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 III

May 19, 2020

To:

Hon. Mark J. McGinnis
Circuit Court Judge
Outagamie County Justice Center
320 S. Walnut St.
Appleton, WI 54911

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
320 S. Walnut St.
Appleton, WI 54911

Daniel Goggin II
Goggin & Goggin
P.O. Box 646
Neenah, WI 54957-0646

Melinda J. Tempelis
District Attorney
320 S. Walnut St.
Appleton, WI 54911-5918

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

Nathan D. Depner 574704
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2018AP2152-CRNM State of Wisconsin v. Nathan D. Depner (L. C. No. 2017CF1033)

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 Nathan Depner has filed a no-merit report concluding no grounds exist to challenge Depner's convictions for possession of methamphetamine, possession with intent to deliver between three and ten grams of methamphetamine, possession of drug paraphernalia, and two counts of delivering between three and ten grams of methamphetamine. Depner filed a

response challenging the sentence imposed, and counsel filed a supplemental no-merit report addressing Depner's concerns. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2017-18).[1]

The State charged Depner with the above-referenced crimes, all as a repeater. The charges stemmed from drug sales to a confidential informant. In exchange for Depner's no-contest pleas to all five charges, the State agreed to remove the repeater enhancers and cap its aggregate sentence recommendation at five years of initial confinement and ten years of extended supervision. The defense remained free to argue at sentencing. Out of maximum possible aggregate sentences totaling forty-eight years and seven months, the circuit court imposed consecutive sentences consisting of four and one-half years' initial confinement followed by four and one-half years' extended supervision on the two methamphetamine delivery counts, to run consecutive to any sentence Depner was then serving. With respect to the possession with intent to deliver methamphetamine count, the court withheld sentence and imposed a consecutive five-year probation term. The court imposed a $100 fine plus costs on the methamphetamine possession count, and costs only on the drug paraphernalia possession count.

The no-merit report addresses whether Depner knowingly, intelligently and voluntarily entered his no-contest pleas. We note that at the plea hearing, the circuit court failed to personally advise Depner of the potential deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). In order to obtain relief because of such an omission, however, a defendant must

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

show that the plea is likely to result in deportation, exclusion from admission to this country, or denial of naturalization. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749. The record reflects that Depner has lived in Wisconsin his "entire life" and is, therefore, a United States citizen not subject to deportation. Any challenge to the pleas on this basis would therefore lack arguable merit. Upon reviewing the record, we ultimately agree with counsel's analysis and conclusion that any challenge to Depner's pleas would lack arguable merit.

The no-merit report also addresses whether there are any grounds to challenge the effectiveness of Depner's trial counsel. Upon reviewing the record, we agree with counsel's analysis and conclusion that there is no arguable merit to this issue.

The no-merit report and supplemental no-merit report address whether the circuit court properly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Depner's character, including his lengthy criminal history; the need to protect the public; and the mitigating factors Depner raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. In his response to the no-merit report, Depner asserts that the sentencing court wrongfully evaluated Depner's character by comparing his present crimes and explanations with those from a criminal case the judge presided over seven years earlier in which Depner was the defendant. The court noted that the explanations Depner had provided for his conduct as a young adult were "very similar" to what Depner was saying "today." The court also stated:

> [A]s a judge [sentencing] a young guy you make sort of an important decision in that person's life; and … you hope like hell that that's the last time that guy ever goes to prison. …
>
> Then seven years later you get dumped this file and you go, oh, my God. He's still at it. He's let down his mom. He let down his

> brother. He made his grandma (who wrote a letter on his behalf) look like a fool. He's let down his employers[,] lets down everybody time and time again; and then he has the audacity or the stupidity to actually try to make up the fiction that you make up [for your conduct].

Depner's argument fails because a sentencing court may consider, among other things, the defendant's past record of criminal offenses; history of undesirable behavior patterns; and the defendant's personality, character, and social traits. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The sentencing court considers a variety of factors because it has a responsibility "to acquire full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence." ***State v. Salas Gayton***, 2016 WI 58, ¶23, 370 Wis. 2d 264, 882 N.W.2d 459. Because the court could properly consider past crimes and undesirable behavior patterns relative to Depner's character, any challenge to Depner's sentence on this ground would lack arguable merit. To the extent Depner asserts that the sentencing court placed too much emphasis on his character, the court has the latitude to determine how much weight to accord each sentencing factor. *See* ***State v. Wickstrom***, 118 Wis. 2d 339, 355, 348 N.W.2d 183 (Ct. App. 1984).

Depner also suggests that he was sentenced on the basis of inaccurate information. Defendants have a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶¶9, 26, 291 Wis. 2d 179, 717 N.W.2d 1. To secure resentencing, however, a defendant must prove both that the court was presented with inaccurate information and that the court actually relied on that misinformation in reaching the sentence imposed. ***Id.***, ¶26. In questioning whether Depner was sincere in his expressed desire for a better life "out in the community doing good," the circuit court stated:

> I would think, Mr. Depner, if you were serious or sincere you would be the last guy to get kicked out of programming. You would be showing up at these programs early. You would be staying late, and you wouldn't just be screwing off. You would be engaged. You would be thoughtful. You would be respectful. You would be obedient, and you would be appreciative of that opportunity. And the presentence report indicates that you were just the complete opposite, but that's an addict who is also a criminal who doesn't give the hell about anything but himself.

The presentence investigation report recounts that Depner was terminated from the Earned Release Program twice during the time he spent in prison from June 2011 to March 2014. He was removed from the program the first time due to "poor performance and attitude." He was removed the second time after receiving a conduct report for being disruptive and disrespectful. Depner argues that because his participation in the program was "before" his heavy drug use started, the circuit court could not "judge [him] about wanting help for a drug problem that wasn't present at the time of said programming." That Depner did not believe he had a drug problem while participating in the Earned Release Program does not render the court's statements inaccurate.

Depner also contends the sentencing court misstated that Depner was arrested with the drug money from the first of two drug transactions with a confidential informant. The complaint narrative recounted that there were two controlled buys occurring two weeks apart, the first involving $180 of prerecorded currency, and the second involving $190 of prerecorded currency. The complaint narrative further stated that when Depner was arrested, officers seized $1050 from his person, $190 of which was the buy money from the second transaction. With respect to the rest of the seized cash, Depner claimed that $500 of the money was given to him by his mother to help pay his rent and $360 came from a friend for helping him do work. In rejecting Depner's explanation for his conduct and the source of the cash seized during the arrest, the court stated:

> The twists and turns that you put on it are really pathetic, and I don't want to coach you up and down or try to knock holes in your story, but when you read through this you go, man, that's all the better you are coming up with when you are making up a story?
>
> My mom gave me money for rent. I was doing side jobs yet I have the drug money from *the first transaction* from two weeks ago, and I really think that you believe it maybe or you are dumb enough to think that we actually believe it, and that's part of the problem because that's why you have continued to engage in this.

(Emphasis added.)

These comments reflect the circuit court's skepticism of Depner's explanation for the $860 that was found along with the buy money. In this context, it does not matter whether the buy money came from the first or second transaction. Therefore, Depner cannot show that the court relied on the alleged misstatement when imposing the sentence. Depner also asserts that the court could not say that Depner was "making up fictitious stories." However, the circuit court judge determines credibility at sentencing. ***Anderson v. State***, 76 Wis. 2d 361, 369, 251 N.W.2d 768 (1977) (holding that as arbiter of credibility, sentencing judge was not required to accept defendant's claim that he restrained accomplice from inflicting additional harm upon the victim). The sentencing court could reasonably reject Depner's explanation for the cash found in his possession at the time of his arrest. Any claim that Depner is entitled to resentencing on these grounds would lack arguable merit.

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

Therefore,

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

IT IS FURTHER ORDERED that attorney Daniel R. Goggin II is relieved of his obligation to further represent Nathan Depner in this matter. *See* 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