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MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT IV/II**

April 17, 2013

To:

Hon. Robert P. VanDeHey  
Circuit Court Judge  
Grant County Courthouse  
130 W. Maple St.  
Lancaster, WI 53813

Kimberly Kohn  
Clerk of Circuit Court  
Grant County Courthouse  
130 W. Maple St.  
Lancaster, WI 53813

Robert R. Henak  
Henak Law Office, S.C.  
316 N. Milwaukee St., Ste. 535  
Milwaukee, WI 53202

Lisa A. Riniker  
District Attorney  
130 W. Maple Street  
Lancaster, WI 53813

Gregory M. Weber  
Assistant Attorney General  
P.O. Box 7857  
Madison, WI 53707-7857

Joseph D. Fecht, #448724  
Stanley Corr. Inst.  
100 Corrections Drive  
Stanley, WI 54768

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

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2012AP1488-CRNM      State of Wisconsin v. Joseph D. Fecht (L.C. # 2003CF41)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Joseph D. Fecht appeals from a judgment of conviction for one count of second-degree intentional homicide, contrary to WIS. STAT. § 940.05(1), and from an order granting his postconviction motion for sentence modification. Fecht's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Fecht received a copy of the report, was advised of his right to file a response, and has

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version.

elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the amended judgment reflecting Fecht's modified sentence may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* RULE 809.21.

This case has a long procedural history. Fecht was originally charged in 2003 with one count of first-degree intentional homicide based on allegations that he brutally stabbed his wife, causing her death. As part of a plea agreement, Fecht pled guilty to a reduced charge of second-degree intentional homicide and on August 14, 2003, was sentenced to a fifty-year bifurcated sentence, with thirty years of initial confinement and twenty years of extended supervision. Postconviction counsel was appointed to represent Fecht and determined there were no meritorious issues for appeal. Pursuant to Fecht's request, counsel was permitted to withdraw and Fecht proceeded pro se. After an unsuccessful postconviction plea withdrawal motion, Fecht filed a notice of appeal and retained an attorney. Retained counsel successfully moved to dismiss the appeal and this court reinstated Fecht's WIS. STAT. RULE 809.30 direct appeal. No further action was taken by retained counsel, and Fecht's deadlines expired.

Fecht then filed a postconviction motion for habeas corpus relief in the trial court, seeking the reinstatement of his direct appeal time limits in order to pursue plea withdrawal. The trial court proceeded to take evidence concerning Fecht's plea withdrawal claims and denied Fecht's postconviction motion on the ground that even if appointed counsel had performed deficiently by abandoning Fecht on appeal, there was no reasonable probability that Fecht would have prevailed on his plea withdrawal claims. On appeal, this court affirmed the trial court's order denying Fecht's motion for habeas relief. *State v. Joseph D. Fecht*, No. 2008AP2419-CR, unpublished slip op. (WI App Oct. 1, 2009). This court concluded that though the trial court

erred in denying Fecht's motion to reinstate his direct appeal, "between the evidentiary hearing already conducted by the circuit court and this court's review on the present appeal, Fecht has obtained all the relief to which he was entitled." *Id.*, ¶¶1, 14. Thereafter, pursuant to Fecht's unopposed petition for habeas relief, the federal district court reinstated Fecht's WIS. STAT. RULE 809.30 direct appeal, and the Office of the State Public Defender appointed Attorney Robert R. Henak.

In 2012, Fecht, by Attorney Henak, filed a WIS. STAT. RULE 809.30(2)(h) postconviction motion seeking sentencing relief. The postconviction motion alleged that: (1) the trial court erroneously exercised its sentencing discretion by considering that Fecht's crime was committed in front of his daughter; and (2) Fecht was entitled to modification of his sentence due to the existence of a new factor. The alleged new factor was that though Fecht had a trial defense of which both he and the trial court were previously unaware, Fecht was choosing to forego that defense and request only a sentence modification in lieu of plea withdrawal. At the postconviction hearing, the trial court verified that part of Fecht's sentence modification claim was based specifically on the fact that he was choosing to forego a plea withdrawal claim based on the previously unknown trial defense. The trial court personally ascertained Fecht's understanding that by proceeding with the sentence modification motion, he was waiving his right to raise or appeal any issue concerning whether his plea was unknowing due to the new information, and that this was true regardless of whether he actually obtained any sentencing relief. Fecht stated that he understood and had discussed these decisions with his attorney. After the trial court determined that Fecht had demonstrated a new factor, postconviction counsel argued for a sentence modification down to twenty or twenty-five years. Over the State's objection, the trial court modified Fecht's sentence down to twenty-seven and one-half years'

initial confinement and seventeen and one-half years' extended supervision, for a total bifurcated sentence of forty-five years.

The no-merit brief first addresses the validity of Fecht's guilty plea. This issue need not be considered because it relates to a prior final judgment of conviction, and the present appeal brings before this court only the order modifying Fecht's sentence and the subsequent amended judgment of conviction. *See State v. Scaccio*, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449. Fecht could have challenged his plea in his postconviction motion but knowingly abandoned that issue. *Cf. State v. Walker*, 2006 WI 82, ¶7, 292 Wis. 2d 326, 716 N.W.2d 498 (in order to preserve claims other than sufficiency of the evidence for appeal, a defendant must first raise them in a postconviction motion in the trial court). Additionally, Fecht knowingly and on the record waived any challenge to the validity of his plea as a matter of strategy and with the advice of counsel. *State v. McDonald*, 50 Wis. 2d 534, 538, 184 N.W.2d 886 (1971) (“a deliberate choice of strategy, even if it backfires, amounts to a waiver binding upon the defendant and this court.”). Fecht is bound by his decision to forfeit or waive any plea withdrawal claim.

The no-merit brief next addresses whether the trial court properly exercised its sentencing discretion. The no-merit brief frames the issue as whether “the sentencing court erroneously exercise[d] its discretion when it ultimately sentenced Fecht to 27 ½ years initial confinement and 17 ½ years extended supervision after granting his motion for a sentence modification.” The no-merit brief analyzes as related issues whether the trial court properly exercised its discretion at: (1) the original sentencing; and (2) the sentence modification proceeding. Due to the interrelated nature of these proceedings, we will independently review both the original sentencing and the sentence modification hearing.

The no-merit brief analyzes the trial court's exercise of discretion at Fecht's original sentencing hearing and properly concludes that any challenge to Fecht's sentence would be without merit. At Fecht's original sentencing, the trial court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentence was based on the facts of record and the court identified as its primary objectives: (1) punishment based on the gravity of the offense and its impact on the community and the victim's family; (2) protection of the public through a lengthy incarceration; and (3) rehabilitation of the defendant by imposing a sentence that accounted for his acceptance of responsibility and offered him some hope of eventual release. Those are proper objectives. See *State v. Gallion*, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197. The no-merit brief also addresses Fecht's postconviction claim that the sentencing court erroneously considered as an aggravating factor that Fecht committed the offense in front of his daughter. We agree with appellate counsel's analysis and ultimate conclusion that this claim lacks merit. That the offense was committed in front of Fecht's daughter was a permissible consideration given the facts of this case.

Similarly, the no-merit brief correctly determines that the postconviction court properly exercised its discretion in modifying Fecht's sentence. A defendant seeking modification of his or her sentence based on a new factor must demonstrate both the existence of a new factor and that the new factor justifies modification of the sentence. *State v. Harbor*, 2011 WI 28, ¶38, 333

Wis. 2d 53, 797 N.W.2d 828.<sup>2</sup> The existence of a new factor does not automatically entitle the defendant to sentence modification. *Id.*, ¶37. “Rather, if a new factor is present, the circuit court determines whether that new factor justifies modification of the sentence.” *Id.* Whether and to what degree a sentence should be modified is a discretionary determination for the trial court. *Id.* A trial court’s discretionary decision will be sustained if the court examined the proper facts, applied the correct standard of law, and reached a reasonable conclusion using a rational process. *Gaugert v. Duve*, 2001 WI 83, ¶44, 244 Wis. 2d 691, 628 N.W.2d 861. At the postconviction hearing, the trial court incorporated its original sentencing statements and considered what if any effect the new information would have had on its original sentence. The trial court also analogized Fecht’s sentence to one ordered in a similar case. With all of this in mind and after explaining its reasoning process on the record, the trial court deemed a five-year reduction to be appropriate.

Finally, the no-merit brief properly determines that Fecht’s sentence was not excessive or unduly harsh. Both the original fifty-year and the modified forty-year sentences are well within the sixty-year maximum and cannot be considered excessive. *See State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) (“A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.”). We conclude that the trial court properly exercised its discretion at the original

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<sup>2</sup> Whether a fact or set of facts is a “new factor” is a question of law subject to independent review. *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. However, because this is a no-merit appeal and the State did not appeal the trial court’s sentence modification determination, we will assume the existence of a new factor.

sentencing hearing and again at the postconviction hearing when it determined that, upon the existence of a new factor, Fecht was entitled to a five-year sentence reduction. Any challenge to Fecht's sentence would be without merit.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Joseph D. Fecht further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Robert R. Henak is relieved from further representing Joseph D. Fecht in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*