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**DISTRICT IV**

March 13, 2017

To:

Hon. Todd W. Bjerke  
Circuit Court Judge  
La Crosse County Courthouse  
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La Crosse, WI 54601

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Clerk of Circuit Court  
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Nicholas S. Fitzpatrick  
La Crosse County Jail  
333 Vine St.  
La Crosse, WI 54601

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

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2016AP710-CRNM      State of Wisconsin v. Nicholas S. Fitzpatrick (L.C. # 2013CF746)

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

Attorney David Karpe, appointed counsel for Nicholas Fitzpatrick, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)<sup>1</sup> and *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Fitzpatrick's plea or sentencing. Fitzpatrick was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record,

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

Fitzpatrick was charged with delivering three grams or less of heroin, as a second or subsequent offense. Pursuant to a plea agreement, Fitzpatrick pled guilty to delivering three grams or less of heroin, without the subsequent offense penalty enhancer. The court sentenced Fitzpatrick to two years of initial confinement and four years of extended supervision.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the validity of Fitzpatrick's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Fitzpatrick and determine information such as Fitzpatrick's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Fitzpatrick's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Fitzpatrick's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. *State v. Ramuta*, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered facts relevant to the standard sentencing factors and objectives, including Fitzpatrick's character

and criminal history, the gravity of the offense, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The court considered that sentencing had been delayed to allow Fitzpatrick the opportunity to participate in Drug Court, that Fitzpatrick had failed to comply with the requirements for that program, and that he had acquired new charges of felony bail jumping and obstructing. The sentence was well within the maximum Fitzpatrick faced, and therefore was not so excessive or unduly harsh as to shock the conscience. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. Additionally, the court granted Fitzpatrick 36 days of sentence credit, on counsel's stipulation.

We agree with counsel's assessment that there would be no arguable merit to a challenge to Fitzpatrick's sentence on grounds that the individual above Fitzpatrick on the drug distribution ladder received a lesser sentence. The circuit court explained that, based on Fitzpatrick's individual history and treatment needs, the court imposed a slightly higher sentence on Fitzpatrick than the sentence the drug supplier received. *See Ocanas v. State*, 70 Wis. 2d 179, 186-88, 233 N.W.2d 457 (1975) (holding that, while due process "requires substantially the same sentence for substantially the same case histories, it does not preclude different sentences for persons convicted of the same crime based upon their individual culpability and need for rehabilitation"; rather, "a finding that there has been a denial of equal protection must rest upon a conclusion that the disparity was arbitrary or based upon considerations not pertinent to proper sentencing discretion"). We also agree with counsel's assessment that it would be wholly frivolous to challenge the circuit court finding Fitzpatrick ineligible for the Challenge Incarceration Program. We discern no erroneous exercise of the circuit court's sentencing discretion.

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.

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

IT IS FURTHER ORDERED that Attorney David Karpe is relieved of any further representation of Nicholas Fitzpatrick in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*