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DISTRICT I

November 22, 2022

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

2020AP998-CRNM State of Wisconsin v. Dion D. Carroll (L.C. # 2017CF4105)

Before Brash, C.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).

Dion D. Carroll appeals from a judgment, entered on his guilty plea, convicting him on one count of physical abuse of a child by reckless causation of great bodily harm. Appellate counsel has filed a no-merit report.[1] *See* ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[2] Carroll has filed a response. Upon this court's independent

[1] The no-merit report was filed by Attorney Jorge R. Fragoso, who has been replaced by Attorney David Malkus as Carroll's appellate counsel.

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

review of the record, as mandated by ***Anders***, counsel's report, and Carroll's response, we conclude there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm the judgment.

BACKGROUND

On September 2, 2017, Milwaukee Police were dispatched to Children's Hospital pursuant to a child abuse complaint. A three-year-old female, D.C., had been admitted for second- and third-degree burns on the lower half of her body. Carroll, D.C.'s father, was interviewed. According to the criminal complaint, Carroll reported he gave D.C. a bath the night before. He had finished washing her and went to get a towel when he heard the water turn on and D.C. scream. He returned to the bathroom and saw that D.C. had turned on the hot water and fallen in the bathtub. Carroll said he dried her off and looked at her body, but she seemed fine. The next morning, D.C. seemed to have injuries, so he asked his sister to take D.C. to the hospital. Later, when interviewed for the presentence investigation report, Carroll said that D.C. had spilled a cup of hot tea on herself, which he had made and left on the floor.

Shantrice Simon, Carroll's sister,[3] told police that D.C. and Carroll were living with her. When she arrived home the previous day at 10 p.m., D.C. was asleep in Carroll's bedroom. The next morning, Simon heard Carroll's girlfriend telling him to take D.C. to the hospital because D.C. could not walk. Simon knocked on Carroll's bedroom door and asked what was going on. Carroll partially opened the door and told her, "Nuttin. I'm good. Everything straight." Simon pressed, and Carroll said that D.C. had just burned herself. Simon pushed open the door and saw

[3] Carroll and Simon are not biologically related, but they referred to each other as siblings.

D.C., sitting on a toilet-training chair; Simon could see blisters with bubbles on the bottom and tops of D.C.'s feet. Simon picked D.C. up, wrapped her in a coat, and took her to St. Joseph's Hospital, which transferred D.C. to Children's Hospital via ambulance because St. Joseph's did not believe it could adequately treat D.C. given the severity of her burns.

Dr. Hillary Petska reviewed photos of D.C.'s injuries. Petska told police that D.C.'s injuries were not consistent with Carroll's statement of events—there were no splash marks—but the injuries were "highly concerning for an intentional submersion burn" and that D.C. would have had to be held for a period of time. There was also patterned bruising on D.C.'s back and a loop mark on D.C.'s chest, both assessed for child abuse.

Carroll was interviewed again on September 3, 2017. He said he was giving D.C. a bath when she urinated and defecated in the bathtub. He took her out of the tub, drained the water, cleaned the tub, and gave her another bath. He then took her out of the water again and left the room. He surmised that D.C. must have turned on the hot water and fallen into the tub and, further, that the drain must have closed. When asked why he failed to seek medical attention for D.C., Carroll denied seeing the burns until the next morning. Later in the interview, Carroll said the burns did not look bad at all. He explained that he did not know if he had blacked out, but he sensed something went wrong because D.C. told him she wanted to die. He told her "no" and went to get a towel, at which point she must have turned on the hot water. When asked again about not taking D.C. to the hospital, Carroll said that neither he nor his girlfriend had a car.

The State charged Carroll with one count of physical abuse of a child by reckless causation of great bodily harm and one count of child neglect resulting in bodily harm. Carroll filed a motion to suppress his multiple statements to police; the motion was denied after a

hearing. Carroll then agreed to resolve his case through a plea. In exchange for his guilty plea to the physical abuse count, the child neglect charge would be dismissed and read in. The State agreed to recommend between three and five years of initial confinement, leaving the length of the extended supervision term to the court. Carroll would be free to argue for any sentence. After a colloquy, the circuit court accepted Carroll's plea. It later imposed a sentence of four years' initial confinement and four years' extended supervision. Carroll appeals.

DISCUSSION

Counsel's No-Merit Report

The first issue discussed in the no-merit report is whether Carroll's plea was knowingly, voluntarily, and intelligently entered. Our review of the record—including the plea questionnaire and waiver of rights form and addendum, attached jury instructions for the offense that were initialed by Carroll, and the plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court also informed Carroll of the effects of read-in offenses, as recommended by ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835. We are satisfied that the no-merit report properly analyzes any challenge to the plea as lacking arguable merit.

The second issue discussed in the no-merit report is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant,

and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider other factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The eight-year sentence imposed is well within the fifteen-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We are satisfied that the no-merit report properly analyzes any challenge to the court's sentencing discretion as lacking arguable merit.

The final issue the no-merit report discusses is whether the circuit court improperly denied Carroll's suppression motion.[4] *See* WIS. STAT. § 971.31(10). Carroll requested a ***Miranda/Goodchild*** hearing, seeking to suppress four statements he had given to police.[5] Carroll did not dispute that police had advised him of his ***Miranda*** rights. However, he asserted

[4] The suppression motion was heard and denied by the Honorable David Borowski. The Honorable Cynthia A. Davis accepted Carroll's plea and imposed sentence.

[5] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444-45 (1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264, 133 N.W.2d 753 (1965). A ***Miranda*** hearing is used to determine whether a defendant properly waived his or her constitutional rights before giving a statement, *see* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984), and a ***Goodchild*** hearing determines the voluntariness of such a statement, *see* ***id.***, 27 Wis. 2d at 264-65.

that he is an insulin-dependent diabetic whose diabetes is difficult to manage, causing his blood sugar to fluctuate wildly and leading to "significant confusion and disorientation." Thus, he claimed, he did not properly waive his rights, nor were his statements voluntary.

The burden at a ***Miranda/Goodchild*** hearing is on the State. ***State v. Jiles***, 2003 WI 66, ¶26, 262 Wis. 2d 457, 663 N.W.2d 798. It must show, by a preponderance of the evidence, that the defendant received and understood his ***Miranda*** warnings before knowingly and intelligently waiving his protected rights, and that the defendant's statements were given voluntarily. ***Jiles***, 262 Wis. 2d 457, ¶26. At the hearing, the State called two detectives to testify and introduced recordings of the interrogations as exhibits.

Detective Nicholas Johnson, who interviewed Carroll twice, recalled that Carroll told him that he had diabetes, so Johnson had asked if that would in any way impact Carroll's statement. Johnson testified that his recollection was that Carroll said he was okay and could talk to the detective. Johnson also testified that Carroll never told him he was experiencing any health or comprehension problems or that he had not been given needed medication. In the second interview, Carroll told Johnson he had "received his insulin earlier and that it was all good."

Detective Michael Thomae testified that when he interviewed Carroll, the only thing Carroll mentioned about his health was high blood pressure. Carroll did not say he was suffering from any issues during the interview or otherwise indicate he was unable to answer Thomae's questions.

In rebuttal, Carroll testified that when Johnson came to interview him the first time, Carroll "really was unaware where [he] was at the time" because he "was still kind of in shock of

how everything happened." He further testified that he was tired during the interviews and that his diabetes was not being managed at the time.

