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February 28, 2018

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

2015AP2483-CRNM State of Wisconsin v. Leonardo Juarez (L.C. #2014CF51)

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).

Leonardo Juarez appeals from judgments convicting him of false imprisonment contrary to WIS. STAT. § 940.30 (2013-14),[1] obstructing contrary to WIS. STAT. § 946.41(1), and disorderly conduct contrary to WIS. STAT. § 947.01(1). Juarez's appellate counsel filed a no-

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

merit report pursuant to WIS. STAT. RULE 809.32 (2015-16) and ***Anders v. California***, 386 U.S. 738 (1967). Juarez received a copy of the report and filed two responses.[2] Upon consideration of the report, Juarez's responses and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgments because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21 (2015-16).

The no-merit report addresses the following possible appellate issues: (1) whether Juarez's no contest pleas were knowingly, voluntarily, and intelligently entered and had a factual basis; (2) whether trial counsel was ineffective for failing to file a motion to suppress evidence; and (3) whether Juarez received effective assistance from his trial counsel. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his no contest pleas,[3] Juarez answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.[4] Juarez affirmed the voluntary and intelligent nature of his pleas and confirmed to the circuit court that he had sufficient time to confer with counsel and that he was satisfied with counsel's

[2] Our May 10, 2017 order granted Juarez until July 14, 2017, to file an amended response to his counsel's WIS. STAT. RULE 809.32 (2015-16) no-merit report. Juarez has not complied with this order. Therefore, we will decide this appeal based on the responses Juarez filed on June 14 and 22, 2016. The stay of this case is lifted.

[3] The circuit court made a discretionary decision to decline to accept Juarez's ***Alford*** pleas. ***North Carolina v. Alford***, 400 U.S. 25 (1970); ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). We see no issue with arguable merit arising from the circuit court's refusal to accept an ***Alford*** plea.

[4] The circuit court did not give the deportation warning to Juarez during the plea colloquy. The presentence investigation report states that Juarez was born in Illinois. Therefore, he is not in danger of deportation as a result of this felony conviction. No issue with arguable merit could arise from this omission.

representation. The plea questionnaire and waiver of rights form Juarez signed is competent evidence of knowing and voluntary pleas. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. The record discloses that Juarez's no contest pleas were knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Juarez's no contest pleas.

In his response to counsel's no-merit report, Juarez argues that the plea colloquy was inadequate. As stated above, the plea colloquy was adequate. Juarez characterizes all of his responses during the plea hearing as perfunctory and claims that he did not understand certain aspects of the proceeding. The record contradicts these claims. During the plea colloquy, Juarez affirmed his understanding of the proceeding. Although Juarez stated that he had questions about his case, he did not pose those questions to either his counsel or the circuit court, and he elected to proceed with the plea colloquy. In light of this record, any claim that Juarez did not understand the proceedings is inconsistent with the record and with the position Juarez took in the circuit court at the time he pled no contest. ***State v. Michels***, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987) (a party cannot take inconsistent positions).[5]

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[5] Juarez's response repeatedly refers to a trial. Juarez waived a trial when he entered no contest pleas.

The no-merit report fails to discuss the circuit court's exercise of sentencing discretion. Counsel was obligated to address possible appellate issues arising at sentencing and state why the issues do not have arguable merit. Future no-merit reports may be rejected if they do not fulfill the purpose of WIS. STAT. RULE 809.32 (2015-16).

With regard to the sentences, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). During allocution, Juarez took responsibility for his conduct. The court adequately discussed the facts and factors relevant to sentencing Juarez to concurrent terms of six years for false imprisonment, nine months for obstructing, and ninety days for disorderly conduct. In fashioning the sentences, the court considered the seriousness of the offenses, including the two charges of fourth-degree sexual assault that were amended via the plea agreement to obstruction. The court also considered the victim's demeanor after her encounter with Juarez and that Juarez's DNA was found in numerous places on the victim's body, including her intimate body parts, consistent with her description of a sexual assault.[6] Finally, the court considered Juarez's character and history of other violent offenses and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight of the sentencing factors was within the circuit court's discretion. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The court made Juarez eligible for the Substance Abuse Program, but his age rendered him ineligible for the Challenge Incarceration

[6] Even though the plea agreement reduced the two fourth-degree sexual assault charges to obstruction, the circuit court was free to consider the victim's description of Juarez's conduct, conduct that would have constituted fourth-degree sexual assault. ***State v. McQuay***, 154 Wis. 2d 116, 126-27, 452 N.W.2d 377 (1990). This conduct informed the circuit court's assessment of Juarez's character and credibility. ***Id.***

Program. WIS. STAT. § 973.01(3g), (3m). The felony sentence complied with § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The $250 DNA surcharge for the felony conviction (false imprisonment) was imposed in an appropriate exercise of discretion. WIS. STAT. § 973.046(1r)(a); ***State v. Cherry***, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d 393. We conclude that there would be no arguable merit to a challenge to the sentences.

We agree with appellate counsel that no issue with arguable merit arises from any failure to challenge the State's evidence, including the DNA evidence. At the final pretrial conference, trial counsel stated that there was no basis to suppress any statement made by Juarez. Juarez told the circuit court that he stood by his voluntary out-of-custody statement to police in which he denied having had any physical contact with the victim. Juarez's no contest pleas waived the right to present evidence and a defense. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. At the plea hearing, Juarez agreed that the complaint stated the factual basis for his no contest pleas and the complaint's allegations were sufficient.[7] Juarez cannot now challenge the sufficiency of the factual basis in the complaint.[8] *See* ***Rafferty v. State***, 29 Wis. 2d 470, 478-79, 138 N.W.2d 741 (1966) (the no contest pleas waived objections to both the legality and sufficiency of the evidence).

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[7] The factual allegations in the complaint and the amended complaint are substantially similar.

[8] Even if such a challenge were possible, we would conclude that the factual allegations are sufficient.

We turn to Juarez's ninety-page response to counsel's no-merit report. Juarez's response to counsel's no-merit report ignores the record in this case and is an attempt to litigate his circuit court case as if he never entered no contest pleas.

Juarez originally entered no contest pleas. After the first plea hearing, which featured a largely sufficient plea colloquy, Juarez filed two motions to withdraw his no contest pleas on the grounds that he misunderstood the DNA report at the time he entered his no contest pleas, he had discovered factual inconsistencies in the discovery, and he was unaware of all plea possibilities when he entered his no contest pleas. The circuit court permitted Juarez to withdraw his first set of no contest pleas, but Juarez subsequently entered another plea agreement with the State. Pursuant to the second plea agreement, Juarez pled no contest during a proper colloquy with the circuit court in which he specifically waived the applicable constitutional rights: the right to a trial, to testify and present evidence at trial, to subpoena witnesses to testify on his behalf at trial, to confront the witnesses against him, and to have the State prove his guilt beyond a reasonable doubt. Although Juarez had concerns about the state of the evidence, he waived those concerns when he decided to enter his second set of no contest pleas. Given the record, we see no arguable merit to any claim that Juarez entered his no contest pleas without understanding his case or his constitutional rights.

Under Wisconsin law, a no contest plea waives all nonjurisdictional defects and defenses. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. Juarez's claim that he is innocent is waived as is his claim that trial counsel should have investigated the issues appearing on Juarez's lengthy checklist (submitted as part of his response to counsel's no-merit report).

The no-merit report addresses whether Juarez received effective assistance from his trial counsel. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

Juarez complains that he had limited interactions with his trial counsel and that trial counsel did not provide him with information or develop a defense. These claims are at odds with Juarez's statements at the plea hearing that he had sufficient time to confer with counsel, that he was satisfied with counsel's representation, and that he was waiving his constitutional rights to have a trial and present evidence. Juarez cannot take inconsistent positions. ***Michels***, 141 Wis. 2d at 98.

Juarez claims that he was under stress before he pled no contest. A defendant seeking to avoid the effect of a facially valid plea colloquy on the grounds that the plea was involuntary must show that any alleged coercion was other than self-imposed. *See* ***Craker v. State***, 66 Wis. 2d 222, 228-29, 223 N.W.2d 872 (1974). Juarez has made no such showing.

Applying the record and the manifest injustice standard for plea withdrawal after sentencing to Juarez's claims on appeal, ***State v. Tourville***, 2016 WI 17, ¶39, 367 Wis. 2d 285, 876 N.W.2d 735, we conclude that no issue with arguable merit is present.

Juarez complains that his appellate counsel was ineffective in various respects. This argument is outside the scope of this appeal. ***State v. Knight***, 168 Wis. 2d 509, 520, 484 N.W.2d 540 (1992) (challenge to appellate counsel proceeds via a petition for a writ of habeas corpus).

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgments of conviction, and relieve Attorney Luca Fagundes of further representation of Juarez in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2015-16).

IT IS FURTHER ORDERED that Attorney Luca Fagundes is relieved of further representation of Leonardo Juarez in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals