or that Rodgers suffered any prejudice as a result.

Our independent review of the records does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Bradley J. Lochowicz is relieved of any further representation of Erick V. Rodgers. *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