The circuit court denied the suppression motion. It found that there was "no evidence whatsoever" that Carroll was "suffering any ill effects from diabetes when he was interviewed by these detectives." It noted that Carroll answered questions "logically and coherently," waived his ***Miranda*** rights, and "showed no stress whatsoever." It thus concluded that Carroll's statements "were given freely, voluntarily, and knowingly." These findings of fact are not clearly erroneous, and the circuit court appropriately applied the legal standards for suppression. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. There is no arguable merit to challenging the circuit court's denial of Carroll's motion to suppress.[6]

Carroll's No-Merit Response

In his response, Carroll lists multiple concerns, none of which give rise to any arguably meritorious issue.[7] He first asserts that there was "alot of misleading information" in his case

[6] Although not pled in his motion, Carroll's attorney also claimed that Carroll had invoked his right to counsel during one of the interviews, but that invocation was not "scrupulously honored." *See* ***State v. Edler***, 2013 WI 73, ¶23, 350 Wis. 2d 1, 833 N.W.2d 564 (citation omitted).

The circuit court reviewed the recording of the interview and noted that after the supposed request for counsel, when the detective began to pick up his materials, Carroll "spontaneously starts talking again." *See* ***State v. Stevens***, 2012 WI 97, ¶49, 343 Wis. 2d 157, 822 N.W.2d 79 ("[O]nce an accused invokes his right to counsel …, the police must cease interrogation until counsel is present unless the accused himself initiates further communication with the police." (emphasis omitted; citation omitted). While Carroll argued that the continued talking was also attributable to his diabetes, the circuit court naturally rejected that explanation, given its conclusion that Carroll was not suffering adverse effects from his illness.

[7] To the extent that the no-merit response makes other arguments that are not discussed with specificity in this opinion, those arguments are deemed to lack sufficient merit to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

and states that he has an associate's degree in criminal justice "which wasn't mentioned." Carroll's degree is referenced at least three times in the record, including in the presentence investigation report, and the circuit court noted that Carroll's education was one of the things "that are positive" with respect to sentencing.

Carroll contends that detectives "falsely made a cause of injury by submerge in a hot bathtub which would have caused full body injuries." The intentional submersion theory appears to have originated with Dr. Petska, not the detectives. It goes without saying that full body injuries would only have been sustained if D.C.'s entire body were submerged; injuries below her waist are consistent with her being held in the tub in a seated position. In any event, by entering a plea, Carroll gave up the opportunity to challenge the sufficiency of the State's evidence. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (providing that a valid guilty plea waives all nonjurisdictional defects and defenses).

Carroll complains that the no-contact order issued in this case "affected me emotionally and should've been considered in the seriousness of the offense" and that he "never caused harm to any community [he] resided in[.]" Carroll does not explain what his emotional state after the fact has to do with the seriousness of his crime nor why it is a relevant sentencing factor. The circuit court did comment at sentencing that Carroll's "lack of a significant criminal history" and his employment history—both reflections of how he relates to the community—were positive factors in Carroll's favor.

Carroll complains that he "was targeted with racial bias," shown by the fact that the circuit court denied him eligibility for either the substance abuse or challenge incarceration early release programs. However, because Carroll was convicted of a violation of WIS. STAT. § 948.03

(2017-18), he was statutorily ineligible for both programs. *See* WIS. STAT. §§ 302.045(2)(c) (2017-18), 302.05(3)(a)1. (2017-18).

Carroll complains that probation was not considered "plus it wasn't argued by [his] defense counsel." Carroll is incorrect. Defense counsel told the circuit court, "Our recommendation is for probation. We believe that a [six-year] sentence … imposed and stayed for 5 years of probation would be a sentence that addresses the sentencing factors and the parties' interests." The circuit court, however, specifically rejected probation, stating it was not an appropriate option because it would unduly depreciate the seriousness of the offense.

Finally, Carroll protests that he asked police "to give [him] a 'lie detector test' which [he] didn't receive." Police are not required to administer a polygraph test, and the results of a polygraph examination are not admissible at trial. *See* ***State v. Pfaff***, 2004 WI App 31, ¶26, 269 Wis. 2d 786, 676 N.W.2d 562. While an offer to take a polygraph test is relevant to an assessment of the offeror's credibility and may be admissible for that purpose, that line of argument was waived by entry of the plea. *See* ***Kelty***, 294 Wis. 2d 62, ¶18.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of further representation of Carroll 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