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 III

November 28, 2023

To:

Hon. Tammy Jo Hock
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Timothy T. O'Connell
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Pedro Luis Hernandez 593632
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:

2022AP269-CRNM State of Wisconsin v. Pedro Luis Hernandez
(L. C. No. 2018CF1324)

Before Stark, P.J., Hruz and Gill, 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).

Pedro Hernandez appeals from a judgment convicting him of attempted first-degree intentional homicide with several penalty enhancers and from an order denying his postconviction motion for plea withdrawal. Attorney Timothy O'Connell has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2021-22).[1] The no-merit report sets forth the procedural history of the case and addresses whether Hernandez's

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

plea was knowing, intelligent and voluntary and whether the circuit court properly exercised its sentencing discretion.

Hernandez has filed a response to the no-merit report alleging that: (1) his trial counsel provided ineffective assistance by failing to obtain an expert opinion regarding Hernandez's competency to stand trial; (2) the circuit court erred by failing to conduct a colloquy regarding Hernandez's competency to stand trial; and (3) the presentence investigation report (PSI) contained inaccurate information upon which the court relied at sentencing. O'Connell has filed a supplemental no-merit report addressing the issues Hernandez raises, to which Hernandez has filed a supplemental response. Having independently reviewed the entire record, reports and responses, as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal, counsel will be allowed to withdraw, and the judgment of conviction and postconviction order are summarily affirmed.

According to the complaint, Hernandez slashed the face and neck of his girlfriend with a box cutter "out of nowhere" while she was driving a car with the couple's two children in the backseat and he then ran away from police when they attempted to apprehend him. The girlfriend told police that Hernandez had been acting strangely, expressing the belief that both she and the Mexican Mafia were trying to kill him. Based on those allegations, the State charged Hernandez with: (1) attempted first-degree intentional homicide, by use of a dangerous weapon, as domestic abuse, and as a repeat offender; (2) obstructing an officer, as a repeat offender; and (3) first-degree reckless endangerment, by use of a dangerous weapon, as domestic abuse, and as a repeat offender.

Hernandez's trial counsel requested a competency evaluation. Forensic psychiatrist Elliott Lead diagnosed Hernandez as suffering from schizophrenia and other thought disorders, and he concluded that Hernandez was incompetent to stand trial. Based upon Lead's uncontested report, the circuit court determined that Hernandez was not competent to stand trial but that he was likely to regain competency within the statutory time period with treatment, including the administration of psychotropic medications. The court consequently issued an order for involuntary medication.

Several months later, licensed psychologist Jenna Niess filed a report concluding that Hernandez had regained competency. Hernandez's trial counsel informed the circuit court that he would like to obtain a second opinion and requested a competency hearing. At the time scheduled for the hearing, however, trial counsel informed the court that, after speaking with Hernandez and his family, the defense had decided to withdraw its request for an additional competency evaluation. The court then found Hernandez competent to proceed based upon Niess's uncontested report, without personally asking Hernandez whether he believed that he was competent.

Hernandez subsequently withdrew his NGI plea and pled no contest to the enhanced attempted homicide charge. In exchange, the State agreed to cap its sentence recommendation at fifteen years of initial confinement followed by fifteen years of extended supervision, and it requested that the other two charges be dismissed and read in. The circuit court accepted Hernandez's plea after conducting a plea colloquy and reviewing a signed plea questionnaire with an attachment setting forth the elements of the offense and penalty enhancers.

At the sentencing hearing, Hernandez offered several corrections to the PSI, including denying that he had ever been in a gang or that he had once been shot in the head. The circuit court agreed to strike the paragraph in the PSI that made both references. After hearing from the victim, Hernandez's mother, and the parties, the court discussed appropriate sentencing factors, emphasizing the seriousness of the offense, Hernandez's criminal history, and his past failures on supervision. The court then sentenced Hernandez to twenty years of initial confinement followed by ten years of extended supervision.

Hernandez moved to withdraw his plea on the grounds of ineffective assistance of counsel and a defective plea colloquy. He alleged that his trial counsel told him that: (1) he would only be sentenced to fifteen years of initial confinement if he accepted the State's plea offer; (2) he would receive the maximum penalty if he went to trial; (3) he would receive a life sentence if he pursued an NGI defense; and (4) he would have access to treatment if he went to prison but not at a mental health facility. Hernandez further alleged that the circuit court failed to explain during the plea colloquy what it meant to "read in" dismissed charges.

Trial counsel disputed each of Hernandez's allegations, and the circuit court determined that trial counsel did not provide Hernandez with the claimed inaccurate information about potential punishments that Hernandez alleged. The court also specifically found credible counsel's testimony that he had reviewed all of the information in the plea questionnaire with Hernandez—including that the court was not bound by sentence recommendations and that it could consider read-in offenses for the purpose of sentencing. The court further found that Hernandez in fact understood the effect of read-in offenses.

Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that Hernandez has no arguable basis to challenge his plea or sentence. First, the record supports the circuit court's findings as to what trial counsel told Hernandez and what Hernandez understood. *See* ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999) (noting that the court may assess the credibility of the proffered explanation for a plea withdrawal request). Given those findings, Hernandez cannot establish that his plea was unknowing or involuntary. *See generally* ***State v. Brown***, 2006 WI 100, ¶¶35-42, 293 Wis. 2d 594, 716 N.W.2d 906 (discussing the requirements for a valid plea).

Second, to establish a claim of ineffective assistance, a defendant must prove both deficient performance by his or her counsel and prejudice resulting from that deficient performance. ***State v. Sholar***, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89. In order to establish that Hernandez was prejudiced by his trial counsel's failure to obtain a second opinion as to whether Hernandez had regained competency to stand trial, Hernandez would need to show a reasonable probability that a second opinion would have led to a different result. *See* ***id.***, ¶¶44-45. Here, however, appellate counsel retained an expert to evaluate Hernandez, and that expert concurred with Niess's opinion that Hernandez had regained competency with the use of medication.

Third, a circuit court may properly rely upon trial counsel's representation that a defendant is not contesting a competency report. ***State v. Guck***, 176 Wis. 2d 845, 857-58, 500 N.W.2d 910 (1993). Therefore, the court did not err here by failing to personally ask Hernandez whether he agreed that he had regained competency.

Fourth, to establish a claim of sentencing based upon inaccurate information, a defendant must show not only that "extensively and materially false" information was presented to the circuit court but also that the court "actually relied" upon that information by giving it explicit consideration. ***State v. Travis***, 2013 WI 38, ¶18, 347 Wis. 2d 142, 832 N.W.2d 491; ***State v. Tiepelman***, 2006 WI 66, ¶14, 291 Wis. 2d 179, 717 N.W.2d 1 (citation omitted). Here, the court explicitly struck the information that Hernandez challenged as inaccurate, and it did not refer to it again during the sentencing hearing. Therefore, Hernandez cannot show that the court actually relied upon that information.

Our independent review of the record discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders***. Accordingly, counsel shall be allowed to withdraw, and the judgment of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy O'Connell is relieved of any further representation of Pedro Luis Hernandez in this matter pursuant to 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