



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

October 23, 2019

To:

Hon. Mark F. Nielsen
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Patricia J. Hanson
District Attorney
730 Wisconsin Ave.
Racine, WI 53403

Bradley J. Lochowicz
Seymour, Kremer, Koch, Lochowicz &
Duquette
P.O. Box 470
Elkhorn, WI 53121-0470

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Gary L. Petty, #62490
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

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

2018AP1783-CRNM State of Wisconsin v. Gary L. Petty (L.C. #2016CF1351)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Gary L. Petty appeals from a judgment convicting him of aggravated battery and possession with intent to deliver between fifteen and forty grams of cocaine. Petty's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v.*

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

California, 386 U.S. 738 (1967). Petty filed a response. Counsel then filed a supplemental no-merit report. After reviewing the record, counsel's reports, and Petty's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. WIS. STAT. RULE 809.21.

Petty was convicted following no contest pleas to aggravated battery and possession with intent to deliver between fifteen and forty grams of cocaine. He was accused of attacking an elderly woman with a baseball bat and then fleeing to a nearby apartment to hide drugs, which police later found. Two additional drug-related charges were dismissed and read-in. The circuit court imposed an aggregate sentence of ten years of initial confinement and five years of extended supervision. This no-merit appeal follows.

The no-merit report addresses whether Petty's no contest pleas were knowingly, voluntarily, and intelligently entered. The record shows that the circuit court engaged in a colloquy with Petty that satisfied the applicable requirements of WIS. STAT. § 971.08(1) and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.² In addition, a signed plea questionnaire and waiver of rights form was entered into the record, along with the relevant jury instructions detailing the elements of the offenses. We agree with counsel that a challenge to the entry of Petty's no contest pleas would lack arguable merit.

² There is one exception to this. The circuit court failed to provide the deportation warning required by WIS. STAT. § 971.08(1)(c). This failure does not present a potentially meritorious issue for appeal, however, as there is no indication that Petty's pleas are likely to result in his deportation, exclusion from admission to this country, or denial of naturalization.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court’s sentencing 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). The court considered the seriousness of the offenses, Petty’s character, and the need to protect the public. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It also stated reasons for declaring Petty ineligible for the earned release and challenge incarceration programs. Under the circumstances of the case, which were aggravated by Petty’s substantial criminal record, the sentence imposed does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Petty’s sentence would lack arguable merit.

As noted, Petty filed a response to the no-merit report. In it, he complains that his trial counsel failed to investigate a potential defense they discussed to the charge of possession with intent to deliver.³ The problem with this complaint is that it comes too late. By entering his pleas, Petty forfeited the right to raise a defense. *See State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. The circuit court made that consequence clear at the plea colloquy during the following exchange:

THE COURT: Did you and [defense counsel] review your opportunities for a trial, what defenses might be brought, what evidence might be presented?

DEFENDANT: Yes, sir.

³ Petty speculates that a City of Racine camera may have shown that he was not carrying any drugs when he fled to the nearby apartment. This, of course, would have contradicted statements of both the victim of the battery and the occupant of the apartment where the drugs were found.

THE COURT: You understand you're foregoing those opportunities. You are giving up those potential defenses when you enter a plea?

DEFENDANT: Yes, sir.

Accordingly, we are not persuaded that Petty's response presents an issue of arguable merit.⁴

Our independent review of the record does not disclose any potentially meritorious issue for appeal.⁵ 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 and relieve Attorney Bradley J. Lochowicz of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Bradley J. Lochowicz is relieved of further representation of Petty in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals

⁴ Petty's complaint against trial counsel is also undermined by his statement at the plea colloquy that he was satisfied with counsel's service.

⁵ The record does not include a transcript of the restitution hearing. However, the docket entries transmitted with the notice of appeal reflect that Petty agreed to the amount of restitution ordered.