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**DISTRICT I**

September 6, 2023

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

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2021AP274-CRNM      State of Wisconsin v. Pierre Douglas Gardner  
(L.C. # 2016CF4431)

Before White, C.J., Dugan and Geenen, 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 Lauren Breckenfelder, appointed counsel for Pierre Gardner, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2021-22);<sup>1</sup> *Anders v. California*, 386 U.S. 738, 744 (1967). Gardner pled not guilty by reason of mental

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

disease or defect (NGI) to a charge of first-degree reckless homicide. In the bifurcated NGI proceedings, Gardner pled guilty during the guilt phase and proceeded to a jury trial on mental responsibility. After the close of evidence, the circuit court granted the State's motion for a directed verdict on the NGI defense.

The no-merit report addresses whether there would be arguable merit to a challenge to: (1) the validity of Gardner's guilty plea; (2) any of the following during the mental responsibility phase: the circuit court's exercise of discretion in admitting limited testimony on the history of domestic violence between Gardner and the victim, its decision granting a directed verdict, or Gardner's waiver of the right not to testify; or (3) the sentence imposed by the circuit court. Gardner was provided a copy of the report, and has filed responses asserting potential issues, including ineffective assistance of counsel. Counsel has filed a supplemental no-merit report addressing Gardner's claim of ineffective assistance of counsel. Upon independently reviewing the entire record as required by *Anders v. California*, 386 U.S. 738 (1967), as well as the no-merit report, responses, and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

In October 2016, Gardner was charged with first-degree reckless homicide by use of a dangerous weapon for the shooting death of Nya Hammond, who was his girlfriend and the mother of his child. At the initial appearance, defense counsel questioned Gardner's competency to proceed, and the court commissioner ordered a competency evaluation. After the evaluation, the court found that Gardner was not competent but was likely to regain competency. Gardner was subsequently found to have regained competency and the case resumed.

Gardner waived his right to a preliminary hearing and entered an NGI plea. The circuit court ordered an NGI evaluation; the resulting report did not support the NGI plea. Counsel again questioned Gardner's competency, and a new competency evaluation was ordered. The circuit court found that Gardner was incompetent but likely to regain competency. Subsequently, the court found that Gardner had regained competency. Gardner reasserted his NGI plea and the court indicated it would proceed with a bifurcated trial.

On March 20, 2018, Gardner entered a guilty plea in the guilt phase of his bifurcated trial. Pursuant to the parties' plea agreement, Gardner pled guilty to first-degree reckless homicide without the dangerous weapon enhancer, with the parties free to argue at sentencing. Additionally, the parties agreed to an adjourned trial on mental responsibility. Defense counsel indicated that the defense would retain another expert to evaluate Gardner for his NGI plea.

At the next hearing, counsel again raised Gardner's competency, and the circuit court ordered a competency evaluation. After the evaluation, the court found that Gardner was not competent, but likely to regain competency. The court later determined that Gardner had regained competency.

On January 24, 2019, and January 25, 2019, the circuit court held the mental responsibility jury trial. The State presented testimony by the psychologist who performed the NGI evaluation ordered by the court. Gardner testified on his own behalf. At the conclusion of the evidence, the circuit court granted the State's motion for a directed verdict.

The circuit court held a sentencing hearing on April 5, 2019. The court sentenced Gardner to thirty-three years of initial confinement and fifteen years of extended supervision.

First, the no-merit report addresses whether there would be arguable merit to a challenge to Gardner's guilty plea to first-degree reckless homicide. A postsentencing motion for plea withdrawal must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire and waiver of rights form that Gardner signed, satisfied the court's mandatory duties to personally address Gardner and determine information such as Gardner's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See State v. Hoppe*, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. We agree with counsel's assessment that a challenge to the validity of Gardner's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to any issue arising from the mental responsibility phase. Specifically, the no-merit report addresses potential challenges to the circuit court's exercise of discretion in allowing the State's expert to give limited testimony about the history of domestic violence between Gardner and Hammond as part of her explanation why she did not support the NGI plea; Gardner's waiver of his right to remain silent and to testify; or the court's decision granting the State's motion for a directed verdict on the NGI affirmative defense.

We agree with counsel's assessment that there would be no arguable merit to a challenge to the circuit court's exercise of discretion in admitting evidence or to Gardner's waiver of the right to remain silent. We do not discuss those issues further.

We also agree with counsel's assessment that there would be no arguable merit to a challenge to the circuit court's decision granting the State's motion for a directed verdict. The expert psychologist testified that she concluded, to a reasonable degree of professional certainty, that at the time of the offense: (1) Gardner suffered from a qualifying mental illness; but (2) Gardner did not lack substantial capacity, as a result of his mental illness, to appreciate the wrongfulness of his conduct or conform his conduct to the law. *See* WIS. STAT. § 971.15(1) ("A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect the person lacked substantial capacity either to appreciate the wrongfulness of his or her conduct or conform his or her conduct to the requirements of law.").

Gardner testified as follows. Gardner and Hammond were in a romantic relationship and had a child together. Hammond moved out of their house after Gardner was physically violent toward her. Gardner wanted Hammond to come home and did not believe she would do so willingly. Gardner drove to Hammond's place of employment with a gun to scare her and force her to come back home with him. Gardner approached Hammond, and Hammond got in the car with Gardner. Gardner pulled out the gun and told Hammond it was time to come home. When Hammond moved to get out of the car, Gardner panicked and shot her. Gardner provided this explanation for why he shot Hammond: "I don't know. She moved. I was scared. I was panicking. I thought—I don't know." When Gardner was asked if he knew at the time that it was wrong to bring a gun to confront Hammond, Gardner answered:

No, I didn't. I didn't think I was—I thought I was getting my family back. I thought I was going to get my family back. I wasn't thinking I was doing something wrong. I thought I was doing the right thing. I wanted my family back. I was scared I wouldn't get my family back.

On cross-examination, Gardner explained further:

I wasn't thinking clearly. I was just like—I was out of my mind. I just—I was nervous. I thought I was going to lose my house and everything. I thought I was going to lose my family and my son. Thought she with going to take my son from me.

We conclude that it would be wholly frivolous to argue that the circuit court erred by granting the State's motion for a directed verdict. Gardner did not present any credible evidence at the NGI trial that would have supported a jury finding that at the time of the offense, as a result of his mental illness, Gardner lacked substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law. See *State v. Leach*, 124 Wis. 2d 648, 663, 370 N.W.2d 240 (1985) (providing that a directed verdict on the affirmative defense of lack of responsibility due to mental disease or defect is appropriate where, viewing the evidence in the light most favorable to the accused, there is “no credible probative evidence toward meeting the burden of establishing the defense of not guilty by reason of mental disease or defect by a preponderance of the evidence”).

The no-merit report also addresses whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. This court's review of a sentence determination begins “with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of.” *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Gardner's rehabilitative needs, the need to protect the public, and the gravity of the offenses. See *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. See *State v. Stenzel*, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (explaining that a sentence is unduly harsh or excessive “only where the sentence is so excessive

and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances” (citation omitted)). Gardner did not offer any objection to the requested \$40,000 in restitution, and the parties stipulated to 919 days of sentence credit, which the court awarded. We agree with counsel’s assessment that a challenge to the sentence imposed by the circuit court would be wholly frivolous.

Gardner filed responses to the no-merit report raising multiple issues. First, Gardner asserts that his sentence was unduly harsh compared to another defendant who was convicted of killing his wife and sentenced to eleven years in prison. Gardner asserts that he did not kill Hammond, but rather sacrificed her for violating a religious oath. Thus, Gardner asserts, he should have received a lesser sentence. However, as explained above, we conclude that, given the facts of this case, it would be wholly frivolous to argue that the sentence imposed was unduly harsh. Nothing about Gardner’s asserted religious beliefs or the sentence imposed in another case would support a non-frivolous claim that Gardner’s sentence was unduly harsh.

Next, Gardner contends that his trial counsel was ineffective by advising him to waive his preliminary hearing and by failing to submit the second doctor’s report to support Gardner’s NGI plea. As to a claim of ineffective assistance of counsel in connection with the preliminary hearing, Gardner’s valid guilty plea waived that argument. *See State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. As to a claim of ineffective assistance of counsel for failure to submit the second doctor’s report, no-merit counsel filed a supplemental no-merit report with an affidavit averring that the second doctor’s report would not have supported Gardner’s NGI defense. Accordingly, we discern no arguable merit to a claim of ineffective assistance of counsel on this basis.

Gardner also contends that the expert who testified at his NGI trial was biased and her determination was incorrect. Gardner asserts that the expert relied only on the criminal investigation because Gardner refused to talk with the expert and because the expert is a “regular human” while Gardner’s situation is “elite.” However, nothing in those assertions establishes a non-frivolous issue to pursue in further proceedings.

Gardner asserts that he should not have been charged or convicted for “sacrificing” Hammond because he was exercising his freedom of religion. He asserts that Hammond violated a religious oath and had to be sacrificed; that he did not “kill” Hammond and she is not dead, but rather, he “sacrificed” her and she has returned to the earth; and that he can recreate Hammond using her DNA. Again, none of those assertions provide a non-frivolous basis for further proceedings.

Gardner also argues that the circuit court should have allowed the jury to decide his NGI defense. He asserts that he would not have pled NGI if he knew that the court could take the NGI decision away from the jury. However, we have explained above, we conclude that it would be wholly frivolous to argue that the circuit court erred by granting the State’s motion for a directed verdict on the NGI defense. Additionally, Gardner does not provide any explanation for why he would not have entered the NGI plea had he known that a directed verdict was possible. That is, if Gardner had not entered an NGI plea, he would have been convicted on his guilty plea without proceeding to the responsibility phase. Accordingly, we discern no arguable merit for further proceedings on this issue.

Gardner also contends that, since his incarceration, he has been found mentally ill and committed for treatment. Thus, Gardner contends, he must have been mentally ill at the time of



the offense and he should have been found NGI. However, as explained above, a qualifying mental illness at the time of the offense is only the first part of the NGI defense. The defendant must also prove that, as a result of the mental illness, the defendant lacked the substantial capacity to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the law. Here, there was evidence that Gardner suffered from a mental illness. There was no evidence that, as a result of his mental illness, Gardner lacked the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law.

Finally, to the extent Gardner's no-merit responses raise any issues not specifically addressed in this decision, we have considered those issues and we have determined that they lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

We note that the judgment of conviction contains a clerical error that should be corrected upon remittitur. See *State v. Prihoda*, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857 (explaining that the circuit court must correct a clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction). The judgment states that Gardner was convicted of first-degree reckless homicide with the use of a dangerous weapon penalty enhancer under WIS. STAT. § 939.63(1)(b). However, Gardner pled guilty to first-degree reckless homicide without the dangerous weapon enhancer. Upon remittitur, the circuit court shall enter an amended judgment of conviction that corrects that clerical error.

IT IS ORDERED that the judgment of conviction is modified as set forth above, and as modified summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Lauren Breckenfelder is relieved of any further representation of Pierre Gardner in this matter. *See* WIS. STAT. RULE 809.32(3).

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*