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November 29, 2016

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

2015AP2211-CRNM State of Wisconsin v. Brandon A. Jones
(L.C. #2014CF843)

Before Kessler, Brennan and Brash, JJ.

Brandon A. Jones appeals from an amended judgment of conviction for one count of second-degree sexual assault of a child, contrary to WIS. STAT. § 948.02(2) (2013-14).[1] Jones's postconviction/appellate counsel, Daniel P. Murray, has filed a no-merit report pursuant to WIS.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Jones has filed a response.[2] We have independently reviewed the record, the no-merit report, and the response, as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

The complaint alleged that twenty-six-year-old Jones had sexual intercourse with a fifteen-year-old girl on three occasions between July 1, 2013, and January 30, 2014. The complaint further stated that Jones had the victim's name tattooed on his chest and had taken the victim to some prenatal doctor's appointments. Jones was charged with one count of second-degree sexual assault of a child.

Jones entered a plea agreement with the State pursuant to which he pled guilty as charged and the State agreed to recommend an imposed and stayed sentence of five years of initial confinement and five years of extended supervision, with Jones being placed on probation for five years.

[2] Jones filed his written response on February 26, 2016. On November 14, 2016, Jones sent this court twenty pages of documents dated 2009 and 2010 that apparently were used to evaluate his eligibility for SSI benefits, which he was granted. In his cover letter to this court, Jones indicated that at sentencing, he was not sure of all the reasons he receives SSI and he is now providing additional information on those reasons. We have reviewed the documents, which discuss Jones's physical health, mental health, and intelligence test scores. One doctor indicated that Jones "appears to be mildly mentally retarded," but he opined that Jones has "the capacity to direct his [SSI] funds." Jones's mental and physical health conditions were also discussed in the 2014 PSI report. Although the recently submitted documents provide additional details, the information is consistent with what was previously discussed in the PSI report. For instance, the PSI report discussed Jones's "learning disabilities" and "cognitive delays." The newly submitted documents do not change this court's assessment of the case.

It is not clear from Jones's correspondence whether he also sent the documents to postconviction/appellate counsel. Therefore, we are including a copy of those documents with postconviction/appellate counsel's copy of this order.

The trial court conducted a plea colloquy with Jones, accepted Jones's guilty plea, and found him guilty.[3] A presentence investigation (PSI) report was generated, but per the trial court's instruction, it did not contain a specific sentencing recommendation.

At sentencing, the State urged the trial court to follow its sentencing recommendation, noting that the recommendation was designed to be "in part treatment and in part punishment." The State acknowledged that this was Jones's first criminal conviction but also noted that Jones had previously been charged with domestic-violence-related crimes that were dismissed. In addition, the State discussed a recording of a telephone conversation Jones had with his sister when Jones was in jail. In that call, Jones encouraged his sister to talk the victim into having an abortion and said, "[I]f she ain't pregnant, I'm good." When Jones's sister said an abortion could be dangerous and painful because the victim was five months pregnant, Jones asked whether the sister would call the victim and "get her not to come to court." Jones and his sister then had a three-way telephone call with the victim, during which Jones told the victim he was facing fifty years of imprisonment if the baby was his.

Trial counsel urged the trial court to follow the State's recommendation, except he suggested that the imposed and stayed sentence consist of three years of initial confinement and three years of extended supervision. Trial counsel noted that this sentence would allow Jones to be a contributing father to the victim's child and also to his two other children.[4] In addition, trial

[3] The Honorable Stephanie Rothstein accepted Jones's plea because the judge presiding over Jones's case, the Honorable David L. Borowski, was in trial. Judge Borowski sentenced Jones.

[4] In the course of the discussion about Jones's other two children, the trial court learned that Jones first impregnated the children's mother when she was about sixteen years old and he was about twenty-one years old.

counsel discussed the fact that Jones had been in a relationship with the victim and had provided financial support for her.

The trial court rejected the probation recommendation, stating that Jones "is a predator" and "too much of a danger to the public." It imposed a sentence of five years of initial confinement and five years of extended supervision. It also ordered Jones, a first-time felon, to provide a DNA sample and pay the $250 DNA surcharge.

At a subsequent restitution hearing, Jones stipulated to pay restitution of $5,721.70, which included birth costs and financial support for the newborn child. At that hearing, trial counsel told the trial court that DNA testing of the newborn child had confirmed that Jones is the father.

The no-merit report analyzes two issues: (1) whether Jones's plea was knowingly, intelligently, and voluntarily entered; and (2) whether the trial court imposed an illegal sentence or erroneously exercised its sentencing discretion. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss those issues. We will also address the issues Jones raised in his response, as well as issues related to the DNA surcharge and the trial court's reference to a COMPAS[5] report at sentencing.

[5] "'COMPAS' stands for 'Correctional Offender Management Profiling for Alternative Sanctions.'" ***State v. Loomis***, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749.

We begin with Jones's plea. There is no arguable basis to allege that Jones's guilty plea was not knowingly, intelligently, and voluntarily entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents were the applicable jury instructions and an addendum signed by Jones and his attorney that outlined additional understandings, such as the fact that Jones was giving up certain defenses. The trial court conducted a thorough plea colloquy that addressed Jones's understanding of the plea agreement and the charge to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his plea. *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

The trial court referenced the guilty plea questionnaire and the jury instructions, and it also talked about the two elements of the crime. The trial court confirmed with Jones that he knew that although the trial court would listen to the parties' recommendations, there was no "guarantee[d]" sentence, and the trial court would decide what the appropriate sentence was. The trial court stated the maximum sentence that could be imposed, which was up to forty years of imprisonment and a $100,000 fine. The trial court also discussed with Jones the constitutional rights Jones was waiving, such as his right to a jury trial and his right to testify in his own defense. In addition, the trial court discussed with Jones the fact that he would have to register as a sex offender and could be subject to a WIS. STAT. ch. 980 commitment. Finally, the trial court told Jones the consequences of being a felon, including that he would "have to give a DNA sample and pay a surcharge for that."

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Jones's conversations with his trial counsel, and the trial court's colloquy appropriately advised Jones of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. The record does not suggest there would be an arguable basis to challenge Jones's plea.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Its sentencing comments addressed Jones's prior contacts with the criminal justice system, which included

criminal charges that were issued and dismissed in two domestic violence cases; pending charges for criminal trespass and disorderly conduct; and over fifty citations for "low-level law breaking, breaking of ordinances." The trial court also addressed Jones's education, job history, and the fact that he has received SSI benefits for several health issues.

The trial court discussed the gravity of the offense. The trial court read aloud a letter from the victim's mother, who described the emotional and financial challenges facing the victim and the victim's mother as a result of Jones's crime. The trial court faulted Jones for having unprotected sexual intercourse with a girl eleven years his junior, getting her pregnant, and then suggesting that she should "get rid of the evidence by having an abortion." The trial court gave Jones credit for accepting responsibility for the crime, although it noted that Jones's level of remorse appeared to be "tepid" and "timid."

The trial court said that it considered Jones to be a "predator" who had sexual intercourse with two girls who were not adults, including the victim in this case and the mother of Jones's other two children. The trial court said Jones is "a danger and a risk to this community" and that Jones "cannot be treated at least initially in the community."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The trial court could have imposed twenty-five years of initial confinement and fifteen years of extended supervision. The sentence of five years of initial confinement and five years of extended supervision was well within the maximum total sentence, and we discern no erroneous exercise of discretion. *See*

State v. Scaccio, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

In his response to the no-merit report, Jones states that he would like "a sentence modification." He asserts that this was his first criminal conviction, he "made a terrible mistake," he wants "to be a father to [his] children," and he will "never make a mistake like this again." He argues that the trial court was "harsh on my sentence" and that one or two years should be removed from his sentence. Jones's response does not persuade us there is an issue of arguable merit to pursue. First, for the reasons discussed above, we are not convinced there would be merit to challenging the harshness of the sentence. The crime itself, plus Jones's attempts to dissuade the victim from pursuing the criminal case, justified the sentence, which is a quarter of what could have been imposed.

Second, a successful motion for sentence modification requires a defendant "to demonstrate by clear and convincing evidence the existence of a new factor." ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 838. The reasons Jones offers in his response are not factors that were unknown to the trial court at sentencing; indeed, he and his counsel relied on those arguments in recommending a shorter sentence. We conclude there would be no arguable merit to pursue a motion for sentence modification.

In reviewing the sentencing transcript, we identified two additional issues that require brief discussion. First, the PSI report included a COMPAS report. Our supreme court recently rejected a defendant's claim that using a COMPAS report at sentencing violates due process. *See* ***State v. Loomis***, 2016 WI 68, ¶8, 371 Wis. 2d 235, 881 N.W.2d 749. ***Loomis*** concluded: "[I]f used properly, observing the limitations and cautions set forth herein, a [trial] court's

consideration of a COMPAS risk assessment at sentencing does not violate a defendant's right to due process." ***Id.***

Loomis held that "a sentencing court may consider a COMPAS risk assessment at sentencing," as long as it abides by several limitations. ***Id.***, ¶98. Risk scores in a COMPAS report "may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence." ***Id.*** "Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community." ***Id.*** ***Loomis*** added: "A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing." ***Id.***, ¶99.

In this case, the PSI report noted several important "cautions and limitations" for using the COMPAS report, which ***Loomis*** indicated was important. *See* ***id.***, ¶100 n.60. For instance, the COMPAS report indicated that "COMPAS is an actuarial assessment tool which has been validated on a national norming population" and which "does not … attempt to predict specifically the likelihood that an individual offender will commit a certain type of particular offense."

At the sentencing hearing, the trial court briefly discussed the COMPAS report, reviewing Jones's scores in several areas. The trial court observed that one of the scores, relating to Jones's vocation and education, was consistent with Jones having "some potential cognitive issues, potentially [a] learning disability," which the trial court said was a mitigating factor it was weighing.

Our review of the trial court's comments on the COMPAS report leads us to conclude there would be no arguable merit to assert that the trial court's use of the COMPAS report was

improper or denied Jones due process. The trial court commented on the report only briefly, and its comments implied that the report was one of many factors it was considering. *See* ***id.***, ¶99. We discern no basis to reject the no-merit report to pursue further proceedings based on the trial court's reference to the COMPAS report at sentencing.

A second issue that was not addressed in the no-merit report is the imposition of the $250 DNA surcharge. The criminal complaint alleged the date of offense as "between July 1, 2013 and January 30, 2014." Jones was sentenced on July 11, 2014. On January 1, 2014, the $250 DNA surcharge that had been discretionary for most felony convictions, *see* WIS. STAT. § 973.046(1g) (2011-12), became mandatory for each felony conviction, *see* 2013 Wis. Act 20, §§ 2355, 9426(1)(am).

The trial court indicated that it was imposing the $250 surcharge because it was "required" and also because it was "punishment," "deterrence," and "part of this defendant's rehabilitation." In other words, the trial court imposed the surcharge because it was now mandatory, but also based on its determination that imposing the DNA surcharge on this first-time felon was necessary for Jones's rehabilitation, punishment, and deterrence.

There has been litigation in the court of appeals and the supreme court concerning the imposition of the mandatory DNA surcharge in cases where the defendant commits a crime in 2013 but is sentenced in 2014. *See, e.g.*, ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, review granted (WI Mar. 7, 2016) (No. 2014AP2981). Even if Jones could prove that imposition of the mandatory surcharge in his case was an *ex post facto* violation, the remedy would not be to vacate the surcharge but instead to consider whether the DNA surcharge could be imposed as an exercise of discretion, as that was the law in effect in 2013. As we note

above, the trial court explicitly stated several reasons why it was appropriate to impose the DNA surcharge on Jones. Those reasons justify the imposition of a discretionary surcharge. *See* ***State v. Cherry***, 2008 WI App 80, ¶¶9-10, 312 Wis. 2d 203, 752 N.W.2d 393. In addition, the surcharge was justified by the fact that the State would incur a cost for collecting first-time felon Jones's sample, having it analyzed, and putting it into the DNA database. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12. For these reasons, we conclude there would be no arguable merit to challenging the imposition of a DNA surcharge in this case.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Daniel P. Murray is relieved of further representation of Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals