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March 24, 2015

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

2014AP425-CRNM State of Wisconsin v. Walter Christopher Kubiak
(L. C. No. 2012CF195)

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

Counsel for Walter Kubiak has filed a no-merit report concluding no grounds exist to challenge Kubiak's conviction for possession of a firearm subsequent to a finding that Kubiak was not guilty of a felony by reason of mental disease or defect (NGI). *See* WIS. STAT. § 941.29(2)(c).¹ Kubiak has filed a response challenging his conviction. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude

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

there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Kubiak with theft of movable property (special facts); possessing a firearm after being adjudged NGI of a felony; and disorderly conduct while in possession of a dangerous weapon. At the outset of the criminal proceedings, the court granted defense counsel's request for a competency examination. Consistent with the examining psychologist's opinion, the court found Kubiak competent to proceed. In exchange for Kubiak's no contest plea to the firearm possession charge, the State agreed to dismiss the theft charge outright and make no specific sentence recommendation.² Out of a maximum possible ten-year sentence, the court imposed a sentence of seven years and three months, consisting of two years and three months' initial confinement followed by five years' extended supervision.

There is no arguable merit to challenge the circuit court's competency determination. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." *State v. Byrge*, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings. *Id.*, ¶31. A trial court's competency determination should be reversed only when clearly erroneous. *Id.*, ¶45.

² Although dismissal of the disorderly conduct charge was not explicitly mentioned as part of the plea agreement, the circuit court docket indicates that count was dismissed on the prosecutor's motion.

The evaluating psychologist, Dr. Michael Galli, submitted a report opining to a reasonable degree of professional certainty that Kubiak has “the substantial mental capacity to understand court proceedings and to be able to assist in his own defense.” Galli recounted that Kubiak had an accurate understanding of the charges he faced and the underlying incidents forming the basis for the charges. Kubiak knew he was represented by counsel and had an accurate understanding of his lawyer’s role in the case. Kubiak also had an accurate understanding of his plea options and the general procedure he faced as his case proceeded. At the competency hearing, Kubiak insisted he was competent to proceed. Based on Galli’s report and Kubiak’s position that he was competent, the court found Kubiak competent to proceed. The record supports the circuit court’s determination.

The record discloses no arguable basis for withdrawing Kubiak’s no contest plea. The court’s plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Kubiak completed, informed Kubiak of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no contest plea. The court confirmed Kubiak’s understanding that it was not bound by the terms of the plea agreement, *see State v. Hampton*, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also advised Kubiak of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). The court also confirmed that medication Kubiak was taking for a thyroid condition did not impact his ability to understand the proceedings. Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Kubiak committed the crime charged. The record shows the plea was knowingly, voluntarily and intelligently made. *See State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

In his response to the no-merit report, Kubiak appears to challenge the veracity of witnesses cited in the probable cause portion of the Complaint. At the plea hearing, however, Kubiak agreed there was sufficient information in the Complaint that was truthful and accurate to find a factual basis for his plea. Moreover, a valid guilty plea waives all nonjurisdictional defects and defenses. *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. Kubiak also appears to challenge his NGI felony conviction for battery to an officer from November 2000, claiming it was “totally not true.” The 2000 conviction, however, is unreversed and remains of record, and we lack jurisdiction to review that conviction in the context of this appeal.

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Kubiak’s character, including his criminal history; the need to protect the public; and the mitigating factors Kubiak raised. See *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Kubiak’s sentence is 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 judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Linda Schaefer is relieved of further representing Kubiak in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals