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August 19, 2015

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

2015AP266-CRNM State of Wisconsin v. Cody A. Tummett (L.C. #2013CF710)

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

Cody A. Tummett appeals from a judgment convicting him, upon his pleas of no contest,[1] to one count each of attempted first-degree intentional homicide and first-degree recklessly endangering safety. Tummett's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[2] and ***Anders v. California***, 386 U.S. 738 (1967). Tummett was

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[1] The judgment of conviction correctly recites the offenses and penalties but indicates that Tummett pled not guilty rather than no contest.

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

advised of his right to file a response but has elected not to do so. Upon consideration of the no-merit report and our independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that the appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We accept the no-merit report, affirm the judgment of conviction, and relieve Attorney Ralph J. Sczygelski of further representing Tummett in this matter.

Tummett was angry that his former girlfriend, with whom he had lived for a year, was seeing another man. He showed up at her house with a loaded 12-gauge shotgun, aimed it at her, then turned the gun on her companion, saying, "I'm going to kill you, so you never fuck with my woman ever again." The men struggled over the gun. Two shots were fired but no one was hit.

Tummett was charged with one count each of attempted first-degree intentional homicide, use of a dangerous weapon, and first-degree recklessly endangering safety, use of a dangerous weapon, domestic abuse. Tummett entered no-contest pleas to the charged offenses without the weapon enhancers but with the domestic abuse surcharge on count two. On count one, the trial court sentenced him to twenty years: twelve years' initial confinement and eight years' extended supervision, consecutive to a sentence he was serving on an unrelated case. On count two, it withheld sentence and placed him on three years' probation, consecutive to the sentence for count one. This no-merit appeal followed.

The no-merit report considers these possible appellate issues: whether there was an adequate factual basis upon which to convict Tummett; whether Tummett's pleas were knowingly, voluntarily, and intelligently entered; and whether Tummett's sentence was too harsh. We agree with appellate counsel that none has arguable merit.

There is no manifest injustice upon which Tummett could withdraw his pleas. *See **State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, augmented by the plea questionnaire and waiver of rights forms, informed Tummett of the constitutional rights he waived by pleading, the elements of the offenses, and the potential penalties. *See **State v. Hoppe***, 2009 WI 41, ¶¶18, 30-32, 317 Wis. 2d 161, 765 N.W.2d 794. An adequate factual basis supported the convictions. The court expressly advised Tummett that it was not bound by the parties' agreement and, if deemed appropriate, it could impose the maximum penalties. *See **State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. The record shows the pleas were knowingly, voluntarily and intelligently entered. *See* WIS. STAT. § 971.08; ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Entry of a valid no-contest plea constitutes a waiver of non-jurisdictional defects and defenses. ***Id.*** at 265-66, 293.

The record also reveals no basis for challenging the trial court's sentencing discretion. The court considered the proper factors, including the seriousness of the offenses, Tummett's character and rehabilitation needs, and the need to protect the public. *See **State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984).

Regarding the seriousness of the offenses, the court observed that "there is only one offense that is more serious on our books and that is the completion of the act which you tried to do here." As to Tummett's character, the court discussed twenty-three-year-old Tummett's disregard for others, as shown by his "bad" prior record, his forty sexual partners, several underage and many one-night stands, his fathering two children by two different women, and his lack of knowledge as to what he owed in child support. The court commented that rehabilitation would require more than a short-term solution and likely would be "a lifelong thing." As to the

need to protect the public, the court observed that women especially were at risk because he treated them like property and used them as he wanted. The court appropriately concluded that Tummett was a danger because "if you don't like what is happening … you take things into your own hands such as you did here and bring a gun and you discharge it." Tummett's sentence was far less than the seventy-two-and-one-half years he faced. It therefore presumptively was neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507.

Our review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Ralph J. Sczygelski is relieved from further representing Tummett in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals