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

2013AP2552-CRNM State of Wisconsin v. Ernest T. Tucker (L.C. # 2011CF246)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

Ernest Tucker appeals from a judgment convicting him of third-degree sexual assault contrary to WIS. STAT. § 940.225(3) (2011-12)¹ and an order denying his postconviction motion seeking resentencing. Tucker's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Tucker received a copy of the report and has filed numerous responses. Appellate counsel filed a RULE 809.32(1)(f)

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

supplemental no-merit report. Upon consideration of the report, Tucker's responses, counsel's supplemental no-merit report and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment and the order because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Tucker had a basis for plea withdrawal when sentencing was adjourned to update the presentence investigation report with information not favorable to Tucker, (2) whether the circuit court erroneously denied Tucker's motion for resentencing, and (3) whether Tucker received effective assistance from his trial counsel. We agree with appellate counsel that these issues do not have arguable merit for appeal.

Counsel's no-merit report fails to discuss whether there would be arguable merit to a challenge to the circuit court's denial of Tucker's motion to suppress, WIS. STAT. § 971.31(10) (plea does not preclude appellate review of the denial of a motion to suppress), whether Tucker's guilty plea was knowingly, voluntarily and intelligently entered, and whether the circuit court properly exercised its sentencing discretion. Counsel was obligated to address these possible appellate issues arising from the record and state why they do not have arguable merit. Future no-merit reports may be rejected if they do not fulfill the purpose of WIS. STAT. RULE 809.32.

We have independently reviewed the record relating to Tucker's motion to suppress. The circuit court granted in part and denied in part Tucker's motion to suppress three statements he gave to police and related evidence. Of the three statements Tucker challenged, the court

determined that two were properly given after Tucker waived his *Miranda*² rights. The other statement was given in violation of *Miranda*, and the court suppressed that statement. The record supports the circuit court's determinations, and no issue with arguable merit arises.

We have reviewed the entry of Tucker's guilty plea. Tucker answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. At the plea hearing, Tucker indicated that he understood the constitutional rights he was waiving, the elements of the crime and the penalty range. Tucker stated that he had no hesitation about pleading guilty, and he wanted to spare the victim a trial. The court took the factual basis for the plea from the complaint, police reports and statements. The record discloses that Tucker's guilty plea was knowingly, voluntarily and intelligently entered, *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, *State v. Harrington*, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Tucker signed is competent evidence of a knowing and voluntary plea. *State v. Moederndorfer*, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. *Hoppe*, 317 Wis. 2d 161,

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶¶30-32. We conclude that there would be no arguable merit to a challenge to the entry of Tucker's guilty plea.³

We have independently reviewed the circuit court's exercise of sentencing discretion. With regard to the nine-year sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Tucker. In fashioning the sentence, the court considered the seriousness of the offense and the DNA confirmation of the sexual assault, and Tucker's character and history of other offenses, including another sexual assault. The court also considered the need to protect the public, punish Tucker and deter Tucker and others. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of four years of confinement and five years of extended supervision. We conclude that there would be no arguable merit to a challenge to the sentence.

Tucker sought resentencing because he did not understand aspects of the COMPAS evaluation, which he declined to review at the initial sentencing hearing. A new COMPAS evaluation completed after Tucker better understood the evaluation process was more favorable to him. To obtain resentencing, a defendant must establish that the information was inaccurate and the court actually relied upon it. *State v. Tiepelman*, 2006 WI 66, ¶28, 291 Wis. 2d 179, 717

³ We note that the circuit court did not give the deportation warning to Tucker during the plea colloquy. The presentence investigation report states that Tucker was born in Texas. Therefore, he is not in danger of deportation as a result of this felony conviction. No issue of arguable merit could arise from this omission. *State v. Bedolla*, 2006 WI App 154, ¶5, 295 Wis. 2d 410, 720 N.W.2d 158.

N.W.2d 1. The circuit court declined to resentence because the court did not rely upon the COMPAS evaluation at sentencing. Because there is no indication that the circuit court relied upon the COMPAS evaluation that was the basis for Tucker's resentencing motion, there would be no arguable merit to an appeal based on the circuit court's refusal to resentence Tucker.

The no-merit report addresses whether Tucker received effective assistance from his trial counsel because his counsel did not have Tucker evaluated for competency or pursue a possible WIS. STAT. § 971.06(1)(d) plea of not guilty by reason of mental disease or defect (NGI). Tucker's response to counsel's no-merit report and counsel's supplemental no-merit report also discuss this issue. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner* hearing.

In his response to counsel's no-merit report, Tucker claims that trial counsel should have had him evaluated for competency and NGI at the time of his criminal proceedings because he suffered a work-related head injury in February 2011, six months before the August 2011 crime. Tucker claimed that the head injury and significant intoxication on the night of the crime left him unable to remember the crime as the victim described it. Tucker admitted that he approached the nineteen-year-old victim (his girlfriend's daughter) on the couch, touched her and kissed her forehead. During a police interview, Tucker stated that if the victim claimed he sexually assaulted her, then he did so, even though he did not remember doing so. Tucker told the presentence investigation author that he was drinking heavily all day and using a prescription

pain reliever, the victim joined him for drinks, and he woke up charged with sexual assault. He was not sure why the victim would lie about the assault. The victim claimed that Tucker penetrated her digitally and with his penis, and DNA evidence confirmed that Tucker sexually assaulted the victim.

Because the first presentence investigation report did not take into account all of the victim's statements about the event, sentencing was adjourned from October 4, 2012, for an updated presentence investigation report. Tucker was given the opportunity to consider whether he wanted to withdraw his plea in light of the new information coming before the court (the charge did not change, but the details became more aggravated and the DNA evidence was added to the complaint). At the October 12 sentencing hearing, Tucker specifically agreed that he had enough time to consider what to do about his plea, and he decided to proceed on the plea he had entered.

At the October 12 sentencing, trial counsel informed the circuit court that Tucker had cognitive impairment and periods of memory loss due to the head injury. Trial counsel submitted a September 2011 neurological evaluation stating that Tucker had some cognitive impairment. Trial counsel argued at sentencing that the State was trying to minimize Tucker's brain injury and its consequences. During allocution, Tucker expressed remorse stating, "I did wrong and I am paying for it." The court imposed a nine-year sentence.

Counsel's no-merit report discusses the competency and cognitive impairment issue. After Tucker raised the issue with appellate counsel, appellate counsel petitioned the circuit court for a competency evaluation. The court directed counsel to investigate the issue. Counsel consulted with a psychologist about Tucker's brain injury and impairment claims. Without

examining Tucker, the psychologist opined that Tucker's circumstances did not implicate competency or an NGI plea and suggested that being retained to evaluate Tucker would waste time and resources. Counsel did not retain the psychologist.

In his no-merit response, Tucker argues that appellate counsel should have sought a competency hearing, and he was unable to assist his trial counsel with his defense because he could not remember the details of the crime. Accompanying Tucker's response are treatment notes from June 2011, before the August 27, 2011 assault. In those notes, the provider stated that Tucker complained about memory loss and persistent headaches after the February 2011 head injury. Tucker was seen again on August 16, eleven days before the August 27 crime. Tucker continued to complain of "mild cognitive difficulties." He was referred for a neuropsychological evaluation. He was seen in Occupational Therapy on August 22, five days before the crime, with complaints about short-term memory deficits, and he manifested such deficits in testing.

The September 19, 2011 neuropsychological evaluation recited that Tucker claimed blackouts and memory problems. Tucker reported that he was a heavy drinker, and he exhibited memory deficits on testing. The neuropsychologist concluded that Tucker had cognitive impairment, although it was "difficult to pin down a clear pattern of neurobehavioral deficit."

The examiner stated:

Rather, there do seem to be broad ranging cognitive impairments with isolated areas of strength (language, mental arithmetic), though for the most part his attention span, memory, processing speed, and spatial functions were all normal. In the context of good effort and no other clear cause of deficit, I think it is reasonable to assume that there are some persistent cognitive deficits.

The examiner's diagnosis was "cognitive disorder, likely secondary to mild traumatic brain injury."

In her supplemental no-merit report, appellate counsel responds to Tucker's competency claim. She investigated Tucker's impairment claim and conferred with trial counsel. Trial counsel advised her that Tucker had no difficulties interacting with him, and he did not notice any impairment. Trial counsel had represented Tucker in a pre-head injury matter, and he noticed no difference in Tucker before and after the injury. The psychologist appellate counsel contacted did not agree that memory loss was a competency or NGI issue. Counsel further opines that Tucker was competent to assist in his appeal, and he has communicated with her via telephone and lengthy letters. Counsel notes that a successful NGI plea would have required not just mental illness, but a lack of the substantial capacity to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law. WIS. STAT. § 971.15(1). Appellate counsel opines that Tucker cannot meet this standard.

In response, Tucker avers that other inmates have helped him communicate in writing with his appellate counsel. He found counsel's letters confusing and asked other inmates for help in understanding them.

We must determine whether the record or facts outside of the record, WIS. STAT. RULE 809.32(1)(f), show an arguably meritorious claim relating to competency or an NGI plea to support an ineffective assistance of trial counsel claim. We conclude that the facts and applicable legal standards do not indicate an issue with arguable merit for appeal.

The facts within and without the record demonstrate the following. Throughout his prosecution and appeal, Tucker has consistently claimed that he did not remember the details of

the crime. Tucker has always partially attributed his lack of recollection to intoxication. DNA evidence confirmed the sexual assault. Despite his intoxication and lack of memory claims, Tucker entered a guilty plea and declined to withdraw his guilty plea when given the opportunity. Tucker conceded that if the victim claimed he assaulted her, he must have done so because the victim would not lie. Tucker never denied that the sexual assault occurred, only that he did not remember committing the crime, and he pled guilty to spare the victim a trial.⁴ At sentencing, Tucker admitted that he “did wrong,” and acknowledged his guilt and bad behavior, indicating that he knew right from wrong during the circuit court proceedings. Trial counsel, who knew that Tucker had suffered a brain injury, did not believe that Tucker was incompetent or a candidate for an NGI plea. The record is replete with indications that Tucker understood the circuit court proceedings. The September 2011 neuropsychological evaluation noted that while Tucker had some degree of impairment, Tucker’s memory and processing speed were normal for the most part. There is no indication that Tucker’s decision-making ability at the time he entered his plea was affected by his brain injury or cognitive impairment.

A defendant is not per se incompetent for trial if the defendant has amnesia due to a head injury. *State v. McIntosh*, 137 Wis. 2d 339, 347, 404 N.W.2d 557 (Ct. App.1987). And, while intoxication can be a defense, WIS. STAT. § 939.42, Tucker relinquished any such defense when he decided to plead guilty.

⁴ Defendants can have their own reasons for entering a plea to avoid a trial, and those reasons generally do not invalidate a plea. See *State v. Goyette*, 2006 WI App 178, ¶31, 296 Wis. 2d 359, 722 N.W.2d 731.

On appeal, Tucker does not raise anything new on the cognitive impairment or lack of memory issue. On the record created in the circuit court and the additional information provided by appellate counsel and Tucker, we conclude that there is no basis for a competency evaluation or NGI claim. Therefore, a claim of ineffective assistance of trial counsel relating to competency and NGI would lack arguable merit.

We have also considered whether Tucker's competency to assist appellate counsel is at issue. Competency is an issue in the postconviction setting if a defendant "is unable to assist counsel or to make decisions ... with a reasonable degree of rational understanding." *State v. Debra A.E.*, 188 Wis. 2d 111, 126, 523 N.W.2d 727 (1994). Appellate counsel states that Tucker has interacted with her appropriately on the telephone and in letters, even if Tucker claims that other inmates have assisted him with written communication. Such inmate assistance is neither unusual nor a per se indication of a lack of competency. Tucker's responses to counsel's no-merit report and supplement bring his issues before this court, and Tucker does not contend that he has been unable to communicate with his appellate counsel or the court.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and the postconviction order and relieve Attorney Melissa Petersen of further representation of Tucker in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Melissa Petersen is relieved of further representation of Ernest Tucker in this matter.

Diane M. Fremgen
Clerk of Court of Appeals