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DISTRICT II

November 16, 2016

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

2015AP224-CRNM	State of Wisconsin v. Lao Jin (L.C. #2013CF222)
2015AP225-CRNM	State of Wisconsin v. Lao Jin (L.C. #2013CF394)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

In these consolidated matters, Lao Jin appealed from judgments of conviction entered upon his no contest pleas to fourteen counts across two circuit court cases and from orders denying his postconviction motions for plea withdrawal.¹ Jin's appellate counsel filed a no-merit

¹ Appeal No. 2015AP224-CRNM arises from Sheboygan County Circuit Court case No. 2013CF222 while appeal No. 2015AP225-CRNM arises from Sheboygan County Circuit Court case No. 2013CF394.

report pursuant to WIS. STAT. RULE 809.32 (2013-14),² and *Anders v. California*, 386 U.S. 738 (1967). Appellate counsel has informed this court that Jin died on March 16, 2016. Having conducted an independent review of the record, we conclude that this appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We affirm the judgments and orders of the circuit court.

In April 2013, the State filed a seventeen-count complaint against Jin in case No. 2013CF222. During the pendency of that case, the State filed a complaint in case No. 2013CF394 charging Jin with ten additional offenses. On September 16, 2013, pursuant to a partial plea agreement, Jin pled no contest to count one in No. 2013CF222. On October 10, 2013, pursuant to a global plea agreement, Jin pled no contest to nine additional counts in No. 2013CF222, and to four counts in No. 2013CF394. The remaining counts as well as a separate circuit court case, No. 2013CF393, were dismissed; some were dismissed outright and others were dismissed but read in for sentencing purposes. In December 2013, the circuit court sentenced Jin in connection with all fourteen convictions. Jin, by appointed counsel, filed a postconviction motion seeking to withdraw his pleas. Following an evidentiary hearing, the circuit court denied Jin's plea withdrawal motion. This no-merit appeal followed.

The no-merit report addresses whether there exist any arguably meritorious grounds supporting the withdrawal of Jin's no contest pleas, and if any issue of arguable merit arises from the circuit court's exercise of its sentencing discretion. Because Jin is deceased, any potential sentencing issues are moot and we will not address Jin's sentence. However, the appeal itself is

² All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

not moot. *See State v. McDonald*, 144 Wis. 2d 531, 536, 424 N.W.2d 411 (1988) (right to appeal continues despite defendant’s death). A defendant has the right to effective assistance of counsel on appeal. A no-merit report is an approved method by which appointed counsel discharges the duty of representation. *See State ex rel. Flores v. State*, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994).

Jin filed a postconviction motion seeking plea withdrawal under both *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), and *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).³ The postconviction court held an evidentiary hearing at which both Jin and trial counsel testified about the circumstances surrounding the entry of Jin’s no contest pleas. As to the no contest pleas entered on October 10, 2013, the postconviction court found that Jin set forth a prima facie *Bangert* violation because the plea colloquy failed to establish Jin’s understanding of the potential penalties. *See Bangert*, 131 Wis. 2d at 274-75. However, based on the entire record and trial counsel’s postconviction testimony, the postconviction court found the State met its burden to show that despite the deficiency, Jin knew and understood the potential penalties at the time he entered his no contest pleas. *See id.* at 274-76. Similarly, the postconviction court rejected Jin’s claims that trial counsel coerced him into pleading no contest, finding that Jin’s allegations were incredible and “extremely difficult to accept” and that trial counsel’s postconviction testimony was “far more credible than that of the defendant.”

³ The *Bangert* analysis addresses defects in the plea colloquy while *Bentley* applies where the defendant alleges that factors extrinsic to the plea colloquy, such as trial counsel’s conduct, rendered his plea infirm. *See State v. Hoppe*, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794.

We agree with appellate counsel that no arguably meritorious issue arises from the postconviction court's decision denying Jin's request to withdraw his no contest pleas.⁴ "[W]hen the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses." *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979). The postconviction court's factual findings are not clearly erroneous and support a conclusion that Jin's no contest pleas were knowingly, intelligently and voluntarily entered. *See State v. Brown*, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906.

Observing that the circuit court ordered a WIS. STAT. § 971.14 competency evaluation during the pendency of Jin's cases, the no-merit report addresses the potential issue of whether Jin should be permitted to withdraw his pleas due to incompetence. Based on our review of the record, we are satisfied that counsel's no-merit report properly analyzes this issue as without arguable merit, and will not discuss it further.

⁴ We have reviewed the plea-taking procedures and conclude that they do not give rise to any other issue of arguable merit. Other than failing to state the range of penalties, the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and *State v. Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Moreover, the circuit court properly relied on Jin's signed plea questionnaires. *See State v. Moerderdoerfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

Our review of the record discloses no other potential issues for appeal.⁵ Accordingly, this court accepts the no-merit report, affirms the convictions and discharges appellate counsel of the obligation to represent Jin further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction and orders denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Lao Jin. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

⁵ Jin's no contest pleas waived the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.