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DISTRICT IV

July 1, 2021

To:

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Circuit Court Judge
Electronic Notice

Jacki Gackstatter
Clerk of Circuit Court
Rock County
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Samuel Summerville Jr. 266065
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You are hereby notified that the Court has entered the following opinion and order:

2020AP459-CRNM	State of Wisconsin v. Samuel Summerville, Jr. (L.C. # 2017CF233)
2020AP460-CRNM	State of Wisconsin v. Samuel Summerville, Jr. (L.C. # 2017CF77)
2020AP461-CRNM	State of Wisconsin v. Samuel Summerville, Jr. (L.C. # 2016CF1076)

Before Kloppenburg, Graham, and Nashold, 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).

Attorney Lane Fitzgerald, appointed counsel for Samuel Summerville, Jr., has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-

20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Summerville was sent a copy of the report and has filed a response. Upon consideration of the report, the response, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Summerville entered into a plea agreement disposing of five circuit court cases, three of which are the subject of these consolidated no-merit appeals. In these three cases, Summerville pled guilty to the following four offenses: (1) felony intimidation of a victim, as an act of domestic abuse; (2) misdemeanor battery; (3) felony bail jumping; and (4) aggravated battery, as an act of domestic abuse. The State agreed to dismiss several other charges. The circuit court imposed consecutive prison sentences on the intimidation of a victim charge and the aggravated battery charge, for a total of twelve years of initial confinement and ten years of extended supervision. The court imposed concurrent nine-month jail terms on the misdemeanor battery charge and the bail-jumping charge.[2]

As an initial matter, we address Summerville's argument that Wisconsin's no-merit procedure is unconstitutional because it requires counsel to discuss the reasons why an appeal lacks arguable merit. *See* WIS. STAT. RULE § 809.32(1)(a). Summerville contends that this requirement violates ***Anders*** and is unconstitutional. There is no arguable merit to this claim. Both the Wisconsin Supreme Court and the United States Supreme Court have upheld the

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] According to the sentencing transcript, the circuit court referred to the felony bail-jumping charge as "Count 2" from case No. 2017CF77 when imposing sentence. In fact, this charge was Count 3. However, the record as a whole, including the plea hearing transcript and the judgment of conviction, makes clear that the court sentenced Summerville on the bail-jumping charge and did not sentence Summerville on Count 2 in that case. Count 2 in that case was dismissed in accordance with the parties' plea agreement.

constitutionality of Wisconsin's no-merit procedure. *See* ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 91, 100-01, 103, 403 N.W.2d 449 (1987), *aff'd*, ***McCoy v. Court of Appeals of Wisconsin***, 486 U.S. 429, 430-31, 444 (1988).

The no-merit report addresses whether Summerville's guilty pleas were knowing, intelligent, and voluntary. We agree with counsel that there is no arguable merit to this issue. The circuit court's plea colloquy, including the court's references to the plea questionnaire and waiver of rights form, sufficiently complied with the requirements of WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, relating to the nature of the charges, the maximum penalties, the rights Summerville was waiving, and other matters. We see no other ground on which Summerville might challenge his pleas.

In his response to the no-merit report, Summerville contends that the circuit court failed to establish his knowledge of the elements of aggravated battery. We disagree and conclude that the circuit court adequately established Summerville's understanding of the nature of this charge and the other charges, consistent with the permissible methods set forth in ***State v. Hendricks***, 2018 WI 15, ¶19, 379 Wis. 2d 549, 906 N.W.2d 666, and ***Brown***, 293 Wis. 2d 594, ¶48.

Summerville's response also raises the issue of whether the circuit court adequately established a factual basis for his pleas, as required by WIS. STAT. § 971.08(1)(b). There is no arguable merit to this issue. The circuit court may satisfy the factual basis requirement in a number of ways, including by reference to the allegations in the complaint, as the circuit court did here. *See* ***State v. Black***, 2001 WI 31, ¶¶11-14, 242 Wis. 2d 126, 624 N.W.2d 363. "[A] factual basis for a plea exists if an inculpatory inference can be drawn from the complaint or facts admitted to by the defendant even though it may conflict with an exculpatory inference elsewhere in the record

and the defendant later maintains that the exculpatory inference is the correct one." ***Id.***, ¶16; *see also* ***State v. Payette***, 2008 WI App 106, ¶7, 313 Wis. 2d 39, 756 N.W.2d 423 ("It is not necessary that guilt be the only inference that can be drawn from the facts in the complaint, nor that the inference of guilt is established beyond a reasonable doubt."). Here, the complaint's allegations, along with reasonable inferences from those allegations, adequately supported Summerville's guilty pleas.

Next, Summerville's response raises a potential claim for ineffective assistance of trial counsel relating to the aggravated battery charge. For the reasons we now explain, we see no arguable merit to this claim.

Summerville's allegations regarding trial counsel's claimed deficient performance are not particularly detailed. In liberally construing those allegations, we conclude that Summerville intends to allege that his guilty plea to the aggravated battery charge was not knowing and voluntary because counsel misinformed him that the victim's injuries constituted great bodily harm. Aggravated battery has as an element that the victim suffered great bodily harm. *See* WIS. STAT. § 940.19(5). "Great bodily harm" is defined as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." WIS. STAT. § 939.22(14).

To show ineffective assistance of counsel, the defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

proceeding would have been different." ***Id.*** at 694. In the plea context, this means that the defendant must establish that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

Summerville alleges that his trial counsel misinformed him that a cut below the victim's eye constituted great bodily harm, and further alleges that the victim's injuries were not severe enough to constitute great bodily harm. Even assuming that counsel misinformed Summerville as he alleges, we conclude that Summerville cannot plausibly claim that he was prejudiced because there is no basis to argue that the victim's injuries were not severe enough to constitute great bodily harm. The record reflects that the victim's injuries consisted of more than a cut below her eye; that she had serious injuries to her face and eye that required at least four surgeries; and that she was still suffering from significant vision loss at the time of sentencing, a year after the incident in which Summerville punched her in the face with his fist approximately 30 times. Even if true, Summerville's allegations show that counsel provided Summerville with advice that was ultimately correct—that the victim's injuries constituted great bodily harm—based on incorrect reasoning—that a cut under the victim's eye constituted great bodily harm.

In his response, Summerville provides excerpts from the victim's medical records containing findings from an emergency room visit. Summerville appears to contend that these records show that the prosecuting attorney misrepresented the extent of the victim's injuries in court, and that the victim's injuries were too minor to constitute great bodily harm. We disagree that these limited excerpts from the victim's medical records support either contention.

Based on the remaining arguments in his response, we conclude that Summerville wishes to raise the following additional issues: (1) whether he lacked sufficient notice and opportunity to challenge an amended information; (2) whether a disorderly conduct charge that was dismissed as part of his plea agreement was unconstitutional or otherwise defective; (3) whether his conviction for intimidating a victim was improper because the underlying crime was a "victimless" crime; and (4) whether a guilty plea to bail jumping is not valid if the alleged bond violation is based on a charge that was later dismissed. None of these issues has arguable merit, and we see no other assertions in Summerville's response that could support a challenge to his guilty pleas.

We turn to sentencing. The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. As Summerville points out in his response, the discussion of sentencing in counsel's no merit report is faulty because counsel refers to crimes for which Summerville was not convicted. Nonetheless, based on our independent review of the record, we conclude that there is no arguable merit to challenging the circuit court's exercise of its sentencing discretion. The court considered the required sentencing factors along with other relevant factors, and the court did not rely on any inappropriate factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The sentences were within the maximum, and Summerville could not plausibly argue that the sentences were so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no other arguable basis for Summerville to challenge his sentences.

Our review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Lane Fitzgerald is relieved of any further representation of Samuel Summerville, Jr., in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals