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April 29, 2015

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

2014AP751-CRNM State of Wisconsin v. Peter J. Frank, Jr. (L.C. # 2012CF367)

Before Brown, C.J., Reilly and Gundrum, JJ.

Peter J. Frank, Jr. appeals from a judgment of conviction entered upon his no contest plea to false imprisonment as a repeater. Frank's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Frank received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the no-merit report and an independent review of the record,

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

we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In August 2012, the State filed a criminal complaint charging Frank with second-degree recklessly endangering safety, false imprisonment, felony intimidation of a victim, armed robbery, and criminal damage to property. Frank was charged as a repeater in all counts, and each was alleged to be a crime of domestic abuse pursuant to WIS. STAT. § 968.075(1)(a). Frank was bound over for trial following a preliminary hearing, and the State filed an information mirroring the five charges in the complaint.

Frank entered into a plea agreement with the State wherein he agreed to plead guilty or no contest to count two, false imprisonment as a repeater, with the State then moving to dismiss outright the remaining four counts. In terms of sentencing, the parties agreed that a presentence investigation report (PSI) would be prepared, and that the State would cap its initial confinement recommendation at eighteen months. The parties were free to argue all other terms and conditions. At sentencing, the trial court ordered a bifurcated sentence totaling five years, with two years of initial confinement and three years of extended supervision.

We agree with appellate counsel's analysis and conclusion that no arguably meritorious issues arise from the plea-taking procedures in this case. The record shows that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The trial court specifically ascertained Frank's understanding of the nature of and factual basis for the charge, the parties' plea agreement, and that the court was not bound by the parties' agreement or

recommendations. Frank acknowledged that he was a repeater based on his prior misdemeanor convictions, and the trial court ascertained Frank's understanding of the enhanced maximum penalty he faced, which consisted of five years of initial confinement and three years of extended supervision, plus a fine of up to $10,000. The trial court recited and ascertained Frank's understanding of the offense elements, which were also enumerated in the plea questionnaire, and that he was admitting that the offense was domestic-abuse related as alleged in the complaint. The parties stipulated and the court found that a factual basis existed for the crime of conviction based on the facts alleged in the complaint and adduced at the preliminary hearing.

The court drew Frank's attention to the completed plea questionnaire on file and ascertained that he reviewed, signed and understood its contents. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (a completed plea questionnaire and waiver of rights form is competent evidence of a knowing, intelligent, and voluntary plea). The court specifically directed Frank's attention to the form's list of constitutional rights:

> THE COURT: Next, it's my duty to make sure you understand the rights that you do give up by your plea under the Constitution. I see on the form those boxes are checked. Does that mean you understood those?
>
> MR. FRANK, JR.: Yes.
>
> THE COURT: Just to make sure, does your plea today give up your right to a jury trial?
>
> MR. FRANK, JR.: Yes, it does.

The trial court then ensured that Frank understood other specific rights contained in the form. Though the trial court recited some but not all of the specific constitutional rights waived by a guilty plea, it properly relied on Frank's signed plea questionnaire to establish his understanding of those rights. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794

(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 the plea is taken).

Similarly, though the trial court did not read the deportation warning contained in the plea questionnaire, this warning was contained in the plea questionnaire. More importantly, the record establishes that Frank was born in Fond du Lac, Wisconsin. Nothing in the record suggests that Frank's plea "is likely to result in … deportation, exclusion from admission to this country, or denial of naturalization[.]" WIS. STAT. § 971.08(2).

Finally, we conclude that no arguably meritorious issues arise from the fact that Frank never expressly articulated his plea of no contest at the plea hearing. ***State v. Burns***, 226 Wis. 2d 762, 764, 594 N.W.2d 799 (1999) (affirming the defendant's judgment of conviction even though he did not "expressly and personally articulate a plea of no contest on the record in open court, because the only inference possible from the totality of the facts and circumstances in the record is that the defendant intended to plead no contest."). Here, Frank completed, signed and filed a plea questionnaire indicating his intent to plead "no contest" to the charge of false imprisonment. The court and parties repeatedly stated that the purpose of the hearing was to allow Frank to enter a no contest plea so that he could proceed to sentencing. The trial court's colloquy included the following:

> THE COURT: Mr. Frank, besides the agreement with the prosecution regarding the other counts and the recommendation for sentencing, have there been any other promises, agreements, or even threats that in some way would be forcing you or coercing you to plead no contest?
>
> MR. FRANK, JR.: No, Your Honor.

