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October 12, 2016

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

2016AP399-CRNM State of Wisconsin v. George Torres (L.C. # 2014CM20)

Before Neubauer, C.J.[1]

George Torres appeals from a judgment of conviction for conspiracy to commit battery while possessing or using a dangerous weapon, for which he received a sentence of one month jail time to be served concurrently with time he would be serving on an alternative to revocation on a prior conviction. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14), and ***Anders v. California***, 386 U.S. 738 (1967). Torres received a copy

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

of the report and was advised of his right to file a response. He has elected not to do so. Upon consideration of the report and an independent review of the record, 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.

Torres was a passenger in a car stopped by police very shortly after the report of a street fight. The criminal complaint recites that the car's windshield was shattered in multiple places and that a baseball bat, tire iron, and a pair of brass knuckles were observed in the passenger area of the car. The driver of the car admitted that everyone in the car had travelled from Wisconsin Rapids to Stevens Point to retaliate against a group of people for a prior incident. Torres was charged with conspiracy to commit battery while possessing or using a dangerous weapon, a misdemeanor which carried a maximum sentence of fifteen months in jail because of the dangerous weapon enhancer.

A motion to suppress evidence obtained as a result of the stop was denied. A motion for reconsideration of the suppression ruling was also denied. Torres entered a no contest plea under a plea agreement requiring a joint recommendation for a sentence of one month jail time to be served concurrent to confinement Torres would be serving on a prior conviction. After accepting Torres' plea, the court imposed a sentence of one month concurrent jail time.

The no-merit report addresses the potential issues of whether the record supports the trial court's factual findings concerning the vehicle stop, whether the vehicle stop was constitutionally reasonable, whether Torres' plea was freely, voluntarily, and knowingly entered, and whether the sentence was the result of an erroneous exercise of discretion. Except as

discussed below, this court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

The plea colloquy was rather abbreviated with respect to the trial court's duty to ascertain Torres' understanding of the elements of the offense. *See* ***State v. Bangert***, 131 Wis. 2d 246, 269, 389 N.W.2d 12 (1986) (establishing a mandatory obligation on the circuit court to first inform the defendant of the charge's nature or to ascertain that the defendant possesses such information and to do so in a manner that is more than just a perfunctory procedure); *see also* WIS. STAT. § 971.08(1)(a). ***State v. Brown***, 2006 WI 100, ¶¶46-48, 293 Wis. 2d 594, 716 N.W.2d 906, reiterates that a circuit court may fulfill its duty under § 971.08(1)(a), to address the defendant personally to determine that the plea is made with understanding of the nature of the charge by summarizing the elements of the crime by reading from the appropriate jury instruction or statute; asking defendant's counsel whether he explained the nature of the charge to the defendant and requesting counsel to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing; or expressly referring to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea. Here the court simply asked Torres, "And do you understand what the State would have to prove at trial; what elements the State would have to prove at trial before you could be found guilty?" Torres responded that he understood. However, the record lacks any recitation of the elements of conspiracy to commit battery.[2]

[2] The elements of the offense were not listed in the space provided on the "Plea Questionnaire/Waiver of Rights" form signed by Torres and were not attached. On that form the phrase "These elements have been explained to me by my attorney" was circled.

A motion to withdraw a plea is only meritorious if the defendant can assert that he did not know or understand that aspect of his plea that is related to a deficiency in the plea colloquy. ***Brown***, 293 Wis. 2d 594, ¶62. The no-merit report states that: "Torres would have great difficulty making the necessary allegations that he did not know about or lacked understanding of the information in [any] technical omission." Torres has not filed a response to the no-merit report and does not dispute this representation in the no-merit report.[3] We conclude that a motion to withdraw Torres' plea would lack merit.

During the plea colloquy, the trial court also failed to give Torres' the deportation warning as required by WIS. STAT. § 971.08(1)(c).[4] However, the failure to give the warning is not grounds for relief unless the defendant can show that his plea is likely to result in deportation, exclusion from admission to this country, or denial of naturalization. Sec. 971.08(2). The no-merit report states: "Counsel's investigations have not found … that Torres is subject to any risk of deportation." Again, Torres does not dispute this representation by way

[3] We acknowledge that appointed counsel has not once spoken with Torres. Four motions for extensions of time to pursue postconviction relief were sought on the basis that counsel had been unable to communicate with Torres. The no-merit report explains that Torres has never contacted counsel, he did not return phone calls from counsel, and he did not respond to mail that was sent to Torres' last known address and not returned undelivered. (This court's notice to Torres of his right to respond to the no-merit report sent to Torres' last known address was not returned.) Even if there was arguable merit to a motion for plea withdrawal, we could determine that Torres has forfeited his right to further postconviction proceedings and representation by counsel because of his failure to communicate with appointed counsel. *See* ***State ex rel. Van Hout v. Endicott***, 2006 WI App 196, ¶36, 296 Wis. 2d 580, 724 N.W.2d 692 ("a defendant, by actions designed to obfuscate and frustrate the judicial review process, can give up" the right to appeal); ***State v. Woods***, 144 Wis. 2d 710, 715-16, 424 N.W.2d 730 (Ct. App. 1988) (waiver of right to counsel may occur by operation of law based on a defendant's own actions). The no-merit report could be accepted on that basis and appointed counsel relieved of the duty of representation.

[4] It may be that the trial court had no concerns that Torres was a person who might be subject to adverse immigration consequences. However, the record here is entirely devoid of any fact that would negate the necessity of giving the required deportation warning. The required warning should be given in all cases.

of a response to the no-merit report. There is no merit to a motion to withdraw the plea based on the failure to give the deportation warning.

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney John P. Morgan is relieved from further representing George Torres in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals