



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

July 8, 2020

To:

Hon. Gary R. Sharpe
Circuit Court Judge
Fond du Lac County Courthouse
160 S. Macy St.
Fond du Lac, WI 54935

Ramona Geib
Clerk of Circuit Court
Fond du Lac County Courthouse
160 S. Macy St.
Fond du Lac, WI 54935

William J. Donarski
The Law Office of William J. Donarski
2221 S. Webster Ave., #166
Green Bay, WI 54301

Eric Toney
District Attorney
Fond du Lac County
160 S. Macy St.
Fond du Lac, WI 54935

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

Vincent Martinez, #204321
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

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

2019AP336-CRNM State of Wisconsin v. Vincent Martinez (L.C. #2013CF516)

Before Neubauer, C.J., Gundrum and Davis, 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).

Vincent Martinez appeals from a judgment convicting him after pleading no contest to domestic abuse/substantial battery/intending bodily harm and to stalking. Charges of strangulation, suffocation, and false imprisonment were dismissed and read in. Martinez's appointed appellate counsel has filed a comprehensive no-merit report pursuant to WIS. STAT.

RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738 (1967). Martinez exercised his right to file a response, to which counsel filed a thorough supplemental report. On considering the no-merit reports, Martinez's response, and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

In a jealous rage, Martinez punched and kicked his girlfriend KV and held a knife to her neck; she needed medical treatment for a fractured cheekbone, a chipped tooth, and injuries requiring stitches. That case was joined with a second domestic violence case occurring about six weeks later that alleged stalking KV, battery against a friend of KV who came to her aid, and disorderly conduct with use of a dangerous weapon. All were charged with a repeater enhancer.

Martinez went through a series of four appointed attorneys. After discharging the fourth and then being appointed standby counsel, he filed an interlocutory appeal on grounds that he was denied his constitutional right to counsel. This court granted his petition and ruled that he forfeited his right to counsel by dint of his refusal to cooperate with appointed counsel and his own filing of numerous pro se motions. *State v. Martinez*, No. 2015AP2002/2003-CR, unpublished slip op. ¶¶3-12, 20 (WI App Apr. 19, 2017).

On the morning of trial, Martinez pled no contest to substantial battery and stalking, both as a repeater but without a previously charged dangerous weapon enhancer; the strangulation/suffocation and false imprisonment charges were dismissed and read in. The

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

parties also agreed that they both would be free to argue sentencing and that neither would request a PSI. This no-merit appeal followed.

The no-merit report and supplemental report address whether: Martinez should be allowed to withdraw his no-contest plea because it was not knowing, intelligent, and voluntary; his sentence was illegal, outside a proper use of discretion, or otherwise based on improper factors; he was improperly denied the right to counsel; he was denied the right to a speedy trial; there was an error in proving the prior conviction for the purpose of the repeater enhancer; it was improper for the court to consider the dangerous weapon at sentencing; his probable cause hearing was not timely held; his two cases were improperly joined; there was not a factual basis for the domestic violence surcharge; the trial court was biased against him; and there were discovery violations. After reviewing the record, we are satisfied that appellate counsel has thoroughly considered each issue and we appreciate the care he has taken. We thus need address the issues no further, except to the extent that Martinez challenges them.

Martinez complains that he was afforded ineffective assistance of counsel at his preliminary hearing. But through his decision to plead no contest, he has forfeited his right to contest any nonjurisdictional defects or defenses preceding his plea. *See State v. Kraemer*, 156 Wis. 2d 761, 765, 457 N.W.2d 562 (Ct. App. 1990); *see also State v. Webb*, 160 Wis. 2d 622, 636, 467 N.W.2d 108 (1991).

Martinez also contends that a manifest injustice resulted because the court failed to explain the elements of substantial battery and the direct consequences of his plea, i.e., that he would not be eligible for the earned release program (ERP). He is mistaken on both counts.

Martinez signed the plea questionnaire and affirmatively told the court that he understood the charges to which he was pleading, the penalties he faced, and the significant rights he relinquished by pleading no contest. When the court told Martinez that “substantial bodily harm” encompasses a fracture, stitches, or serious injury to a bodily organ, it asked him whether he understood and he replied, “Yes, sir.” Martinez apparently means that the court did not spell out for him that the State needed to prove that he *intended* to cause the injuries he inflicted on KV. This hair-splitting argument goes nowhere.

Martinez also is mistaken that the court’s failure to inform him that not being eligible for ERP was a failure to inform him of a direct consequence of his plea, of which courts are constitutionally required to notify defendants. See *Brady v. United States*, 397 U.S. 742, 755 (1970); *State v. James*, 176 Wis. 2d 230, 238, 500 N.W.2d 345 (Ct. App. 1993). A direct consequence is one that has “a definite, immediate, and largely automatic effect on the range of the defendant’s punishment.” *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 636, 579 N.W.2d 698 (1998) (citation omitted). Defendants do not, however, have a due process right to be informed of the collateral consequences of their pleas. *State v. Bollig*, 2000 WI 6, ¶16, 232 Wis. 2d 561, 605 N.W. 2d 199. “Collateral consequences are indirect and do not flow from the conviction,” and information about a plea’s collateral consequences is not a prerequisite to entering a knowing and intelligent plea. *State v. Byrge*, 2000 WI 101, ¶¶60-61, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted).

Further, the trial court has no authority to place conditions on a sentence. See *State v. Gibbons*, 71 Wis. 2d 94, 98, 237 N.W.2d 33 (1976). A convicted defendant’s need for specialized treatment is a factor for the trial court to consider when choosing a disposition for the defendant, see WIS. STAT. § 973.01(1), (3g), but once a prison term is selected, the trial court

may not order specific treatment. Control over the care of prisoners is vested by statute in the Department of Corrections and the Department of Health Services. *See* WIS. STAT. § 302.05(1).

Not only does a circuit court exercise its discretion when determining a defendant's eligibility for ERP, *see State v. Owens*, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187, but he or she also may be statutorily prohibited from participating. Martinez is ineligible for ERP because his substantial battery and stalking charges are WIS. STAT. ch. 940 violations. WIS. STAT. § 302.05(3(a). And as he was over forty at sentencing, he also was ineligible for the challenge incarceration program, should he have challenged that. *See* WIS. STAT. § 302.045(2)(b). Further pursuit of this issue would lack arguable merit.

Martinez next contends his fourth appointed attorney provided ineffective assistance during his interlocutory appeal and thus deprived him of his constitutional right to counsel. Martinez already has brought this challenge here. He refused to work cooperatively with any of his attorneys. The trial court explained at length why, by his own choice, he was proceeding only with stand-by counsel, and this court affirmed. This claim thus has no arguable merit.

Martinez's argument that he did not validly plead to the repeater enhancer also fails. The trial court clearly advised him several times of his repeater status. Martinez affirmed that he understood how his incarceration time factored into the calculation.

We likewise are not convinced that the trial court's alleged failure to consider probation as the first alternative to a prison sentence has any arguable merit. Probation should be the disposition unless confinement is necessary to protect the public, the offender needs correctional treatment available only in confinement, or if probation would unduly depreciate the seriousness of the offense. *State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197. Here, the

trial court's consideration of no probation was implicit in its conclusion that incarceration was needed to rehabilitate Martinez and to punish him for the "appallingly frightening" brutality of his crimes against a person he professed to love and who loved and trusted him. The trial court did not need to explicitly state that it was rejecting probation when its remarks plainly indicated why it ordered incarceration.

Another issue Martinez raises is that he appeared telephonically, rather than physically, for certain pretrial proceedings. The underlying rationale was explained to him on the record. That was permissible and raises no arguably meritorious claim. *See* WIS. STAT. § 967.08.

Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Martinez further in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney William J. Donarski is relieved from further representing Vincent Martinez in this appeal. *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