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DISTRICT III

January 30, 2024

To:

Hon. Thomas W. Clark
Circuit Court Judge
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Michelle Weisenberger
Clerk of Circuit Court
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Michael Jon Underland 516729
Jackson Correctional Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

Dennis Schertz
Electronic Notice

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

2022AP626-CRNM State of Wisconsin v. Michael Jon Underland
(L. C. No. 2021CF11)

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).

Appointed counsel for Michael Underland filed a no-merit report concluding that no grounds exist to challenge Underland's conviction for second-degree recklessly endangering safety, with use of a dangerous weapon, as an act of domestic abuse, and as a repeater, or to challenge the order denying Underland's postconviction motion for sentence modification. Underland was informed of his right to file a response to the no-merit report, and he did not respond.

The State charged Underland with aggravated battery, first-degree recklessly endangering safety, and felony bail jumping—the first two counts with use of a dangerous weapon and as acts of domestic abuse and all three counts as a repeater. The charges were based on allegations that Underland assaulted his then-girlfriend, Leslie,¹ in a bar by repeatedly slashing her legs and hands with a knife, resulting in serious bodily injury. According to the complaint, Underland forced Leslie backward off of a bar stool and onto the floor. At the time of the assault, Underland had three misdemeanor convictions that remained of record and unreversed.

Pursuant to a plea agreement, Underland entered a no-contest plea to an amended charge of second-degree recklessly endangering safety, with use of a dangerous weapon, as an act of domestic abuse and as a repeater. In exchange for his no-contest plea, the State agreed to recommend that the circuit court dismiss and read in the remaining counts. The State also agreed to limit the initial confinement portion of its sentence recommendation to the recommendation made in the presentence investigation report (PSI). The PSI recommended four and one-half to five and one-half years of initial confinement followed by two to three years of extended supervision. Consistent with the plea agreement, the State's initial confinement recommendation did not exceed the recommendation made in the PSI.

Out of a maximum possible seventeen-year sentence, the circuit court imposed a thirteen-year sentence consisting of eight years of initial confinement followed by five years of extended supervision. Underland filed a postconviction motion for sentence modification, seeking eligibility for the Substance Abuse Program. After a hearing, the court denied the motion,

¹ Pursuant to the policy underlying WIS. STAT. RULE 809.86(4) (2021-22), we use a pseudonym instead of the victim's name. All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

reiterating that the primary goals for the sentence imposed were protection of the public and punishment. The court added that to allow Underland to be released early from the initial confinement portion of his sentence under the Substance Abuse Program would “unduly depreciate the severity of the offense” and “be contrary to the punishment and protection goals as stated during the sentencing hearing.”

Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), this court discovered that at the plea hearing, the circuit court did not personally inform Underland that the court was not bound by the plea agreement, as is required under *State v. Hampton*, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. The court ultimately departed from the sentence recommendation made under the plea agreement. A potential issue would therefore arise if Underland claimed he did not know that the court was free to impose a sentence greater than that recommended under the plea agreement.

We consequently ordered additional proceedings with respect to this possible issue. We noted that if Underland was ultimately successful in withdrawing his plea, any agreements made under the plea agreement might be rescinded and the parties returned to the positions they occupied at the time they believed they had entered into a valid plea agreement. *See State v. Deilke*, 2004 WI 104, ¶26, 274 Wis. 2d 595, 682 N.W.2d 945. Counsel submitted a supplemental no-merit report along with a written statement from Underland stating that, after discussing the matter with his attorney, he waived any challenge to the legitimacy of his plea based on the circuit court’s failure to inform him that it was not bound by the plea agreement.

At the plea hearing, the circuit court also failed to personally advise Underland of the potential deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c).

However, in order to obtain relief because of such an omission, a defendant must show that the plea is likely to result in deportation, exclusion from admission to this country, or denial of naturalization under federal law. *See State v. Negrete*, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749. The record reflects that Underland is a United States citizen not subject to deportation. Any challenge to the plea on this basis would therefore lack arguable merit. No issue of arguable merit otherwise exists from the taking of Underland's no-contest plea.

The no-merit report addresses whether the circuit court properly exercised its sentencing discretion; whether the court properly denied Underland's postconviction motion for sentence modification; and whether there are any grounds to challenge the effectiveness of Underland's trial counsel. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that there is no arguable merit to any of these issues. The no-merit report sets forth an adequate discussion of the potential issues to support the no-merit conclusion, and we need not address them further.

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of his obligation to further represent Michael Underland in this matter. *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