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DISTRICT II

February 8, 2023

To:

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Michael J. Gardner, #625912
680 County Hwy. D
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1603-CRNM State of Wisconsin v. Michael J. Gardner (L.C. #2019CF140)

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

Michael J. Gardner appeals from a judgment entered upon his plea of no contest to one count of burglary, a Class F felony. Gardner's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)¹ and *Anders v. California*, 386 U.S. 738 (1967). Gardner was advised of his right to file a response but has not done so. Upon

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

consideration of the no-merit report 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.

Gardner was charged with burglary to a nearby residence. In exchange for Gardner's no-contest plea to the sole charge, the State agreed to recommend an eight-year bifurcated sentence with two years of initial confinement followed by six years of extended supervision. The circuit court set the matter over for sentencing to include a restitution hearing.

At sentencing, trial counsel informed the circuit court that Gardner would stipulate to restitution in the amount of \$3,400 to represent the amount of cash Gardner admittedly stole from the victim. The State informed the court that the victim was asking for an additional \$2,400 in missing cash as well as another \$1,250 to replace a pair of unrecovered earrings. After hearing testimony from the victim and from Gardner, the circuit court found that, after receiving credit for the \$3,500 taken out of his bail and applied to his restitution, Gardner still owed \$3,650 in restitution (\$2,400 for the other missing cash and \$1,250 for the unrecovered earrings). The court then imposed a five-year bifurcated sentence, with two years of initial confinement followed by three years of extended supervision. The court found Gardner eligible for the Substance Abuse Program (which he has since completed) and awarded him fifty-one days of sentence credit. Gardner appeals.

Appointed counsel's no-merit report addresses: (1) whether the circuit court properly exercised its discretion in awarding restitution; and (2) whether trial counsel provided ineffective assistance of counsel. This court is satisfied that the no-merit report correctly analyzes these issues as without arguable merit, and we will not discuss them further.

Next, though appointed counsel briefly summarizes some facts from the plea-hearing transcript, the discussion is incomplete in that it does not analyze whether the circuit court's plea-taking colloquy was sufficient under relevant statutory and case law. We have performed an independent review of the entire Record, including the plea-taking colloquy and the completed and filed plea-waiver paperwork. We conclude that the circuit court engaged in a thorough colloquy that satisfied the requirements of WIS. STAT. § 971.08(1); *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906; and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. In addition to its substantive plea-taking colloquy, the circuit court properly relied on Gardner's signed plea questionnaire and its attachments. See *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Based on the Record, including the plea-taking colloquy and the written plea questionnaire, we conclude that a challenge to Gardner's no-contest plea would lack arguable merit.

Finally, though appellate counsel's no-merit report discusses the discretionary standard by which we must review a circuit court's sentence, the no-merit report applies this standard to the circuit court's restitution determination, rather than to its entire sentencing decision. To counsel's discussion in the no-merit report, we add that, in fashioning the sentence, the circuit court considered the seriousness of the offense, the defendant's character and history, 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. The court considered proper factors, did not consider improper ones, and reached a rational, explainable result. Further, we cannot conclude that the aggregate sentence of five years, when measured against the maximum sentence of twelve and one-half years, is so excessive or unusual as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185,

233 N.W.2d 457 (1975). There is no arguably meritorious challenge to the sentence imposed in this case. Therefore,

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

IT IS FURTHER ORDERED that Attorney Sarra M. Clarkson is relieved from further representing Michael J. Gardner 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