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July 19, 2017

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

2016AP1587-CRNM State of Wisconsin v. Jon H. Funseth (L.C. #2013CF59)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jon H. Funseth appeals from a judgment of conviction for stalking and misdemeanor reckless driving causing bodily harm. His appellate counsel has filed a no-merit report pursuant

to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Funseth has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions 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.

Funseth was originally charged with three felonies—reckless driving causing great bodily harm, aggravated battery with intent to cause bodily harm, and first-degree reckless injury—for causing a March 6, 2012 car crash. He grabbed the steering wheel of the car being driven by M.B. when she rebuffed his attempt to kiss her. Funseth was also charged with stalking as domestic abuse for conduct directed at M.B. between December 24, 2011, and March 6, 2012. He entered a no contest plea to the amended charge of misdemeanor reckless driving causing bodily harm and stalking as domestic abuse.[2] Under the plea agreement the other charges were dismissed and the prosecutor agreed to recommend ninety days in jail and a $300 fine on the reckless driving conviction and a withheld sentence and three years' probation on the stalking conviction. Funseth was sentenced to one year initial confinement and two years' extended supervision on the stalking conviction and a consecutive term of one year probation on the reckless driving conviction. He was ordered to pay restitution of $118,393.61. The judgment of

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Postconviction, the parties stipulated to removal of the domestic abuse modifier on the stalking conviction because there was no factual basis for that modifier. In a supplemental no-merit report, appointed counsel explained the amendment to the judgment of conviction. The modifier has no impact on the term of imprisonment so it cannot be argued that the modifier affects the knowingness of Funseth's plea with respect to the range of punishment.

conviction includes an assessment of the $250 mandatory DNA surcharge for the felony conviction.

The no-merit report addresses the potential issues of whether Funseth's plea was freely, voluntarily, and knowingly entered and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes these issues as without merit, and this court will not discuss them further.[3] We also conclude there is no arguable merit to a claim that the sentence was unduly harsh or excessive.

In his response, Funseth suggests there are grounds for plea withdrawal for several reasons. First, he claims his attorney assured him that inaccurate information would not hurt him at sentencing but Funseth believes it did. Funseth appears to be referring to the victim's statement in the presentence investigation report (PSI). Funseth's belief that the victim's statement contains numerous inaccuracies is simply disagreement with her version of the crimes. At sentencing the victim appeared and confirmed that the version of events recited in the PSI was correct. Funseth's attorney then argued in detail that there were reasons to doubt the victim's credibility. Thus, at sentencing the court heard conflicting versions and it was up to the court to determine what to believe. Funseth cannot demonstrate that the information was inaccurate. Even if he could, the remedy is resentencing not plea withdrawal.

[3] The no-merit report fails to acknowledge and address that during the plea colloquy the circuit court did not give Funseth the deportation warning required by WIS. STAT. § 971.08(1)(c). Nothing in the record suggests that Funseth or his parents were born outside of the United States. The failure to give the warning is not a ground for relief because there is no suggestion that Funseth could show that his plea is likely to result in deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1.

Funseth contends he wanted his attorney to challenge the sufficiency and truthfulness of the complaint. On the same theme, he suggests that there should have been a "no case conclusion" because the victim or a witness made contradictory statements. He also complains that there was no indication of the text messages sent by the victim to him and in that respect the complaint was only one sided for text messages. These again are claims that the victim's version of the crimes was not accurate. That is not a basis to challenge the sufficiency of the complaint or plea withdrawal.

Funseth states that he only agreed to take the plea "if it was agreed upon." He believes he should be allowed to withdraw his plea because the judge sentenced him to more time than the plea agreement recommendation. Funseth's claim that the plea was conditioned on the circuit court's obligation to give him the agreed upon sentence is belied by the record. During the plea colloquy and after the recitation of the plea agreement, the court advised Funseth that it was not bound by promises made by the prosecutor, law enforcement officers, or other individuals. Funseth acknowledged that he understood. The court went further and explained truth-in-sentencing to Funseth by giving an example that if Funseth was sentenced to one year in prison, he would serve 365 days. Funseth again confirmed an understanding. Moreover, disappointment in the eventual punishment imposed is no ground for withdrawal of a no contest plea. A defendant may not delay his motion until he has the opportunity to test the weight of potential punishment. ***Dudrey v. State***, 74 Wis. 2d 480, 485-86, 247 N.W.2d 105 (1976).

Finally, Funseth indicates that he has newly discovered evidence in the form of a "feasible motive for [the victim's] initial false statements" when the motive was previously unknown and "there are circumstantial guarantees of the trustworthiness of the recantations." A plea will not be set aside and a trial conducted merely by claiming that there is new evidence

demonstrating the victim's motive to give a false statement. Impeachment evidence, offered in isolation, does not supply a sufficient basis for reexamining a criminal case. ***Simos v. State***, 53 Wis. 2d 493, 499, 192 N.W.2d 877 (1972). The suggestion of new impeachment evidence does not alone support plea withdrawal because by entry of the no contest plea, Funseth abandoned the opportunity to challenge the victim's credibility.[4] To the extent that he has changed his mind about wanting that opportunity, it is too late. Changes of heart motivated by mere desires to have trials are not enough to vacate no contest pleas, either before or after sentencing. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995). In the absence of substantive new evidence, Funseth's claim of impeachment evidence does not merit further postconviction investigation or judicial examination.

The judgment of conviction includes a $250 DNA surcharge. Due to litigation over DNA surcharges imposed on crimes committed before the January 1, 2014 effective date of the change in the law making DNA surcharges mandatory for each count of conviction, we address the issue here. Under the law in effect at the time Funseth committed the stalking crime in 2012, a circuit court sentencing a defendant for a felony conviction could impose a $250 DNA surcharge as an exercise of discretion unless the crime was one for which the surcharge was mandatory.[5] *See* WIS. STAT. § 973.046(1g) (2011-12); ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203,

[4] By his no contest plea Funseth forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

[5] In July 2013, the legislature repealed the discretionary surcharge under WIS. STAT. § 973.046(1g) (2011-12) and revised § 973.046(1r) to require the circuit court to impose a $250 surcharge for each felony conviction. *See* 2013 Wis. Act 20, §§ 2353-55. The mandatory surcharge was first applicable to defendants sentenced after January 1, 2014, irrespective of when they committed their crimes of conviction. *See* ***id.***, § 9426(1)(am), § 973.046(1r).

752 N.W.2d 393. Here, at sentencing, the circuit court did not address the giving of a DNA sample or the DNA surcharge. Thus, we consider whether the surcharge is a proper mandatory assessment.

The PSI reflects that the collection of Funseth's DNA was required.[6] Thus, upon his stalking conviction, Funseth is required to submit a DNA sample for the first time. WIS. STAT. § 973.047(1f). ***State v. Scruggs***, 2017 WI 15, ¶¶21, 38, 373 Wis. 2d 312, 891 N.W.2d 786, holds that the imposition of a single mandatory DNA surcharge to cover the first time cost of taking the DNA sample is not an unconstitutional ex post facto punishment. There is no issue of arguable merit that the assessment of the $250 DNA surcharge was improper.

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 Funseth 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.

[6] As reported in the PSI, Funseth has prior felony convictions between 1982 and 1994. Those convictions were not of the type where Funseth was required to give a DNA sample. *See* WIS. STAT. § 973.047(1)(a) (1993-94). The statutory requirement that a DNA sample be collected for every crime commenced with changes made by 1999 Wis. Act 9, § 3202k. *See* WIS. STAT. § 973.047(1f) (1999-2000).

IT IS FURTHER ORDERED that Attorney Nikki C. Swayne is relieved from further representing Jon H. Funseth in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals