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July 8, 2016

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

2015AP2437-CRNM State of Wisconsin v. Dequarius D. Fitzpatrick (L.C. # 2013CF5649)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

Dequarius Fitzpatrick appeals a judgment convicting him of taking and driving a vehicle without the owner's consent and armed robbery, both as party to a crime, as well as felon in possession of a firearm. Attorney Marcella De Peters filed a no-merit report and seeks to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14);[1] *see also* ***Anders v.***

[1] All further references in this order to the Wisconsin Statutes are to the 2013-14 version, unless noted otherwise.

California, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of Fitzpatrick's plea and the sentence imposed. Counsel provided Fitzpatrick a copy of the report, but Fitzpatrick has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

To support withdrawal of a plea following sentencing, the defendant is required to demonstrate that the plea colloquy was defective such that the defendant unknowingly entered the plea or that a manifest injustice such as coercion, the lack of a supporting factual basis for the plea, ineffective assistance of counsel, or failure by the prosecutor to uphold the State's end of a plea agreement undermined the plea's validity. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n. 6, 471 N.W.2d 599 (Ct. App. 1991). The record reveals no such defect.

Fitzpatrick entered into a plea agreement by which he agreed to plead guilty to the three counts of conviction, in return for which the State agreed to dismiss four additional counts that would be read in for sentencing purposes. The dismissal reduced Fitzpatrick's total imprisonment exposure by 120 years. This agreement was placed on the record at the commencement of the plea hearing.

At the plea hearing, the circuit court conducted an extensive inquiry into Fitzpatrick's background and understanding of the many constitutional rights he would forego, and made specific inquiries regarding his understanding of and agreement with the factual basis underlying his guilty pleas, including a detailed inquiry regarding Fitzpatrick's understanding of the elements of the offense and "party to a crime" provision. The court explored the penalty ranges,

explained the attendant legal ramifications of the plea, and emphasized the court's ability to impose a sentence anywhere within the applicable statutory range. In addition, the court had before it Fitzpatrick's signed plea questionnaire which he attested to having read and discussed with trial counsel. Counsel, in turn, advised the court that she had reviewed the plea questionnaire and other relevant documents with Fitzpatrick and was confident he understood the terms and impact of the pleas. The court indicated its intent to order a presentence investigation and offered Fitzpatrick the opportunity to decline to move forward with his pleas if he was concerned at all by the court's order for the presentence investigation, giving Fitzpatrick the opportunity to discuss the issue with counsel. Fitzpatrick testified that no one had coerced him into entering the pleas and that he had adequate time to discuss all matters with counsel. Based on the record before it, the circuit court found Fitzpatrick freely, knowingly, and voluntarily entered his pleas. Our review leads us to conclude that the circuit court's plea colloquy was more than adequate to establish the voluntary and knowing entry of Fitzpatrick's guilty pleas.

Trial counsel had filed motions to suppress statements and evidence on Fitzpatrick's behalf. However, at an appearance that was initially calendared as the evidentiary hearing for the suppression motions, Fitzpatrick, following a full colloquy with the circuit court, indicated his desire to waive the motion hearing and set the matter for a plea. The circuit court discussed withdrawal of the suppression motions with Fitzpatrick a second time at the plea hearing and confirmed his voluntary withdrawal of the motions prior to entry of his pleas. There is no indication that trial counsel's conduct with regard to the waiver of the suppression hearing—and thus the implicit withdrawal of the motions themselves—was deficient. Further, by entry of his guilty pleas, all nonjurisdictional defects and defenses were forfeited. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

We agree that any challenge to the circuit court's sentence would also lack arguable merit. Our review of the circuit court's sentence begins with the "presumption that the [circuit] court acted reasonably," leaving the defendant with the burden to demonstrate "some unreasonable or unjustifiable basis in the record" in order for us to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record demonstrates the circuit court's compliance with the requisite sentencing considerations set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court explained the serious nature of the offenses, including the felon in possession conviction which resulted from his earlier juvenile felony armed robbery conviction, the armed robbery of a man in the presence of his six-year-old son, and the car theft which left its owner with no transportation and no way to get to and from work, thus forcing him to rent a vehicle with his own funds and to endure emotional stress. The circuit court noted that Fitzpatrick, then eighteen years of age, "threatened" and "menaced" community members, and was "[o]ut of control … a freight train … barreling off the tracks and destroying everything in front of [him]" despite his mother's many efforts to secure services for him and family support.

The circuit court also focused on deterrence, noting Fitzpatrick had previously been incarcerated at the House of Corrections and the Lincoln Hills juvenile facility. As a mitigating factor, the circuit court noted Fitzpatrick's school record was "very promising" and that it appeared he was beginning to recognize the time to change his mode of thinking had arrived. The circuit court noted Fitzpatrick's age and acceptance of responsibility demonstrated by

pleading guilty, as well as the statement he made prior to sentencing. The circuit court fulfilled its sentencing responsibilities set forth in ***Gallion***.[2]

The bifurcated sentences of imprisonment the circuit court imposed for each conviction were well within the statutory ranges.[3] While Fitzpatrick's total imprisonment exposure was fifty-six years, including thirty-three years of initial confinement, the circuit court's sentences totaled twenty-nine years, including fifteen years of initial confinement. Thus, Fitzpatrick's initial prison confinement amounted to less than half the statutory maximum, with the total bifurcated sentences amounting to roughly fifty-two percent of the maximum statutory exposure.

A sentence well within the applicable statutory maximums is presumed not to be unduly harsh, and reviewing the record independently, as well as according the circuit court's analysis and decision due deference, we conclude that the sentences the circuit court imposed here were not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

[2] The circuit court deemed Fitzpatrick eligible for both the substance abuse and the challenge incarceration programs. The court also exercised its discretion in imposing one DNA surcharge with the requirement that Fitzpatrick give a DNA sample for the first time. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12.

[3] *See* WIS. STAT. §§ 943.23(2), 973.01(2)(b)8. and (d)5. (the maximum sentence for take and drive a vehicle without consent, a Class H felony, is three years confinement with maximum extended supervision of three years); 943.32(2), 973.01(2)(b)3. and (d)2. (the maximum sentence for armed robbery, a Class C felony, is twenty-five years of initial confinement with maximum extended supervision of fifteen years; and 941.29(2)(a), 973.01(2)(b)7. and (d)4. (the maximum sentence for felon in possession of a firearm, a Class G felony, is five years' initial confinement with maximum extended supervision of five years).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Marcella De Peters is relieved of any further representation of Dequarius Fitzpatrick in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals