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DISTRICT II

February 23, 2022

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Walworth County Courthouse
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Thomas G. Felski
P.O. Box 57
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You are hereby notified that the Court has entered the following opinion and order:

2019AP1029-CRNM State of Wisconsin v. Thomas G. Felski (L.C. #2012CF263)

Before Gundrum, P.J., Neubauer and Kornblum, 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).

Thomas G. Felski appeals judgments, entered upon his guilty pleas, that convicted him of two counts of theft by false representation in an amount greater than $5,000 but not exceeding $10,000; one count of theft by false representation in an amount greater than $2,500 but not exceeding $5,000; and one count of theft by contractor in an amount not exceeding $2,500. Attorney Vicki Zick has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20).[1] Felski was advised of his right to respond to the no-merit

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

report and has filed a response raising multiple issues. Having independently reviewed the entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

In June 2012, the State charged Felski with six counts: two counts of theft by false representation in an amount greater than $5,000 but not exceeding $10,000 (Counts 1 and 5); one count of theft in a business setting in an amount greater than $5,000 but not exceeding $10,000 (Count 2); one count of theft by contractor in an amount not exceeding $2,500 (Count 3); one count of theft by false representation in an amount greater than $2,500 but not exceeding $5,000 (Count 4); and one count of theft by contractor in an amount greater than $5,000 but not exceeding $10,000 (Count 6). Felski entered not guilty pleas to each of the charges, and the case proceeded to a jury trial in July 2014.

On the morning of the second day of trial, Felski's attorney informed the circuit court that Felski had decided to accept a plea deal previously offered to him by the State. The State then confirmed that pursuant to its offer, Felski would plead guilty to Counts 1, 3, 4, and 5, and Counts 2 and 6 would be dismissed and read-in. At sentencing, both sides would be free to argue on Counts 1, 3, and 5. The defense would also be free to argue on Count 4, but the State agreed to recommend probation on that count. The plea agreement also resolved a charge of operating a motor vehicle while intoxicated (third-offense) in a separate case and provided that a charge of misdemeanor bail jumping in a third case would be dismissed and read-in.

In addition, under the plea agreement, Felski stipulated that the victims were owed restitution in the amount of $77,782.28. Felski further agreed that he was not requesting a

restitution hearing or challenging his ability to pay that amount. The plea agreement also provided that Felski would "waive his appellate rights," including

> any … motion to withdraw a plea based on a claim of innocence, any challenges to the underlying factual basis for the plea, any type of direct or collateral appeal, any type of … challenge to the sentencing … any type of challenge to any waiver of the rights involved in the entry of a plea and any challenge to the effectiveness of any trial or other attorney who has given him any advice along the way.

The circuit court confirmed that Felski's waiver of his appellate rights would not encompass the "right to appellate review of a sentence imposed in excess of maximum penalties provided by statute or based on constitutionally impermissible factors such as race." *See* ***State v. Bembenek***, 2006 WI App 198, ¶16 n.7, 296 Wis. 2d 422, 724 N.W.2d 685.

Following a lengthy plea colloquy, supplemented by a plea questionnaire and waiver of rights form that Felski had signed, the circuit court accepted Felski's guilty pleas to Counts 1, 3, 4, and 5, finding that his pleas were entered knowingly, intelligently, and voluntarily. The court ordered a presentence investigation report (PSI), and the PSI author ultimately recommended that the court impose "a maximum term in prison with equal or more years on extended supervision." In September 2014, the court sentenced Felski as follows: two years' initial confinement and three years' extended supervision on Count 1; two years' initial confinement and three years' extended supervision on Count 5, consecutive to Felski's sentence on Count 1; nine months' jail on Count 3, consecutive to Felski's sentences on Counts 1 and 5; and three years' probation on Count 4, consecutive to Felski's sentences on the other counts. The court also ordered Felski to pay restitution in the amount of $77,782.28.

Felski timely filed a notice of intent to pursue postconviction relief. After this court granted numerous extensions of the time to file a notice of appeal or postconviction motion, appellate counsel filed a no-merit notice of appeal in June 2019.

The no-merit report addresses: whether Felski knowingly, intelligently, and voluntarily entered his guilty pleas; whether the circuit court properly exercised its discretion when sentencing Felski; whether Felski is entitled to a restitution hearing; whether Felski knowingly, intelligently, and voluntarily waived his right to appeal; and whether the circuit court imposed an excessive sentence by imposing a condition of extended supervision that prohibits Felski from working in the construction and remodeling fields. Having independently reviewed the record, we agree with counsel's description, analysis, and conclusion that any challenge to Felski's convictions or sentences on these grounds would lack arguable merit.

Felski has raised a number of issues in his response to the no-merit report. As noted above, however, as part of the plea agreement, Felski agreed to waive his appellate rights. We have already concluded that there would be no arguable merit to a claim that Felski's waiver of his appellate rights was not knowing, intelligent, and voluntary.

Nevertheless, even absent Felski's waiver of his appellate rights, it is well established that the entry of a valid guilty plea waives all nonjursidictional defects and defenses, including alleged constitutional violations that occurred before the plea was entered. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. By entering his guilty pleas, Felski therefore waived any appellate challenges to his convictions based on his assertions that: (1) the assistant district attorney (ADA) improperly brought charges "against only one of the owners of a corporation"; (2) the charges against him resulted in his company's insurer refusing to defend

the company; and (3) he was never given an opportunity to communicate with the victims to work out resolutions to their claims. As such, any appeal on these grounds would lack arguable merit.

Felski also asserts that the ADA who prosecuted his case "has been accused of hiding exculpatory evidence in two other cases in Walworth County." However, Felski does not assert (or cite any evidence suggesting) that the ADA hid exculpatory evidence *in this case*. Nor does Felski assert that he only learned of the alleged hiding of exculpatory evidence in other cases after he entered his guilty pleas in this case, or that he would not have entered his pleas had he known about the ADA's alleged conduct in the other cases. Under these circumstances, any challenge to Felski's guilty pleas based on the ADA's alleged hiding of exculpatory evidence in other cases would lack arguable merit.

In a similar vein, Felski states he believes that the ADA promised the victims in this case a "[f]ree remodeling job" in exchange for their cooperation. Again, however, Felski cites no evidence suggesting that such promises actually took place. And, once again, he does not assert that he learned of this information after he entered his pleas, or that he would not have entered his pleas had he known about the alleged promises made to the victims. Any argument that Felski's pleas are invalid based on the ADA's alleged promises to the victims would therefore lack arguable merit.

Felski also argues that the ADA materially and substantially breached the plea agreement during his sentencing hearing. When the State commits a material and substantial breach of a plea agreement, the agreement "may be vacated or an accused may be entitled to resentencing." ***State v. Williams***, 2002 WI 1, ¶38, 249 Wis. 2d 492, 637 N.W.2d 733. "A material and

substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained." ***Id.***

As noted above, the plea agreement in this case provided that the State would be free to argue at sentencing with respect to Counts 1, 3, and 5, but it was required to recommend probation on Count 4. Felski contends that the State materially and substantially breached its agreement to recommend probation on Count 4 when the ADA stated, at the beginning of her sentencing remarks: "The fact that this defendant has already been on probation multiple times in the past, and even had one of those terms of probation revoked, tells us that he's not a good candidate for probation."

Any argument that this statement materially and substantially breached the plea agreement would lack arguable merit. After the ADA made the statement in question, she continued:

> Looking at the Pre-Sentence Investigation, obviously, the agent recommends prison, and consistent with our plea agreement, I am going to recommend probation on Count 4.
>
> So I want to be very clear that any of my comments beyond this point are relating to Counts 1, 3 and 5. I absolutely am going to be recommending prison on Counts 1, 3 and 5.
>
> I am asking the court to order a consecutive three-year term of probation on Count 4. So I don't want there to be any confusion about any of my comments compromising the plea agreement. Probation on Count 4 is my recommendation.
>
> The remainder of my comments are only specifically dealing with Counts 1, 3 and 5. … I am actually asking the court not to follow the agent's recommendation by ordering probation on Count 4.

Taken as a whole, the ADA's sentencing remarks show that her initial statement that Felski was not a good candidate for probation referred only to the portion of her recommendation

in which she asked the court to sentence Felski to prison on Counts 1, 3, and 5. Despite recommending prison sentences on those counts, the ADA expressly recommended a term of probation on Count 4, as required by the plea agreement. The circuit court ultimately ordered probation on Count 4, consistent with the ADA's recommendation. The court also rejected Felski's argument that the ADA had breached the plea agreement by stating that he was not a good candidate for probation, noting that the court had reviewed the file before sentencing and "fully understood … from the beginning" that the State was recommending probation on Count 4. Under these circumstances, the ADA's comment did not deprive Felski of any benefit for which he bargained when entering into the plea agreement. *See* ***Williams***, 249 Wis. 2d 492, ¶38.

Felski also suggests that his trial attorney was ineffective by advising him to enter into a plea agreement that required him to waive his appellate rights. However, Felski does not explain why he believes that advice was ineffective under the specific circumstances of this case. Instead, he suggests that an attorney is per se ineffective by advising his or her client to accept a plea agreement that includes a waiver of appellate rights. We have not located any legal authority in support of that proposition. Moreover, during the plea colloquy, Felski's attorney explained on the record why he believed that the plea agreement benefited Felski, and counsel further explained that he had advised Felski to accept the plea deal because he believed the benefits "far outweigh[ed] the risks." Counsel's remarks show that he made a reasonable strategic decision to recommend that Felski accept the plea deal. An attorney's reasonable strategic choices are virtually unassailable on appeal. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984).

Felski also argues that the circuit court should have held a restitution hearing. Although the plea agreement required Felski to stipulate to the amount of restitution, he argues he could

not validly do so because "the restitution amounts … were unknown" at the time he entered his pleas. The record belies this assertion. When reciting the terms of the plea agreement for the court, the ADA expressly stated that under the agreement, Felski would stipulate that he owed $77,782.28 in restitution, and he would agree not to request a restitution hearing and not to challenge his ability to pay that amount. We have already concluded that there would be no arguable merit to a claim that Felski's pleas were not knowing, intelligent, and voluntary. Under these circumstances, any claim that Felski is entitled to a restitution hearing would lack arguable merit.

Finally, Felski challenges his sentences on the ground that the PSI author was biased. He contends the PSI author's husband "is a contractor who I had bid against and who won four other contracts in Walworth County." We conclude this claim lacks arguable merit for three reasons. First, as noted above, Felski knowingly, intelligently, and voluntarily entered into the plea agreement, which expressly provided that Felski was waiving his right to challenge his sentences on appeal, except on the grounds that they exceeded the maximum penalties provided by statute or were based on constitutionally impermissible factors. Felski's assertion of bias by the PSI author does not fall within either of those categories. Second, Felski cites no evidence in support of his unsubstantiated claim that the PSI author was biased. Third, the circuit court was not bound by the PSI author's recommendations, *see* ***State v. Bizzle***, 222 Wis. 2d 100, 105 n.2, 585 N.W.2d 899 (Ct. App. 1998), and the record shows that the court did not, in fact, adopt the PSI author's recommendations as to Counts 1, 4, and 5.

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

Therefore,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved of further representing Thomas G. Felski 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