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DISTRICT II/I

Amended July 12, 2013, to correct clerical errors, pg. 3
June 11, 2013

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

2012AP2123-CRNM State of Wisconsin v. Nicholas L. Fitzpatrick (L.C. #2011CF1196)

Before Curley, P.J., Kessler and Brennan, JJ.

Nicholas L. Fitzpatrick appeals from a judgment of conviction, entered upon his no-contest plea, on one count of second-degree sexual assault. Appellate counsel, Randall E. Paulson, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Fitzpatrick was advised of his right to file a response, and he has responded. Counsel also provided a supplemental report. Upon this court's independent

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

review of the record as mandated by ***Anders***, counsel's reports, and Fitzpatrick's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On Fitzpatrick's eighteenth birthday, multiple people were partying and drinking at his home, including Fitzpatrick himself. Then fourteen-year-old T.J. "ended up staying" at his house because the friend who brought her to the party was too drunk to drive her home. Fitzpatrick suggested that T.J. sleep in his bed, as it would be more comfortable than the floor. She agreed. They started kissing, which T.J. did not mind, but when he touched her vagina, she told him to stop. He did, briefly, but then started again, this time digitally penetrating her. Fitzpatrick then pulled down T.J.'s shorts and engaged her in penis-to-vagina intercourse. A few weeks later, Fitzpatrick's nineteen-year-old friend, A.M., was at his home. He started fondling A.M.'s breasts over her clothes. When she got up to leave, he pushed her onto a bed, rubbed her vagina under her clothes, and then inserted two fingers into her vagina. For these offenses, Fitzpatrick was charged with one count of sexual assault of a person less than sixteen years of age, which is a category of second-degree sexual assault,[2] and one count of third-degree sexual assault.

In exchange for Fitzpatrick's no-contest plea to the second-degree sexual assault, the State agreed to dismiss and read in the second count. The State also agreed to follow the presentence investigation report's sentencing recommendation. The circuit court accepted the

[2] On the judgment of conviction, the offense is described as "2nd Degree Sexual Assault of Child."

plea and ultimately sentenced Fitzpatrick to six years' initial confinement and nine years' extended supervision.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Fitzpatrick's no-contest plea and whether the circuit court appropriately exercised its sentencing discretion. Fitzpatrick in his response raises complaints that we categorize as three additional issues. We address each issue in turn.

There is no arguable basis for challenging whether Fitzpatrick's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Fitzpatrick completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses.[3] The form correctly acknowledged the maximum penalties Fitzpatrick faced and also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. In

[3] During the colloquy, the circuit court pointed out that the jury instructions that counsel had attached to the plea questionnaire describe a crime alleged to have occurred by sexual *contact*, whereas the complaint in this case had alleged sexual *intercourse*. Though the State offered to move to amend the information, there is no indication in the record that the circuit court ever accepted the change.

However, there is no issue of arguable merit stemming from this discrepancy. Counsel explained that he had reviewed both sexual contact and sexual intercourse with Fitzpatrick. The circuit court then reviewed the elements of the offense with Fitzpatrick, first discussing sexual contact as explained in the attached instructions, then inquiring whether Fitzpatrick understood how sexual intercourse—which involves intimate touching—could also be sexual contact. Fitzpatrick acknowledged his understanding of both concepts. It is clear from the record that Fitzpatrick understood the nature of the offense to which he was pleading.

addition to being particularly thorough with regard to the required colloquy duties, the circuit court also explained that the read-in offense would be available as a sentencing consideration even though it would not increase the maximum penalty Fitzpatrick faced. *See* ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835.

The plea questionnaire and waiver of rights form, along with the circuit court's colloquy, appropriately advised Fitzpatrick of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

In his response, Fitzpatrick does not denying having sexual intercourse with T.J. Instead, he essentially contends that the interaction was her idea. This might be viewed as a challenge to the factual basis for the plea. However, there is no issue of arguable merit stemming from this claim: because T.J. was below a legislatively prescribed age limit, her consent is irrelevant.[4] *See* ***C.L. v. School Dist. of Menomonee Falls***, 221 Wis. 2d 692, 703, 585 N.W.2d 826 (Ct. App. 1998); *see also* ***State v. Kummer***, 100 Wis. 2d 220, 230-32, 301 N.W.2d 240 (1981).

[4] To the extent that Fitzpatrick might also be claiming that he did not know T.J.'s age, mistake of age is not a defense. *See* WIS. STAT. § 939.43(2); *see also* ***State v. Jadowski***, 2004 WI 68, ¶18, 272 Wis. 2d 418, 680 N.W.2d 810.

Fitzpatrick also complains about the circumstances of a statement he gave to police, essentially claiming a ***Miranda/Goodchild*** violation.[5] Fitzpatrick claims that when he was taken into custody, he asked the detective, while in the squad car, "Don't I get to call my attorney?" The detective asked him, "Do you have one?" Fitzpatrick replied, "Not yet." Fitzpatrick also claims that just prior to the interview, he ingested pain pills that impaired his mental status, and that one of the detectives "placed his firearm on the table" during the questioning.

Because no suppression motion was filed and ruled on prior to entry of the plea, we must construe Fitzpatrick's complaint as a claim that trial counsel was ineffective for failing to pursue a motion to suppress his statement. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53 (valid guilty or no-contest plea waives nonjurisdictional defects and defenses, including constitutional claims); WIS. STAT. § 971.31(10) (denial of motion to suppress may be reviewed on appeal notwithstanding entry of plea). However, there is no arguably meritorious claim that trial counsel was ineffective for failing to seek suppression of Fitzpatrick's statement.

Any invocation of the Fifth Amendment right to counsel during questioning must be unequivocal and unambiguous. *See* ***State v. Forbush***, 2011 WI 25, ¶17, 332 Wis. 2d 620, 796 N.W.2d 741. Fitzpatrick's inquiry was merely whether he would have an opportunity to call counsel, not an unequivocal and unambiguous request to have counsel present during questioning. As such, a suppression motion on Fifth Amendment grounds would not have

[5] *See* ***Miranda v. Arizona***, 384 U.S. 436, 444 (1966), and ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 262, 133 N.W.2d 753 (1965). A ***Miranda*** hearing is used to determine whether a defendant properly waived his or her constitutional rights before giving a statement, *see* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984), and a ***Goodchild*** hearing determines the voluntariness of such a statement, *see* ***id.***, 27 Wis. 2d at 264-65.

succeeded, and counsel is not ineffective for failing to pursue a meritless motion. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996).

However, even if trial counsel was deficient for failing to pursue a motion to suppress the statement, Fitzpatrick suffered no prejudice. *See* ***State v. Mayo***, 2007 WI 78, ¶¶60-61, 301 Wis. 2d 642, 734 N.W.2d 115 (ineffective assistance of counsel claim requires showing of both deficient performance and prejudice). While trial counsel had not filed a motion to suppress, the State had moved to admit Fitzpatrick's statement in the event of a trial. The circuit court held a hearing at which both ***Miranda*** and ***Goodchild*** issues were explored. The circuit court ultimately determined that Fitzpatrick had not invoked the right to counsel, was not intoxicated or impaired, had properly waived his rights, was not coerced, and had voluntarily given a statement.

Though Fitzpatrick's response includes allegations contrary to this conclusion, Fitzpatrick never claims that he told trial counsel of these facts. Appellate counsel notes in his supplemental no-merit report that Fitzpatrick only mentioned the pain pills, not his question about counsel or the detective's gun on the interview table. "This court will not find counsel deficient for failing to discover information that was available to the defendant but that defendant failed to share with counsel." ***State v. Nielsen***, 2001 WI App 192, ¶23, 247 Wis. 2d 466, 634 N.W.2d 325. There is no arguable merit to a claim that trial counsel was ineffective for failing to pursue a motion to suppress Fitzpatrick's second statement to police.

The other issue counsel raises 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, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *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* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court noted that sentencing was somewhat difficult in this case, because it was not clear whether Fitzpatrick was a sexual predator or simply an immature, impulsive, self-centered eighteen-year-old. It noted that Fitzpatrick's offenses were extremely aggravated: both involved assaultive behavior with some degree of force on a vulnerable victim.[6] It noted that there were no known mental health issues, but Fitzpatrick did have alcohol issues and prior marijuana use. It noted that Fitzpatrick had not accepted any responsibility with any degree of sincerity, claiming that both victims were lying or distorting what happened. The circuit court did consider mitigating factors, like the fact that this was Fitzpatrick's first involvement with the criminal justice system and that he had been working hard at home to graduate from high school.

Nevertheless, the circuit court determined that the punishment and protection were important objectives. It opined that anything less than the six years' initial confinement and nine

[6] The circuit court appears to have been referring to the fact that A.M. was Fitzpatrick's friend, while T.J. was in a leg cast or brace of some sort and was "stuck" at his house because her drunk friend could not take her home.

years' extended supervision imposed would be insufficient to accomplish those objectives and would unduly depreciate the seriousness of the offenses. The circuit court noted that the presentence investigation report was treating Fitzpatrick as a sexual predator but, in light of Fitzpatrick's IEP (individualized education plan), which had been submitted for consideration, the circuit court was not sure the report was correct in that regard. The circuit court noted that treatment would be most effective while Fitzpatrick was confined, in part because his actual needs were still unknown, and it explained that a lengthier extended supervision term would ensure that Fitzpatrick could take advantage of programs and services available to him once his risk was determined.

In his response, Fitzpatrick complains that his sentence was "harsh," imposed because of his mother's outbursts in court. This claim appears premised on nothing more than conjecture and hearsay contained in a letter from Fitzpatrick's father. While it is true that the circuit court did have to admonish a spectator during the sentencing hearing, there is nothing in the record that would support a claim that the circuit court's sentence was designed to punish Fitzpatrick for someone else's behavior in the courtroom.

The maximum possible sentence Fitzpatrick could have received was forty years' imprisonment. The sentence totaling fifteen years' imprisonment is well within the range 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). The record reveals that the circuit court considered only proper factors to arrive at its decision, which is not harsh. There is no arguable merit to a challenge to the sentencing court's 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 Randall E. Paulson is relieved of further representation of Fitzpatrick in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals