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DISTRICT I

December 20, 2016

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

2016AP751-CRNM State of Wisconsin v. Nicholas Deonte Fudge (L.C. # 2014CF1839)

Before Brennan, P.J., Kessler and Brash, JJ.

Nicholas Deonte Fudge appeals a judgment convicting him of one count of second-degree sexual assault of a child. Attorney Leon W. Todd, III, filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14),¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Fudge was informed of his right to file a response, but he has not responded. After considering the no-merit report and conducting an independent review

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

of the record, we conclude that there are no issues of arguable merit that Fudge could raise on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there would be arguable merit to a claim that Fudge should be allowed to withdraw his plea because it was not knowingly, intelligently and voluntarily entered. Before accepting a plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crime to which he is pleading guilty, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08. The circuit court's colloquy with the defendant helps to ensure that the defendant is knowingly, intelligently, and voluntarily waiving the right to trial. *See State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may refer to a plea colloquy and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the circuit court and the defendant." *State v. Hoppe*, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

At the plea hearing, the prosecutor stated the plea agreement on the record, and both Fudge and Fudge's lawyer informed the court that the plea agreement as stated by the prosecutor was accurate. The circuit court explained to Fudge that it was not bound by the plea agreement, and Fudge told the court he understood.

The circuit court explained to Fudge the maximum penalties he faced for the charge by entering a plea. Fudge told the court that he understood. The circuit court informed Fudge that

if he was not a citizen of the United States of America, he could be deported if he pled guilty. See *State v. Douangmala*, 2002 WI 62, ¶46, 253 Wis. 2d 173, 646 N.W.2d 1. Fudge told the court that he understood. The circuit court asked Fudge whether he had reviewed the complaint and the jury instruction which listed the elements of the crime, and whether he had reviewed the jury instruction with his lawyer. Fudge said he had.

The circuit court reviewed with Fudge the constitutional rights he was waiving and ascertained that Fudge understood after the prosecutor read the elements of the crime aloud in court. The circuit court asked Fudge whether anyone had made promises to him in exchange for the plea and whether anyone had threatened Fudge to get him to enter the plea. Fudge said no promises had been made to him and he had not been threatened. The circuit court asked Fudge whether he had reviewed the plea questionnaire and waiver-of-rights form, and Fudge said that he had. Fudge's lawyer stipulated that the court could use the allegations in the complaint as a factual basis for the plea, and Fudge personally informed the court that the information stated by his lawyer was true. Based on the circuit court's thorough plea colloquy with Fudge, and Fudge's review of the plea questionnaire and waiver-of-rights form, there would be no arguable merit to an appellate challenge to the plea.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion in denying Fudge's motion to withdraw his plea prior to sentencing. Fudge argued that he should be allowed to withdraw his plea because Attorney Danielle Shelton, who was representing him when he entered the plea, did not fully explain to him what his options were and did not timely provide him with the DNA evidence against him or tell him what the DNA evidence meant for his defense.

A defendant must present a fair and just reason to withdraw his plea before sentencing. *State v. Canedy*, 161 Wis. 2d 565, 583, 469 N.W.2d 163 (1991). The decision to grant or deny a motion for plea withdrawal before sentencing is committed to the circuit court's discretion. *State v. Rhodes*, 2008 WI App 32, ¶7, 307 Wis. 2d 350, 746 N.W.2d 599.

At a hearing on the motion, Shelton testified that she advised Fudge about the DNA evidence numerous times and told him about the negative impact it would have on his case. She also provided him with a copy of a packet of additional DNA evidence as soon as it was provided to her. In contrast, Fudge testified that Shelton did not give him the initial DNA results until a week before trial and never reviewed the information with him. The circuit court found Shelton's testimony to be more credible than Fudge's testimony and therefore properly rejected Fudge's claim that he should be allowed to withdraw his plea because he did not understand his options and the meaning of the DNA evidence. There would be no arguable merit to this claim.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion when it sentenced Fudge to eighteen years of imprisonment, with twelve years of initial confinement and six years of extended supervision. In its sentencing remarks, the circuit court discussed mitigating and aggravating circumstances, particularly noting that Fudge had previously been convicted of third-degree sexual assault and that there was a separate sexual assault allegation against Fudge although Fudge had not been convicted of a crime based on that allegation. The circuit court stated that Fudge was a risk to the community and needed to be punished for his actions. The circuit court considered appropriate factors in deciding what length of sentence to impose and explained its application of the various sentencing guidelines in accordance with the framework set forth in *State v. Gallion*,

2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, there would be no arguable merit to an appellate challenge to the sentence.

Our independent review of the record also reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney Leon W. Todd, III, from further representation of Fudge.

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

IT IS FURTHER ORDERED that Attorney Leon W. Todd, III, is relieved from any further representation of Fudge in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals