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 I

November 14, 2023

To:

Hon. Stephanie Rothstein
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Marcella De Peters
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Ernesto S. Garcia 697907
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2022AP564-CRNM State of Wisconsin v. Ernesto S. Garcia (L.C. # 2019CF3949)

Before White, C.J., Dugan and Geenen, 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).

Ernesto S. Garcia appeals from a judgment, entered on his no-contest plea, convicting him on one count of felony murder. Appellate counsel, Marcella De Peters, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Garcia was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record as mandated by ***Anders*** and counsel's report, we

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

M.P. made a deal via Facebook for the sale of a half-pound of marijuana on August 30, 2019. The buyer was to pick up the purchase at the home of M.P. and O.A.-D., where M.P., O.A.-D., and Natanael Amilcar Zapata-Santiago were drinking, smoking marijuana, and playing video games in the living room. The buyer and two other men arrived and entered the home. Shortly after one of the three men examined and weighed the marijuana, at least one of them pulled out a gun and told everyone not to move. Zapata-Santiago, who was seated on the couch, leaned forward as if to stand up, and one of the men fired his gun, hitting Zapata-Santiago. The men grabbed the marijuana and fled.

Zapata-Santiago was struck in the arm, but the trajectory of the bullet caused it to perforate his aorta and both lungs, killing him. Through various witness statements and identification procedures, the three men who came to purchase the marijuana were identified as Garcia, Fabian Herrera, and Jovany Jeronimo. All three were charged, in a single complaint, with one count of felony murder as a party to a crime, with armed robbery as the predicate felony. Garcia agreed to resolve his case with a plea; in exchange for his no-contest plea, the State would argue for a prison sentence without recommending a particular length. The circuit court conducted a colloquy and accepted Garcia's plea.

Prior to sentencing, Garcia sent a *pro se* letter to the circuit court seeking to "resummit/resend [sic]" his plea. He said that he felt that he "didn't receive the proper counsel, nor did it seem like [counsel] wanted to work on [the] case." Garcia complained that he did not receive discovery and that counsel did not "go through all the evidence" with him. Garcia also

felt that whenever counsel visited him, "it was always the same negative at[t]itude and doubtness I would get." In response to this letter, Garcia's retained attorney moved to withdraw. The circuit court authorized counsel's withdrawal from the case, and the public defender's office appointed a successor attorney for Garcia.

Garcia's new attorney then filed a formal motion to withdraw the plea. The motion reasserted Garcia's claims that his original attorney did not provide discovery or review evidence with him and asserted that Garcia's plea "was a result of this then-attorney … coercing and pressur[ing] him to plead no contest on a date set for trial." The motion further claimed that Garcia "was stressed and was not fully paying attention at the time of the plea colloquy … [so] he did not knowingly waive his rights[.]" Finally, the motion asserted that Garcia now "intends to rely on an alibi defense at his trial[.]"

At the evidentiary hearing on the motion, only Garcia's original attorney testified. Based on that testimony, plus its own observations from having conducted the plea colloquy, the circuit court denied the plea withdrawal. At the subsequent sentencing hearing, the circuit court imposed fifteen years of initial confinement and eight years of extended supervision. Garcia appeals.

The no-merit report first discusses whether there is any arguable merit to a claim that Garcia's plea was not knowing, intelligent, and voluntary. ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). Our review of the record—including the plea questionnaire and waiver of rights form and addendum; the attached jury instructions for felony murder, the predicate armed robbery charge, and party to a crime liability, all of which were signed by Garcia; and the plea hearing transcript—confirms that the circuit court complied with its

obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***Bangert***, 131 Wis. 2d at 261-62, and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

There were slight errors in the circuit court's explanation of the potential penalties Garcia faced. The court correctly advised that Garcia faced a maximum sentence of fifty-five years' imprisonment, but then mistakenly described the bifurcation of that maximum as forty years of initial confinement and fifteen years of extended supervision. Because of the 75% rule, the actual bifurcation for the maximum sentence would be 41.25 years of initial confinement and 13.75 years of extended supervision.[2] *See* ***State v. Mason***, 2004 WI App 176, ¶¶9-10, 276 Wis. 2d 434, 687 N.W.2d 526. Additionally, during the plea colloquy and on the plea questionnaire, it was erroneously stated that there was a potential $100,000 fine, but there is no fine prescribed for felony murder.[3] *See* WIS. STAT. § 940.03.

However, the incorrect bifurcation does not give rise to an issue of arguable merit because Garcia was properly advised of the correct total maximum fifty-five-year term of imprisonment. In order for a plea to be entered knowingly, intelligently, and voluntarily, the defendant must be informed of the potential punishment he or she faces if convicted. *See* WIS. STAT. § 971.08(1)(a); *see also* ***Bangert***, 131 Wis. 2d at 261-62. Where the circuit court properly informs the defendant of the maximum term of imprisonment, no additional dissection of the potential punishment is required. *See* ***State v. Sutton***, 2006 WI App 118, ¶15, 294 Wis. 2d 330, 718 N.W.2d 146.

[2] Under the 75% rule, the maximum term of confinement for an unclassified felony is 75% of the total length of the bifurcated sentence. *See* WIS. STAT. § 973.01(2)(b)10.

[3] The maximum fine for a Class C felony like armed robbery is $100,000. *See* WIS. STAT. § 939.50(3)(c).

A fine is also part of the range of punishments a defendant faces, *see* ***State v. Ramel***, 2007 WI App 271, ¶15, 306 Wis. 2d 654, 743 N.W.2d 502, but a circuit court's failure to advise a defendant in the plea colloquy of the correct potential punishment does not automatically warrant plea withdrawal, ***State v. Finley***, 2016 WI 63, ¶81, 370 Wis. 2d 402, 882 N.W.2d 761. Here, neither the criminal complaint—which Garcia verified he had personally read—nor the information listed a fine as part of the potential range of punishments. Second, the plea was not contingent on a fine in any way. Third, the circuit court recognized at sentencing that no fine was applicable, and no fine was imposed. Fourth, Garcia made no mention of the misstatement of the fine when he sought to withdraw his plea. We therefore conclude that a challenge to the guilty plea based on a claim that Garcia did not understand the penalty he faced would lack arguable merit. *See* ***State v. Taylor***, 2013 WI 34, ¶39, 347 Wis. 2d 30, 829 N.W.2d 482 (reflecting that a defect in the circuit court's description of the statutory criminal penalty during a plea colloquy is insubstantial and does not raise a question about the validity of the plea when the record shows the defendant knew and understood the penalty).

Based on the foregoing, there is no arguable merit to a claim that Garcia's plea was anything other than knowing, intelligent, and voluntary.

The second issue addressed in the no-merit report is whether Garcia could argue that the circuit court erroneously exercised its discretion in denying his motion for plea withdrawal. When a defendant moves to withdraw a plea before sentencing, the circuit court should permit the withdrawal for any fair and just reason. ***State v. Thomas***, 2000 WI 13, ¶15, 232 Wis. 2d 714, 605 N.W.2d 836. "'Fair and just' means some adequate reason for the defendant's change of heart other than the desire to have a trial." ***State v. Harvey***, 2006 WI App 26, ¶23, 289 Wis. 2d 222, 710 N.W.2d 482 (citation omitted). "The term 'fair and just reason' does not lend itself to

scientific exactness," but reasons for permitting plea withdrawal include "coercion on the part of trial counsel or a genuine misunderstanding either of the plea consequences, or of the charges." ***Id.***, ¶25 (citation omitted). "The defendant must prove that a fair and just reason exists by a preponderance of the evidence." ***State v. Nash***, 2020 WI 85, ¶31, 394 Wis. 2d 238, 951 N.W.2d 404 (quoting ***Thomas***, 232 Wis. 2d 714, ¶15).

Whether to permit plea withdrawal is committed to the circuit court's discretion. ***Harvey***, 289 Wis. 2d 222, ¶24. "Although plea withdrawal before sentencing should be liberally granted, it is not automatic." ***Id.*** "[E]ven where the reasons are fair and just, they must be supported by the evidence of record." ***State v. Shanks***, 152 Wis. 2d 284, 290, 448 N.W.2d 264 (Ct. App. 1989).

As noted, only Garcia's original attorney testified at the withdrawal hearing; Garcia waived his right to do so. Thus, the circuit court concluded that none of Garcia's reasons for seeking plea withdrawal—coercion or unpreparedness by counsel, lack of attention during the colloquy, and a new alibi witness—were supported by any evidence. Our review of the entirety of the hearing transcript satisfies us that the circuit court properly exercised its discretion and "reached a reasonable conclusion based on the correct legal standard and a logical interpretation of the facts." ***Harvey***, 289 Wis. 2d 222, ¶24. There is no arguable merit to the contrary.

The final issue discussed in the no-merit report is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must 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, and determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider other factors. ***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. ***Id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The twenty-three year sentence imposed is well within the fifty-five-year range authorized by law, ***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, ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is 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 Marcella De Peters is relieved of further representation of Garcia in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals