OFFICE OF THE CLERK
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

March 17, 2015

To:

Hon. Peter C. Diltz
Circuit Court Judge
Door County Justice Center
1209 S. Duluth Ave.
Sturgeon Bay, WI 54235

Connie Defere
Clerk of Circuit Court
Door County Justice Center
1205 S. Duluth Ave.
Sturgeon Bay, WI 54235

Raymond L. Pelrine
District Attorney
1215 S. Duluth Ave.
Sturgeon Bay, WI 54235-3849

Ralph Sczygelski
Sczygelski & Pangburn Law Firm, LLC.
713 Washington St.
Manitowoc, WI 54220-4525

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Kemoni C. Garner 311505
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2014AP2128-CRNM State of Wisconsin v. Kemoni C. Garner (L. C. #2012CF68)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Kemoni Garner filed a no-merit report concluding there is no basis for Garner to challenge judgments of conviction for five felonies and an order denying his motion to withdraw his no-contest pleas. Garner was advised of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

BACKGROUND

The complaint charged Garner with nine offenses: (1) disorderly conduct as a repeater; (2) mayhem as a repeater; (3) substantial battery as a repeater; (4) felony bail jumping as a repeater; (5) attempted first-degree intentional homicide as a repeater; (6) hit and run causing great bodily harm; (7) knowingly operating a vehicle without a valid license, causing great bodily harm; (8) use of a vehicle with a controlled substance in his blood, causing great bodily harm; and (9) attempting to flee or elude a traffic officer. The complaint and attached police reports alleged Garner bit off a portion of Jessica Stephany's ear during an altercation, and subsequently ran her over with his car, dragging her approximately twenty-five feet. He then fled the scene, and was pursued by an officer for 13.8 miles at speeds exceeding 110 miles per hour. Garner was intoxicated at the time, and admitted he had "smoked weed." Garner was free on bond on a felony charge at the time of the incident. The amended complaint also recited Garner's prior convictions, which included one felony and three misdemeanor convictions within the previous five years.

Garner was initially represented by Attorney Theresa Schmieder. At a pretrial conference, Schmieder questioned Garner's competency to proceed. The court ordered a competency evaluation by Doctor Michael Galli. Before Galli completed his evaluation, because the State made a limited-time offer for a plea agreement, Garner indicated he wished to accept the State's offer, and he executed a Plea Questionnaire/Waiver of Rights form. However, after the court informed Garner of the elements of the offenses and potential penalties, Garner indicated he believed he was not guilty. The court then terminated the plea hearing and set the case for trial. Five days later, based on Galli's evaluation, the court found Garner competent to proceed.

Immediately after the competency finding, Schmieder informed the court that Garner was willing to accept the State's plea agreement. Under the terms of the agreement, count five was reduced to first-degree reckless injury and, pursuant to Garner's guilty or no-contest pleas to counts three, four, five, eight and nine, the remaining charges would be dismissed and read in and the State would cap its recommendation for initial confinement to fifteen years. The court again reviewed the elements of the offenses, the potential penalties and the constitutional rights Garner waived by pleading no contest. As required by ***State v. Hampton***, 2004 WI 117, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14, the court informed Garner it was not bound by any sentence recommendations. The court also gave the deportation warning required by WIS. STAT. § 971.08(1)(c).[1] The court accepted Garner's no-contest pleas and set the matter for sentencing.

Prior to the sentencing hearing, Garner wrote a letter to the court complaining about Schmieder's representation. On that basis, Schmieder filed a motion to withdraw as counsel and a motion to withdraw Garner's no-contest pleas. The court granted Schmieder's motion to withdraw as counsel. The state public defender appointed attorney Thomas Gerleman as successor counsel.

At the hearing on the motion to withdraw Garner's no-contest pleas, Garner testified he wanted to confront his accusers, and only accepted the State's offer because he anticipated a five-year sentence. He was upset that the author of the presentence investigation (PSI) report recommended twenty-one to thirty years' imprisonment.

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

Schmieder testified she told Garner the defense was free to argue for a lesser sentence, but he was subject to the maximum possible penalties. She explained to him that the State would be asking for fifteen years' initial confinement and she felt requesting probation would be strategically a very poor move because the court was not going to impose probation. Schmieder told Garner she might be able to successfully argue for a prison sentence between five and eight years, and he focused on the five years during subsequent conversations.

Schmieder also testified that a point of contention between herself and Garner was his belief that it was necessary for her to hire an investigator. She testified she did hire an investigator who was unable to confirm any of Garner's accounts of the incident. Schmieder had reviewed all of the evidence and was prepared to go to trial.

Garner's mother also testified at the hearing that she consulted with Garner before he decided to accept the State's plea offer. She told Garner it was his decision, but she would take the plea based on the reduced charges.

The court denied the motion to withdraw the no-contest pleas. The court found Schmieder never told Garner he would get five years. The court noted Garner waited six or seven weeks to file the motion to withdraw the pleas, during which time the PSI report recommended a much higher sentence than the State would recommend. The court then set the matter for a sentencing hearing, leaving time for the defense to conduct its own presentence report.

At the sentencing hearing, Garner vociferously denied biting Stephany's ear and argued he was the victim of an attack by others who lied about the incident. The court withheld sentence and placed Garner on probation on the counts of substantial battery, bail jumping,

operating a vehicle with a controlled substance and eluding an officer. The terms of probation were concurrent with each other, but consecutive to the sentence imposed on count five, first-degree reckless injury. On that count, the court imposed a sentence of fifteen years' initial confinement and seven and one-half years' extended supervision.

Garner filed a postconviction motion to withdraw his no-contest pleas, alleging ineffective assistance of Schmieder and Gerleman. At the postconviction hearing, his new counsel again questioned Schmieder regarding any promise of five years' initial confinement and whether she employed a private investigator to find witnesses to confirm Garner's version of the incident. Schmieder denied telling Garner she could get the sentence down to five years, and again indicated she spoke with the other potential witnesses identified by Garner. She concluded his expectation of their potential testimony "did not coincide" with their statements to her.

Garner's counsel questioned Gerleman as to whether he recalled "wondering if [Schmieder] had ever promised Garner a sentence that would not exceed five years of initial confinement?" Gerleman answered that there may have been miscommunication about the five years, but not an actual five-year promise. As a strategic matter, Gerleman knew that Schmieder would deny making any such promise because he had spoken to her before the hearing, and he thought it was better not to ask her questions that would contradict Garner's assertions. Counsel also questioned whether the private investigator made any reports to Gerleman. Gerleman responded that he could not say what the investigator did outside of his presence, but when asked whether the investigator provided any information that would have been helpful had Garner gone to trial, Gerleman responded, "The short answer is no."

Garner's mother also testified at the postconviction hearing. Regarding the alleged five-year promise, she testified "I did recall she said he could get less than five—five years to eight to ten. And but she can't really promise that, but the cap is fifteen years. That's what [the prosecutor] was offering." "It was not what you call a promise, it was more like saying that you can get no less than five, to eight to ten. Then she said the cap line is 15. [The prosecutor] is offering him fifteen years. That's what she said."

Garner testified he was going to fire Schmieder "a lot of times" and she kept telling him he was going to get him five years, so he "kept her." Garner testified he never had any communication with the investigator, and received no reports from the investigator. The court denied Garner's postconviction motion to withdraw the pleas.

DISCUSSION

The record reveals no arguable basis for Garner to challenge the circuit court's finding that he was competent to stand trial or enter a plea. Schmieder's concern about Garner's competency was based on his past mental health issues, his inability to read, his behavior in jail and statements that showed an unrealistic body image. Doctor Galli's report, however, focused on the issues that actually relate to competency, Garner's capacity to understand the proceedings and assist in his own defense. *See* WIS. STAT. § 971.13(1). Galli's conclusion that Garner was competent was confirmed by Garner's active participation in his defense and cogent questions about the proceedings.

The record discloses no arguable basis for challenging the no-contest pleas. The court's exemplary colloquy established Garner's understanding of the elements of the offenses, the potential penalties and collateral consequences, and the constitutional rights he waived by

pleading no contest. The court fulfilled all of its mandatory duties for taking valid no-contest pleas set out in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 760 N.W.2d 906. Entry of valid no-contest pleas constitutes a waiver of nonjurisdictional defects and defenses. ***State v. Bangert***, 131 Wis. 2d 246, 293, 389 N.W.2d 12 (1986).

The court properly denied Garner's presentence and postconviction motions to withdraw his no-contest pleas because his claims of ineffective assistance of counsel lacked factual support. As the arbiter of the witnesses' credibility, *see* ***State v. Webster***, 196 Wis. 2d 308, 320, 538 N.W.2d 810 (Ct. App. 1995), the circuit court accepted the testimony of Schmieder, Gerleman and Garner's mother that Schmieder made no promise of a five-year sentence and she was prepared to go to trial after having interviewed the witnesses and hiring an investigator whose reports produced no evidence favorable to the defense.

Finally, the record discloses no arguable basis for challenging the sentencing court's discretion. The court could have imposed consecutive sentences totaling more than sixty-five years' imprisonment and fines totaling $105,000. The court appropriately considered the seriousness of the offenses; Garner's character, including his prior record; and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court considered no improper factors and the twenty-two and one-half-year sentence is not arguably so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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

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

IT IS FURTHER ORDERED that attorney Ralph Sczygelski is relieved of his obligation to further represent Garner in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals