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DISTRICT III

May 10, 2016

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

2013AP2567-CRNM State of Wisconsin v. Jacinto Fraire
2013AP2568-CRNM (L. C. Nos. 2009CF314; 2010CF138)

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

Counsel for Jacinto Fraire has filed no-merit reports concluding no grounds exist to challenge Fraire's convictions for first-degree reckless homicide, as party to a crime, and battery to a law enforcement officer, arising from Brown County Circuit Court case Nos. 2009CF314 and 2010CF138. Fraire has filed a response challenging his pleas and alleging his trial counsel was ineffective. We sua sponte consolidated these appeals for disposition. Upon our independent review of the records as mandated by *Anders v. California*, 386 U.S. 738 (1967),

we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.¹

In case No. 2009CF314, the State charged Fraire with first-degree intentional homicide with use of a dangerous weapon and armed robbery with use of force, both counts as party to a crime and as a repeater. While held at the Brown County jail, Fraire and another inmate attempted to escape, resulting in the following charges in case No. 2010CF138: attempted escape; battery of a law enforcement officer; and party to the crime of both false imprisonment and disorderly conduct. All counts were as a repeater. In exchange for his no contest pleas to an amended charge of first-degree reckless homicide, as party to the crime, and battery to a law enforcement officer, both without the repeater enhancer, the State agreed to dismiss and read in the remaining counts from these cases and another felony case. The State also agreed to recommend that the sentence for the battery conviction run concurrently with the sentence imposed for the homicide conviction. Out of a maximum possible sixty-six-year sentence, the court imposed consecutive sentences resulting in a total term of fifty-three years and seven months, consisting of forty years and seven months of initial confinement followed by thirteen years of extended supervision.

In his response to the no-merit report, Fraire contends his plea was not knowingly, voluntarily and intelligently made. The record, however, belies his claim. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Fraire completed, informed Fraire of the elements of the offenses, the penalties that could be imposed,

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

and the constitutional rights he waived by entering no contest pleas. The court confirmed Fraire'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 Fraire of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). Fraire additionally confirmed that prescribed medication he took for a mental illness or disorder did not affect his ability to understand the proceedings. Further, the court found that a sufficient factual basis existed in the criminal complaints to support the conclusion that Fraire committed the crimes charged.

In his response, Fraire indicates that he hesitated before answering the court's questions during the plea colloquy, intimating that this hesitation shows his pleas were not knowingly entered. Fraire's claimed hesitation is not reflected in the record. Even assuming there was hesitation before Fraire answered the court's questions, Fraire ultimately confirmed that he understood the information provided by the court. The record shows the pleas were knowingly, voluntarily, and intelligently made, *see State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986), and nothing in the records or Fraire's response would support a nonfrivolous argument for plea withdrawal.

Fraire's response also appears to challenge the effectiveness of Fraire's trial counsel. To establish ineffective assistance of counsel, Fraire must show that his counsel's performance was not within the wide range of competence demanded of attorneys in criminal cases. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Fraire must demonstrate "there is a reasonable probability that, but for counsel's errors, he would not have [pleaded] guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Any claim of ineffective assistance must first be raised in the trial court. *State v. Machner*, 92 Wis. 2d 797,

804, 285 N.W.2d 905 (Ct. App. 1979). Our review of the record, the no-merit reports and Fraire's response discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a *Machner* hearing.

Finally, there is no arguable basis for challenging the sentences imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Fraire's character, including his criminal history; the need to protect the public; and the mitigating factors Fraire raised. See *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The sentencing court stated that its overriding concern was to protect the public, noting that the homicide occurred less than three months after Fraire had been released on extended supervision. The court also determined that to impose concurrent sentences would "significantly depreciate the harm" that Fraire caused to the law enforcement officer he battered in the jail. Under these circumstances, it cannot reasonably be argued that Fraire'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 records discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Chris A. Gramstrup is relieved of further representing Fraire in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals