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July 29, 2015

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

2014AP1770-CRNM State of Wisconsin v. Matthew R. Fett (L.C. # 2012CF578)
2014AP1771-CRNM State of Wisconsin v. Matthew R. Fett (L.C. # 2013CF382)

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

In these consolidated cases, Matthew R. Fett appeals from judgments of conviction entered upon his guilty pleas to (1) operating a motor vehicle while intoxicated (OWI), as fifth offense and with a repeater enhancer, and (2) felony bail jumping.[1] Fett's appellate counsel has

[1] The OWI fifth offense was charged in Waukesha County Circuit Court case No. 2012CF578, and the felony bail jumping charge arises out of Waukesha County Circuit Court case No. 2013CF382. These cases, along with case Nos. 2011CT1649 and 2012CF1152 (which were ultimately dismissed but read in), were disposed of together for plea and sentencing purposes.

filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[2] and ***Anders v. California***, 386 U.S. 738 (1967). Fett received a copy of the report and filed a response. Upon consideration of the no-merit report and response and an independent review of the record, we conclude that the judgments 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 May 2012, police responded to a report of an apparently intoxicated motorcycle driver near a restaurant's drive-through window. Fett was the motorcycle operator and, following his arrest, was charged in a four-count complaint with OWI fifth as a repeater, operating after revocation as a repeater, misdemeanor bail jumping as a repeater, and fifth offense operating with a prohibited blood-alcohol concentration (PAC) as a repeater. While released on bond, Fett was twice arrested and charged with five additional criminal offenses across two separate cases.

As part of a negotiated agreement, Fett pled guilty to two counts: (1) OWI fifth offense, as a repeater, contrary to WIS. STAT. §§ 346.63(1)(a) and 939.62(1)(b); and (2) felony bail jumping, contrary to WIS. STAT. § 946.49(1)(b). In exchange, the State successfully moved to dismiss and read in the remaining counts in Case Nos. 2012CF578 and 2013CF283, all counts in Case Nos. 2011CT1649 and 2012CF1152, and two traffic matters. Additionally, the State agreed to recommend an unspecified prison sentence on the OWI conviction and a withheld sentence in favor of consecutive probation in connection with the felony bail jumping. At sentencing, the trial court imposed the same bifurcated sentence on both offenses of conviction and ordered that they run concurrent with each other. Specifically, on each, the court imposed a

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

bifurcated sentence totaling four and one-half years, with two years of initial confinement and two and one-half years of extended supervision. The court found Fett eligible for both the Challenge Incarceration and Earned Release Programs and awarded sixty-three days of credit on both concurrent sentences.[3]

The no-merit report addresses whether there is any basis for a challenge to the validity of Fett's guilty pleas and whether the trial court appropriately exercised its discretion at sentencing. We agree with appellate counsel's conclusion that these issues lack arguable merit.

With regard to Fett's guilty pleas, the record demonstrates 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. In addition, the court specifically drew Fett's attention to the completed plea questionnaire on file and ascertained that he reviewed 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 trial court specifically ascertained Fett's understanding of the parties' plea agreement, the maximum penalties for both

[3] Though the trial court originally ordered a $250 DNA surcharge, this order was vacated pursuant to Fett's pro se requests.

offenses,[4] and that the court was not bound by the parties' agreement or recommendations and could impose the maximum. The trial court ascertained Fett's understanding of the essential offense elements and how his actions satisfied each element. Through its colloquy and by reference to the plea form, the trial court confirmed that Fett understood his constitutional rights and that knowing the direct consequences, he wished to waive those rights by pleading guilty. With the parties' consent, the trial court relied on the criminal complaints and properly determined that they established a factual basis for the convictions. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Fett's guilty pleas.[5]

As to the 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). In fashioning the sentence, the court considered the nature of the offenses, Fett's character, including his repeated decisions to disregard the terms of his court-ordered bonds, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289

[4] While the plea form understates the maximum penalty for the OWI conviction, and overstates the permissible felony bail jumping penalty, this information was specifically corrected during the court's on-the-record plea colloquy with Fett, and Fett demonstrated his understanding of the correct applicable penalties. To the extent that the trial court failed to explicitly state the OWI's mandatory minimum penalties, the no-merit report asserts that Fett cannot allege he did not otherwise understand this information. *See* ***State v. Brown,*** 2006 WI 100, ¶¶36-37, 293 Wis. 2d 594, 716 N.W.2d 906 (in order for a plea to be unknowing and involuntary, it is necessary that the defendant did not understand the information that should have been provided by the trial court). Fett's response does not contradict appellate counsel's assertion. Additionally, the applicable mandatory minimum penalty was correctly stated on the signed plea form.

[5] We observe that during the plea colloquy, the trial court did not provide the deportation warning required by WIS. STAT. § 971.08(1)(c). However, counsel's no-merit report asserts that Fett is a lifelong resident of Waukesha county and that the court's failure to give the deportation warning provides no ground for relief because Fett cannot demonstrate that his pleas are likely to result in his deportation, exclusion of admission to this country or denial of naturalization. *See* ***State v. Douangmala***, 2002 WI 62, ¶¶4, 25, 46, 253 Wis. 2d 173, 646 N.W.2d 1. Fett's response does not dispute counsel's analysis, and we agree that the lack of an on-the-record deportation warning does not give rise to an issue of arguable merit.

Wis. 2d 594, 712 N.W.2d 76. The trial court observed that Fett had served increasingly longer jail terms on his prior offenses and that this failed to deter Fett from drinking and driving. The court determined that while rehabilitation was one of its sentencing objectives, it was primarily concerned with protecting the public. The court explained that prison was necessary because Fett posed a danger and could not safely be released to the community. The trial court's sentence was not so excessive or unusual as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no meritorious challenge to the trial court's sentencing decision.

In his response to the no-merit report, Fett writes that he "accepts and completely finds the sentence of initial confinement and extended supervision appropriate under the facts of this case," but takes issue with the trial court's order revoking his driver's license for thirty-six months. Fett states that at some point, he learned that pursuant to WIS. STAT. § 343.30(1r), the court-ordered period of revocation would not commence until his release from prison. He suggests that the court may have believed that the mandatory revocation would commence immediately and that if the court had been aware of § 343.30(1r), it might have imposed the lesser mandatory revocation of twenty-four months. Citing to ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (defendant has a due process right to be sentenced based on accurate information), Fett asserts that he is entitled to a postconviction hearing to determine whether the court sentenced him on the basis of inaccurate information.

We conclude that Fett's response does not establish an issue of arguable merit. To set forth a colorable ***Tiepelman*** claim, a defendant must first establish by clear and convincing

evidence both that inaccurate information was presented at sentencing and that the court relied upon the misinformation in reaching its determination. ***Id***., ¶26.[6] Fett is unable to point to and we are unaware of anything in the record suggesting that the sentencing court mistakenly believed that Fett's license revocation would commence immediately and terminate in thirty-six months. There is certainly no indication that the trial court actually relied on this supposed misperception when imposing sentence. Fett's rank speculation does not give rise to an arguably meritorious issue.

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

Upon the foregoing reasons,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Andrea Taylor Cornwall is relieved from further representing Matthew R. Fett in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[6] If the defendant is able to establish both prongs (inaccurate information and actual reliance), the burden shifts to the State to prove that the error was harmless. ***State v. Tiepelman***, 2006 WI 66, ¶ 26, 291 Wis. 2d 179, 717 N.W.2d 1.