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DISTRICT III

November 8, 2022

To:

Hon. Kendall M. Kelley
Circuit Court Judge
Electronic Notice

Dana J. Johnson
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John VanderLeest
Clerk of Circuit Court
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Christina C. Starner
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Edgar Jesus Zuniga
800 6th Street
Menasha, WI 54952

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

2022AP29-CRNM State of Wisconsin v. Edgar Jesus Zuniga (L. C. No. 2019CM713)

Before Stark, P.J.¹

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).

Edgar Jesus Zuniga appeals from a judgment convicting him of two counts of unlawful use of a phone (using threats and obscenities) and two counts of disorderly conduct, all counts as a repeater. Appellate counsel, Christina Starner, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Zuniga received a copy of the report and was advised of his right to file a response, but he did not do so. We have independently reviewed the record and the no-merit report as mandated by *Anders*. We

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm.

On June 19, 2019, the State charged Zuniga with four counts of unlawful use of a phone (using threats and obscenities), as a repeater, and four counts of disorderly conduct, as a repeater. The complaint alleged that at about 9:00 p.m. on June 18, 2019, Zuniga called the Brown County dispatch center to complain about an employee, M.B.X., who Zuniga alleged was harassing him. The dispatcher told Zuniga to call the Menasha Police Department because Zuniga resided in Menasha and the alleged harassment took place there. The complaint states that Zuniga became agitated, insinuated that he would harm M.B.X., and then hung up. The complaint further states that the dispatcher then spoke with M.B.X., who stated that Zuniga had dated her sister, had been violent with her sister, and had a history of domestic violence. M.B.X. denied having contact with Zuniga and told the dispatcher that she believed Zuniga's threat. Zuniga called the dispatch center three more times that same night and made multiple threats against M.B.X. The center then received a phone call from the Menasha Police Department, informing the dispatcher that Zuniga was in the police department lobby and was unruly. The dispatcher advised law enforcement to arrest Zuniga based on his threatening phone calls.

Pursuant to a plea agreement, Zuniga agreed to plead no contest to two counts of unlawful phone use (using threats and obscenities) and two counts of disorderly conduct, all as a repeater. The State would recommend that the remaining charges be dismissed and read in. Zuniga and the State would jointly recommend a withheld sentence and two years' probation. The circuit court accepted Zuniga's no-contest pleas and found him guilty of the four charges. The court withheld sentence, placed Zuniga on probation for two years, and imposed and stayed six months' jail time on each count, consecutive to each other.

Appellate counsel's no-merit report addresses whether there would be arguable merit to an appellate challenge to Zuniga's guilty pleas. Counsel notes that while the circuit court "did not verbalize the elements of each crime," the court verified that Zuniga reviewed the elements with counsel and understood the plea questionnaire/waiver of rights form, which also listed the elements of the crimes charged. The transcript shows that the court verified Zuniga's understanding of the crimes charged by asking, "if we went through [the plea questionnaire/waiver of rights] form all line by line, would you tell me that you understand each line on each page and that you agree with them in the way that they've been filled out[?]" Zuniga answered in the affirmative. The court then confirmed that Zuniga's counsel reviewed each of the elements for each of the charged crimes with Zuniga. The court also explained the repeater penalty enhancer, confirmed that Zuniga reviewed the constitutional rights listed on the plea questionnaire/waiver of rights form, established that no threats were made against Zuniga, and informed Zuniga that it was not bound by the parties' recommendations. The court's colloquy, supplemented by the plea questionnaire/waiver of rights form, and Zuniga's confirmation that he had reviewed the form with counsel, establish that Zuniga's pleas were voluntary, knowing and intelligent. *See* WIS. STAT. § 971.08; *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987) (holding that a court may rely on a plea questionnaire and waiver of rights form in assessing the defendant's knowledge about the rights he or she is waiving).

Appellate counsel also points out that the circuit court did not warn Zuniga in conformity with WIS. STAT. § 971.08(1)(c) about the risks of deportation and other potential immigration consequences that accompanied his no-contest pleas. The warnings, however, appeared on the plea questionnaire. We therefore agree with appellate counsel that, because Zuniga had actual

knowledge of the information that the court should have provided, the omission of immigration warnings does not provide an arguably meritorious basis to challenge the pleas.² See *State v. Reyes Fuerte*, 2017 WI 104, ¶38, 378 Wis. 2d 504, 904 N.W.2d 773.

Appellate counsel's no-merit report next addresses whether there is a factual basis to support Zuniga's pleas. During the plea hearing, the circuit court established that the criminal complaint supported a factual basis for Zuniga's pleas. Upon an independent review of the record, we agree with appellate counsel's thorough analysis that there is a factual basis to support Zuniga's pleas. There is no arguable merit to this issue.

With regard to the circuit court's sentencing decision, we note that sentencing is a matter for the circuit court's discretion. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court should consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. It should also determine which objective or objectives are of greatest importance. *Gallion*, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court must consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, as well as any additional factors it may wish to consider. See *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. See *id.*

² We observe that before a defendant may seek plea withdrawal based on failure to comply with WIS. STAT. § 971.08(1)(c), the defendant must show that "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." Sec. 971.08(2). Nothing in the record suggests that Zuniga could make such a showing.

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. While the court credited Zuniga for taking responsibility for his actions, the court noted that Zuniga’s conduct “has a very negative effect on the community.” The court referenced Zuniga’s use of public resources to issue threats and expressed concern over Zuniga’s “capacity for really doing some harm.” The resulting sentence was within the potential maximum authorized by law, *see State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public’s sentiment, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Therefore, there would be no arguable merit to a challenge to the court’s sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Christina Starner is relieved of further representation of Edgar Jesus Zuniga 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