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June 6, 2017

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

2015AP2115-CRNM State v. Fanando L. Thomas (L. C. No. 2012CF18)

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

Counsel for Fanando Thomas has filed a no-merit report concluding no grounds exist to challenge Thomas's convictions for second-degree recklessly endangering safety with use of a dangerous weapon; first-degree reckless injury with use of a dangerous weapon; and felon in possession of a firearm. Thomas has responded. Upon our independent review of the record as

mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude no issue of arguable merit appears, and the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21 (2015-16).¹

This matter arises out of a shooting at a bar near closing time. Thomas was allegedly involved in a scuffle with another patron, went outside to retrieve a handgun, came back inside the bar and shot several individuals, including a security guard and another individual. There were eighty or ninety people in the bar at the time of the shooting. Thomas then fled the scene in an automobile. He was followed by a security guard who notified police of Thomas's location, and police then apprehended Thomas.

A witness in Thomas's vehicle told police she had observed Thomas get punched in the face by another patron in the bar. The witness saw Thomas shoot at that patron before the witness ran out of the bar with her boyfriend. Thomas later came outside as well. The witness's boyfriend entered the passenger seat of a vehicle in which Thomas was the driver, and the witness sat in the back seat. Thomas asked, "What do I do with this?" and attempted to hand the gun to the witness and told her to put the pistol in her purse, which she refused to do. She then observed Thomas put the clip to the pistol in the vehicle's center console. Police subsequently located a 9mm handgun magazine containing seven bullets in the vehicle's center console, together with a 9mm handgun with one bullet in the chamber. A bullet recovered from one of the victims in the bar matched the bullets found in the center console.

An amended Information alleged six counts: (1) attempted first-degree intentional homicide, as a repeater; (2) second-degree recklessly endangering safety with use of a dangerous

¹ References to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

weapon; (3) first-degree reckless injury with use of a dangerous weapon, as a repeater; (4) first-degree reckless injury with use of a dangerous weapon; (5) possession of a firearm by a felon; and (6) carrying a concealed weapon, as a repeater. Thomas pleaded no contest to counts two, four and five. The remaining counts were dismissed and read in. The circuit court imposed sentences consisting of: two years' initial confinement and three years' extended supervision on the second-degree reckless endangerment count; a consecutive sentence of five years' initial confinement and seven years' extended supervision on the first-degree reckless injury count ; and two years' initial confinement and two years' extended supervision on the possession of a firearm count, to be served concurrent with the other sentences.

There is no arguable basis upon which Thomas could withdraw his pleas. *See State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The circuit court's plea colloquy, buttressed by the plea questionnaire and waiver of rights form with attachments, informed Thomas of the constitutional rights he waived by pleading no contest, the elements of the offenses, and the potential punishment. The court specifically advised Thomas it was not bound by the parties' agreement and could impose the maximum punishment. The court also advised Thomas of the potential deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). Thomas conceded the criminal complaint and preliminary hearing transcript provided an adequate factual basis supporting the convictions. Thomas's pleas were freely, voluntarily and intelligently entered. *See State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986).

Thomas argues in his response to the no-merit report that his trial attorney failed to challenge the attempted homicide charges and failed to adequately investigate the firearms ballistics, the clothing for gunshot residue, or investigate three eyewitnesses who "gave a

different description of the shooter.” Thomas also contends the State “purposely overcharged” him in order to induce a plea, and it failed to disclose forensic test results in a timely manner. However, entry of a valid no-contest or guilty plea constitutes a waiver of nonjurisdictional defenses and defects. *Id.* at 265-66. In addition, Thomas makes only a conclusory allegation that had “this exculpatory evidence [been] in his possession Thomas would have insisted on going to trial” A defendant must do more than merely allege he would have pled differently; such an allegation must be supported by objective factual assertions. *See State v. Burton*, 2013 WI 61, ¶50, 349 Wis. 2d 1, 832 N.W.2d 611; *see also State v. Allen*, 2004 WI 106, ¶23, 274 Wis. 2d 568, 682 N.W.2d 433. As the circuit court noted at sentencing regarding the defense’s theory that another shooter was involved:

the negotiated settlement here properly takes into account your version of what happened as well as the State’s version of what happened. There are going to be disputes about what actually happened, but we just don’t know all the facts because it happened quickly, it is a crowded area with loud music and alcohol consumption and the things that have talked about today.

....

Even if another gun was present, what you did was extremely dangerous. There were innocent people in that bar. Even if one other guy had a gun, we know that there were approximately 50 to 100 other people present and you endangered the safety of several other people by doing what you did.

The absence of specific allegations in the response to the no-merit report explaining why Thomas would have insisted on going to trial is also striking given that the circuit court bound Thomas over on all counts following a preliminary hearing, and the subsequent plea agreement reduced Thomas’s maximum potential punishment from over 130 years to 17 years. There was also a reduction from six counts in the amended Information to three counts in the plea

agreement and dismissal of the remaining three counts, including attempted first-degree intentional homicide, which alone carried a maximum potential punishment of sixty years.

The record also discloses no basis for challenging the circuit court's sentencing discretion. The court considered the proper factors, including Thomas's character, the seriousness of the offenses and the need to protect the public. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court noted Thomas's extensive criminal history, including six prior felonies and five prior misdemeanors. The court also emphasized the "very serious crimes" involved in the present case and the need to protect the public from an individual pulling out a gun and firing shots in a crowded establishment. The sentences imposed were far less than the maximum allowable by law and therefore presumptively neither overly harsh nor excessive. *See State v. Grindemann*, 2002 WI App 106, ¶¶29-33, 255 Wis. 2d 632, 648 N.W.2d 507.

This court's independent review of the record discloses no other potential issues for appeal. Therefore,

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

IT IS FURTHER ORDERED that attorney Robert Haney is relieved of further representing Fanando Thomas in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals