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March 27, 2018

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

2016AP1988-CRNM State v. Frank G. Bagniefski (L. C. 2013CF1493)

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

Counsel for Frank Bagniefski has filed a no-merit report concluding there is no basis to challenge Bagniefski's convictions for five counts of theft of property having a value of greater than \$10,000 by false representations; and two counts of theft of property having a value of greater than \$5,000 but less than \$10,000 by false representations. Bagniefski has responded.

Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal and summarily affirm.

A securities fraud investigation revealed that Bagniefski was registered with the Nationwide Mortgage Licensing System, but he was not registered with the division to sell securities. It was further discovered that Bagniefski filed articles of organization with the Wisconsin Department of Financial Institutions for a company called “Bags, LLC.” Bags, LLC filed papers with the Wisconsin Secretary of State to do business as “National Business Management Consultants.”

The basic pattern of the alleged thefts was that Bagniefski would encounter victims through his work as a mortgage broker at a company called 1st Rate Lending.¹ In the course of obtaining financing for their homes, Bagniefski would suggest to the victims that they invest monies in a company that he “knew of” called NBMC. Some of the victims were also convinced to take out loans for investments in NBMC. Whatever the circumstances, the victims would ultimately write checks to NBMC for investment, which would subsequently be deposited at a credit union in Green Bay into a checking account held by “Bags, LLC dba National Business Management Consultants.” Bagniefski was the signatory to that account. The monies were not invested, but rather they would be withdrawn as cash or transferred into Bagniefski’s personal checking account.

Bagniefski did not reveal to the victims that he controlled NBMC, and he went to some effort to conceal his connection with NBMC. As an example, a victim reported that NBMC

¹ There were no allegations that 1st Rate Lending was involved in the thefts.

would communicate to her only through email. The internet protocol (IP) address for this email account was traced to Bagniefski at the 1st Rate Lending office. In communications through these emails, Bagniefski would assume the alias of “Thomas Dekamp.” NBMC documents indicated that the company had a physical address in Indiana—with a Washington, Indiana, post office box. Investigation revealed that this post office box was opened by a “Christina Decamp,” who happened to be Bagniefski’s sister. Christina told investigators that Bagniefski asked her to open a post office box for a company called “NBMC,” and that if any mail should come addressed to NBMC, to mail it back to his home address in Green Bay. In addition to the theft of monies, two victims reported that through Bagniefski’s false representations, he had obtained title to vehicles they owned.

A plea agreement was reached whereby Bagniefski pleaded no contest to seven charges, and three charged counts were dismissed and read in, as were two uncharged offenses. The circuit court imposed consecutive sentences on all counts consisting of three years’ initial confinement and three years’ extended supervision for each of five counts of theft of property having a value greater than \$10,000; and two years’ initial confinement and two years’ extended supervision for the two counts of theft of property involving a value greater than \$5,000 but less than \$10,000.

The no-merit report addresses: (1) whether Bagniefski’s pleas were entered knowingly, voluntarily, and intelligently; (2) whether the circuit court properly exercised its sentencing discretion; and (3) whether the circuit court was fair and impartial. Our independent review of

the record confirms counsel's analysis that none of these issues present a potential basis for appeal.²

Bagniefski's response to the no-merit report insists, "I never saw the actual statute that they would need to prove that I intended to take the \$ and not pay it back." However, the record belies Bagniefski's contention. The record shows the jury instructions were attached to the plea questionnaire and waiver of rights form that Bagniefski signed. The attachments included Wis JI—CRIMINAL 1453-A (2006), entitled "Theft by Fraud: Representations Made to the Owner, Directly or by a Third Person – [WIS. STAT.] § 943.20(1)(d)."³ The jury instruction thus directly referenced the theft statute. Moreover, the jury instruction includes the "Statutory Definition of the Crime" as follows:

Theft, as defined in § 943.20(1)(d) of the Criminal Code of Wisconsin, is committed by one who obtains title to property of another person by intentionally deceiving that person with a false representation which is known to be false, made with intent to defraud, and which does defraud the person to whom it is made.

Bagniefski also represented on the record in open court at the plea hearing as follows:

THE COURT: And my understanding from the packet is that you have reviewed the jury instructions that I would have used had this case proceeded to trial, including Wisconsin Criminal 1453-A, theft by fraud, representation made to the owner directly or by a third person. You reviewed that jury instruction?

THE DEFENDANT: Yes, sir.

² We note the circuit court failed to advise Bagniefski of the deportation consequences of his plea as mandated by WIS. STAT. § 971.08(1)(c) (2015-16). However, the no-merit report represents that Bagniefski is a United States citizen, and Bagniefski does not respond to this issue. Accordingly, the court's omission provides no ground for relief. *See* WIS. STAT. § 971.08(2) (2015-16).

³ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

THE COURT: You understand it all?

THE DEFENDANT: Yes, sir.

THE COURT: You had the opportunity to review the comment, the notations that they provide judges in using those instructions?

THE DEFENDANT: Yes, sir.

THE COURT: You believe the State could prove each element of the crime of theft, false representation, as charged to a jury, and they would find you guilty of each element of those crimes beyond a reasonable doubt. True?

And the record should reflect that Mr. Bagniefski is again conferring with his attorney to make sure he understands what we're doing today.

THE DEFENDANT: Yes, sir.

Bagniefski's response to the no-merit report also insists, "[M]y intent was never to defraud anyone." Bagniefski argues his counsel was ineffective for failing to "get the cancelled checks and bank records to prove that I had paid back about 1/3 of the \$." He also claims he was "charged with the wrong offense." However, entry of a valid no-contest or guilty plea constitutes a waiver of all nonjurisdictional defenses and defects. *See State v. Bangert*, 131 Wis. 2d 246, 265-66, 389 N.W.2d 12 (1986).

Bagniefski further claims his counsel "manipulated me into taking a plea" Again, the record belies Bagniefski's claim. At the plea hearing, the circuit court explained its understanding of the parties' agreement, and it asked Bagniefski, "Sir, is that what you want to do today?" Bagniefski answered, "Yes, sir." Bagniefski acknowledged that he signed the plea questionnaire and waiver of rights form after carefully reviewing it, and that he "[u]nderstood everything that's in it." Bagniefski represented to the court that he understood the constitutional rights he waived by pleading no contest, the elements of the offenses, and the potential punishment. He also confirmed that no threats or promises were made to get him to enter his

pleas, that he was satisfied with the work of his attorney, and that he had no questions of his attorney, or the court, at that time. Bagniefski further acknowledged, on the record in open court, that he obtained title to property by intentional deception, as charged in the seven counts.

Bagniefski also challenges the circuit court's sentencing discretion, alleging the court "used 2 character letters that I was never given." According to Bagniefski, the letters were "filled with untruths." The court acknowledged receipt of a great deal of documentation, as well as statements by a number of victims or representatives of victims at the sentencing hearing. However, nothing in the record demonstrates the two challenged letters formed the basis of the sentences. Bagniefski further alleges the court never specifically addressed why the counts were to be served consecutively, and "the total amount of my time." Bagniefski insists the court "should have used all factors in sentencing." In addition, Bagniefski points to other allegedly "similar" cases in which the defendants received lesser sentences. However, the court considered proper factors, including Bagniefski's character, the seriousness of the offenses, and the need to protect the public. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The court concluded:

In this case, it really boils down to protecting the public in light of what you've done with the people that you have been closest to over the course of time. And I just can't accept the risk that you would ever do this again ... and at the cost of so much to others.

The court properly exercised its discretion in considering factors applicable to this particular case, and it imposed sentences well within the maximum authorized by law. The sentences are thus presumptively neither unduly harsh nor excessive. *See State v. Grindemann*, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507.

Finally, Bagniefski argues his sentence was “unjust or illegal.” He notes that he was sentenced to “19 in 19 out made up of 5 counts of 3 in 3 out and 2 counts [of] 2 in 2 out.”

Bagniefski contends:

The thing is if I get Revoked once I reach my out time [,] my out time (ES) Becomes one Group Sentence of 19 yrs. Therefore, if I were to get revoked on my 1st count that held a maximum of 10 yrs. total and I already did 3 yrs of in time on this count[,] I could Potentially [be] revoked for up to 19 years. which totally Exceeds the maximum sentence on my Case count 1 at 10 yrs? I have read some case law on this. State ex rel. Thomas v. Schwarz, [2007 WI 57, 300 Wis. 2d 381, 732 N.W.2d 1.]

In *Thomas*, our supreme court held that “simultaneous revocation of parole and extended supervision is permitted by the sentencing statutes.” *Id.*, ¶38. The court rejected Thomas’s argument that he was required to complete serving his pre-truth-in-sentencing parole sentence before he could begin serving his truth-in-sentencing extended supervision sentence. *Id.*, ¶44. The court held that “extended supervision and parole are to be treated as one continuous period, and both may be revoked upon violation of the conditions imposed.” *Id.*, ¶47. The court stated:

[T]he [Wisconsin Department of Administration] Division [of Hearings and Appeals] acted properly and within its jurisdiction in revoking Kevin Thomas’ parole and extended supervision simultaneously, since here the consecutive indeterminate and determinate sentences were properly treated as one continuous sentence, with the confinement periods served first, followed by continuous nonconfinement periods of parole and extended supervision.

Id., ¶3.

Bagniefski is not serving both an indeterminate sentence and a determinate sentence. *See id.*, ¶¶5-6. Moreover, Bagniefski’s contention that he could potentially be revoked is speculative. In any event, we note WIS. STAT. § 302.113(9)(am), provides that if a person’s extended supervision is revoked, the court shall order the person to be returned to prison “for any

specified period of time that does not exceed the time remaining on the bifurcated sentence.” The time remaining on the bifurcated sentence is defined as “the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision ... and less all time served in confinement for previous revocations of extended supervision under the sentence.” *Id.* In addition, § 302.113(4) provides, “All consecutive sentences imposed for crimes committed on or after December 31, 1999, shall be computed as one continuous sentence. The person shall serve any term of extended supervision after serving all terms of confinement in prison.” Thus, if Bagniefski was revoked from extended supervision he could be returned to prison to serve the time remaining on his bifurcated sentences. The sentences imposed were neither unjust nor illegal.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Frederick A. Bechtold is relieved of further representing Bagniefski in this matter. WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals