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WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

December 28, 2023

To:

Hon. Marc A. Hammer
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Erica L. Bauer
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Gregorio Nunez-Najera
1007 Cherry Street, #1
Green Bay, WI 54301

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

2023AP497-CRNM State of Wisconsin v. Gregorio Nunez-Najera
(L. C. No. 2019CF1414)

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).

Gregorio Nunez-Najera appeals from judgments of conviction entered after he pled no contest to three misdemeanors and one felony. His appellate counsel, Attorney Erica L. Bauer, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).¹ Nunez-Najera was informed of his right to respond. When his response deadline drew near, he wrote to this court requesting additional time to respond. This court granted an extension, but he did not file a response or seek a further extension. We subsequently directed Attorney Bauer to file a supplemental no-merit report addressing an aspect

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

of the plea colloquy, and she has complied. Upon consideration of the no-merit reports and an independent review of the record as required by *Anders*, we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm.

The State filed a criminal complaint in September 2019, charging Nunez-Najera with nine crimes arising out of his interactions with his estranged wife and adult daughter during the period from June 1, 2019, through August 28, 2019. In October 2019, the State filed an amended complaint charging Nunez-Najera with an additional crime against his wife during the period from August 1, 2019, through September 30, 2019.

Nunez-Najera disputed the ten charges for a substantial period of time, but in December 2021 he elected to resolve the case with a plea agreement. Pursuant to that agreement, he entered no-contest pleas to misdemeanor charges of criminal trespass to a dwelling, battery, and disorderly conduct, with the latter two as acts of domestic abuse. He also entered a no-contest plea to a felony charge of second-degree recklessly endangering safety by use of a dangerous weapon, as an act of domestic abuse. In exchange for his pleas, the State moved to dismiss and read in the remaining counts. These counts included: stalking resulting in bodily harm, intimidating a victim; intimidating a witness; criminal trespass to a dwelling; and disorderly conduct, all as acts of domestic abuse; and one count of disorderly conduct charged without the domestic abuse enhancer. The circuit court accepted Nunez-Najera's no-contest pleas and dismissed and read in the remaining counts.

The plea agreement did not include any sentence concessions.² At the sentencing hearing, the State recommended a global disposition of nine years of imprisonment consisting of four years' initial confinement followed by five years' extended supervision. Nunez-Najera sought a time-served disposition for the misdemeanors and a term of probation for the felony. The circuit court imposed sixty days in jail for the disorderly conduct conviction; six months in jail for each of the other two misdemeanor convictions; and, for the felony conviction, a seven-year term of imprisonment consisting of three years' initial confinement followed by four years' extended supervision. The court ordered Nunez-Najera to serve his sentences concurrently and granted him 926 days of sentence credit. The court further found Nunez-Najera eligible for the challenge incarceration program and the Wisconsin substance abuse program.

We first consider whether Nunez-Najera could pursue an arguably meritorious challenge to his no-contest pleas. A no-contest plea must be entered knowingly, intelligently, and voluntarily. *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). The circuit court established that Nunez-Najera had signed a plea questionnaire and waiver of rights form and that he understood its contents. *See State v. Pegeese*, 2019 WI 60, ¶¶36-37, 387 Wis. 2d 119, 928 N.W.2d 590. The court then conducted a colloquy with Nunez-Najera that, with one exception, complied with the court's obligations when accepting a plea other than not guilty. *See id.*, ¶23; *see also* WIS. STAT. § 971.08(1).

² Nunez-Najera faced ninety days in jail and a \$1,000 fine upon his misdemeanor conviction for disorderly conduct, and he faced nine months in jail and a \$10,000 fine for each of his misdemeanor convictions for criminal trespass and for battery. *See* WIS. STAT. §§ 947.01(1), 943.14(2), 940.19(1), 939.51(3)(a), (b) (2019-20). Nunez-Najera faced fifteen years of imprisonment and a \$25,000 fine upon his felony conviction for second-degree recklessly endangering safety by use of a dangerous weapon. *See* WIS. STAT. §§ 941.30(2), 939.50(3)(g), 939.63(1)(b) (2019-20). Additionally, each domestic abuse enhancer entailed a \$100 surcharge. *See* WIS. STAT. § 973.055(1) (2019-20).

The circuit court did not satisfy its duty to establish at the plea hearing that Nunez-Najera understood the elements of battery. *See State v. Brown*, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906 (providing that the circuit court must establish during the plea colloquy that the defendant understands every element of the crimes to which he or she enters a plea other than not guilty). The court’s failure to satisfy a duty during the plea colloquy may constitute grounds for seeking plea withdrawal. *See Bangert*, 131 Wis. 2d at 274. However, a motion for plea withdrawal based on a defect in the plea colloquy is arguably meritorious only if the defendant can allege that he or she did not know or understand the information that should have been but was not provided at the plea hearing. *See id.*

Here, appellate counsel advised us in the no-merit report that the failure to address the elements of battery during the plea colloquy did not provide grounds for further proceedings because Nunez-Najera “acknowledged an understanding of that charge.” In the supplemental no-merit report, appellate counsel clarified that when she conferred with Nunez-Najera, “he acknowledged that he understood the elements of battery and what he was allowing the [c]ourt to convict him of.” Nunez-Najera has not disputed appellate counsel’s assertions. The submissions thus reflect that he cannot make the allegations required to state an arguably meritorious claim for plea withdrawal based on an omission in the plea colloquy. *See Brown*, 293 Wis. 2d 594, ¶62.

Accordingly, this court is satisfied that no basis exists for Nunez-Najera to challenge his no-contest pleas. The totality of the information before this court demonstrates that Nunez-Najera entered his no-contest pleas knowingly, intelligently, and voluntarily. Further pursuit of this issue would be frivolous within the meaning of *Anders*.

Appellate counsel also examined whether Nunez-Najera could raise an arguably meritorious claim for postconviction relief on the ground that a judicial officer did not make a finding of probable cause within forty-eight hours of his arrest, *see State v Aniton*, 183 Wis. 2d 125, 128, 515 N.W.2d 302 (Ct. App. 1994), or on the ground that his preliminary examination—where he elected to waive his right to a hearing—took place more than ten days after his arraignment, *see* WIS. STAT. § 970.03(2). We agree with appellate counsel’s conclusion that pursuit of any such claims would be frivolous within the meaning of *Anders*. A defendant who enters a knowing, intelligent, and voluntary no-contest plea gives up all nonjurisdictional challenges, including constitutional claims. *See State v. Kelty*, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *see also Aniton*, 183 Wis. 2d at 128-29 (holding that a plea other than not guilty waives the claim of an untimely probable cause determination); *State v. Webb*, 160 Wis. 2d 622, 635, 467 N.W.2d 108 (1991) (reflecting that “no procedural defect of any sort at the preliminary hearing affects the circuit court’s jurisdiction”).

We also agree with appellate counsel’s conclusion that Nunez-Najera could not pursue an arguably meritorious claim for relief on the ground that a Spanish-language interpreter was not available at a February 11, 2022 hearing, when Nunez-Najera first appeared for sentencing. Nunez-Najera advised the circuit court in English several times during that hearing that he wanted to proceed to sentencing that day and had sufficient English-language proficiency to do so without an interpreter, but the court concluded that an interpreter should be present for sentencing. The matter was therefore rescheduled, and when the proceedings reconvened two weeks later, sentencing proceeded with an interpreter. Accordingly, Nunez-Najera cannot raise

an arguably meritorious claim that he lacked the assistance of an interpreter at sentencing. Further pursuit of this issue would be frivolous within the meaning of *Anders*.³

Lastly, we are satisfied that the circuit court did not erroneously exercise its sentencing discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court stated that protection of the public was the primary sentencing objective, and the court discussed the sentencing factors that it considered in fashioning a disposition to achieve the sentencing goal. See *id.*, ¶¶41-43. The court’s considerations were proper and relevant and 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 sentence imposed was far less than the maximum aggregate penalty that the law allowed and thus was not excessive or shocking. See *State v. Mursal*, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. A challenge to the court’s exercise of sentencing discretion would lack arguable merit.

³ A criminal defendant has the right to an interpreter when needed at substantive circuit court proceedings. See *Strook v. Kedinger*, 2009 WI App 31, ¶¶12, 14, 316 Wis. 2d 548, 766 N.W.2d 219. The right is codified in WIS. STAT. § 885.38(3), which states that the court shall provide a qualified interpreter for a defendant at a court proceeding “[i]f the court determines that the person has limited English proficiency and that an interpreter is necessary[.]” In this case, Nunez-Najera had the assistance of a Spanish-language interpreter for every substantive hearing. As appellate counsel points out, however, Nunez-Najera’s need for an interpreter during the court proceedings is not clear from the record. He told the court several times that he did not require an interpreter; his trial counsel told the court that Nunez-Najera conferred with trial counsel in English without an interpreter; and, during one status hearing, the interpreter interrupted the proceedings to explain that Nunez-Najera was requesting “consecutive interpretation due to knowing quite a bit of English. He may be getting confused by the simultaneous interpretation.”

We add that appellate counsel has not suggested that Nunez-Najera required an interpreter to communicate with her about his appeal, nor has she indicated that she provided him with a Spanish-language version of her no-merit reports. Moreover, he wrote to this court in English seeking an extension, and the letter reflected an understanding of the litigation and the steps that he could take on his own behalf. In light of the submissions to this court and the totality of the record, we have no reason to doubt Nunez-Najera’s ability to understand the appellate proceedings.

Our independent review of the record 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.

Therefore,

IT IS ORDERED that the judgments are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved of any further representation of Gregorio Nunez-Najera in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals