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DISTRICT II

March 20, 2024

To:

Hon. Jason A. Rossell
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
Electronic Notice

Marcella De Peters
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Walter J. Gascoigne #677273
Sturtevant Transitional Facility
P.O. Box 903
Sturtevant, WI 53177-0903

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

2022AP1939-CRNM State of Wisconsin v. Walter J. Gascoigne (L.C. #2017CF920)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Walter J. Gascoigne appeals from a judgment of conviction and an order denying his postconviction motion. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Gascoigne filed a response. After reviewing the record, counsel's report, and Gascoigne's response, we conclude

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

there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

Gascoigne was convicted following guilty pleas to child enticement, two counts of exposing genitals, sexual intercourse with a child, and maintaining a drug trafficking place. He was accused of having a sexual relationship with a sixteen-year-old girl and providing her with marijuana to use at his home. For his actions, the circuit court imposed an aggregate sentence of eight and a half years of initial confinement and twelve years of extended supervision.

Prior to entering his pleas, Gascoigne moved to suppress his inculpatory statement² to police on the ground that he was not given *Miranda*³ warnings beforehand. Following a hearing on the matter, the circuit court denied the motion. The court concluded that Gascoigne—who had voluntarily driven himself to the police station to “set the record straight” about his relationship with the victim—was not in custody during his brief interview and therefore no *Miranda* warnings were required.

Gascoigne later filed a postconviction motion to withdraw his plea to the charge of maintaining a drug trafficking place. According to Gascoigne, the plea was not knowingly, voluntarily, and intelligently entered due to an inapplicable penalty enhancer referenced by the

² In his statement, Gascoigne, who was forty-six years old, said he was in love with the victim and admitted to providing her with marijuana to use at his home.

³ *See Miranda v. Arizona*, 384 U.S. 436 (1966).

circuit court.⁴ After a hearing on the matter, the court denied the motion. Citing *State v. Cross*, 2010 WI 70, ¶40, 326 Wis. 2d 492, 786 N.W.2d 64, the court noted that a minimal overstatement in potential punishment does not provide a basis for plea withdrawal. This no-merit appeal follows.

The no-merit report addresses (1) whether the circuit court erred in denying Gascoigne's motion to suppress his statement to police; (2) whether the court erred in denying Gascoigne's postconviction motion to withdraw his plea to maintaining a drug trafficking place; (3) whether Gascoigne's other pleas were knowingly, voluntarily, and intelligently entered; and (4) whether the court properly exercised its discretion at sentencing. This court is satisfied that the no-merit report correctly analyzes the issues it raises as without merit, and we will not discuss them further.

As noted, Gascoigne filed a response to counsel's no-merit report. The response discusses the issues addressed in the no-merit report, which we will not repeat. It also raises a claim of ineffective assistance for trial counsel's failure to notice and immediately challenge the inapplicable penalty enhancer referenced above. Again, the circuit court did not utilize the penalty enhancer at sentencing and struck it from Gascoigne's judgment of conviction. Furthermore, Gascoigne has not demonstrated that, but for counsel's error, he would not have

⁴ Gascoigne was charged with maintaining a drug trafficking place on or near a school. The "on or near a school" provision is a penalty enhancer that may increase a sentence by five years. *See* WIS. STAT. § 961.49(1m)(b)6. The circuit court referenced this penalty enhancer in its plea colloquy when discussing the range of punishments Gascoigne faced; however, the penalty enhancer was not actually applicable to the offense of maintaining a drug trafficking place. In the end, the court did not utilize the penalty enhancer at sentencing and struck it from Gascoigne's judgment of conviction.

pled guilty and would have insisted on going to trial.⁵ Absent a showing of prejudice, we are not persuaded that Gascoigne’s response presents an issue of arguable merit.

Our review of the record discloses no other potential issues for appeal.⁶ Accordingly, this court accepts the no-merit report, affirms the judgment and order, and discharges appellate counsel of the obligation to represent Gascoigne further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of further representation of Walter J. Gascoigne in this appeal. *See* WIS. STAT. RULE 809.32(3).

⁵ The circuit court addressed this point at the postconviction motion hearing. The court observed, “it strains the ability of the Court, in my opinion, to believe that an individual would plead guilty to a crime believing that it was a higher penalty and when it’s a lower penalty while having known it was ... lower [the individual] wouldn’t have pled guilty.”

⁶ Gascoigne’s pleas forfeited the right to raise other nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See State v. Kelty*, 2006 WI 101, ¶18 & n. 11, 294 Wis. 2d 62, 716 N.W.2d 886; *see also State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

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

Samuel A. Christensen
Clerk of Court of Appeals