> THE COURT: And do you understand that a no contest plea does result in your conviction just like a guilty plea would?
>
> MR. FRANK, JR.: Yes.
>
> …
>
> THE COURT: Do you personally agree that you did on Friday, August 3rd, 2012, in the City of Fond du Lac, commit the crime of false imprisonment, domestic abuse related?
>
> MR. FRANK, JR.: Yes.

As in ***Burns***, it is clear from the present record, "that is, from the written plea questionnaire and waiver of rights form and the plea colloquy, that the defendant intended to plead no contest to the charged offense." ***Id***. at 769-70.

We also agree with appellate counsel's analysis and conclusion that no issue of arguable merit arises from the sentencing court's exercise of discretion. In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Before imposing sentence, the trial court reviewed the PSI and letters submitted by defense counsel, heard statements from the victim, her relatives and Frank, and considered the arguments of counsel. The court noted that unlike many domestic violence cases, this case did not involve physical injury, although it involved psychological harm. The sentencing court also specifically rejected the victim's accusation that Frank had been using cocaine, and indicated that contrary to the victim's claim, the court did not believe that Frank had been manipulating the system.

The court considered the false imprisonment incident, wherein a butcher knife was produced, to be "a very serious, egregious offense." The court characterized the incident as "an ordeal" that reflected Frank "trying to manipulate, control, and dominate" the victim. The court

acknowledged that the incident was not that long in duration, but stated "that's not really the point. It's what happened during that time."

In terms of Frank's character, the court considered that Frank "has many prior convictions" and was convicted as a repeat offender. The court determined that Frank had issues with his emotional health, including a "problem with control and jealousy." The court also considered mitigating factors, determining that Frank had a positive work ethic, was "oriented to working hard," and had "shown initiative to commence a new business." The court stated its belief that Frank had a genuine interest in his child, though his conduct had disrupted the relationship. However, the court noted as a further negative factor his "previous history of chemical usage" and issues with alcohol as reflected in his prior convictions, including for "drunken driving." The court also considered that Frank had previously been afforded probation in prior cases.

As far as protection of the community, the court determined that in light of his conduct in this case, Frank posed a risk of danger in any future relationship. The trial court indicated that this concern was supported by Frank's extensive experience with the Department of Corrections and the PSI writer's assessment of his risk. In light of these factors and the seriousness of the offense, the trial court concluded that probation would unduly depreciate the seriousness of the offense. The court further concluded that the State's recommendation for eighteen months of initial confinement was insufficient in light of the offense severity, including its impact on the victim. *See* ***State v. Lynch*****,** 105 Wis. 2d 164, 168, 312 N.W.2d 871 (Ct. App. 1981) (though the trial court must consider the proper sentencing factors, the weight to be given each factor lies within its discretion). Further, we cannot conclude that the sentence imposed, which was well within the range authorized by law and did not even invoke the repeater enhancer, is so excessive

or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975); *see also* ***State v. Grindemann***, 2002 WI App 106, ¶¶ 31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (there is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh) (citation omitted). There is no arguably meritorious challenge to the trial court's exercise of discretion at sentencing. [2]

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

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Donald T. Lang is relieved from further representing Peter J. Frank, Jr. in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[2] Based on the record, we agree with appointed counsel's analysis and conclusion that there is no meritorious challenge to the trial court's discretionary imposition of the $250 DNA surcharge on this felony charge. Similarly, we agree with the thorough analysis contained in the no-merit report concerning the $663.26 ordered in restitution. We agree with appellate counsel that neither the DNA surcharge nor the trial court's restitution order gives rise to any issue of arguable merit. Finally, the parties agreed and the court determined that Frank was entitled to sixteen days of sentence credit under WIS. STAT. § 973.155. Nothing in the record leads us to question the propriety of the trial court's sentence credit determination.