COURT OF APPEALS
DECISION
DATED AND RELEASED

April 24, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

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No. 95-3053-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VINCENT D. WHITAKER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Vergeront, J.

PER CURIAM. A jury found Vincent D. Whitaker guilty of the following crimes:

> Attempted first-degree intentional homicide by use of a dangerous weapon, a violation of §§ 940.01(1), 939.32, and 939.63(1)(a)2, STATS.;
>
> First-degree reckless injury by use of a dangerous weapon, a violation of §§ 940.23(1) and 939.63(1)(a)2, STATS.;

> Operating a motor vehicle without the owner's consent, a violation of § 943.23(2), STATS.;
>
> Failing to obey orders or signals of a traffic officer, traffic signs and signals, and fleeing a traffic officer, a violation of § 346.04, STATS.;
>
> Failing to stop at the scene of an accident in which he was involved and failing to render aid to the victim, a violation of § 346.67, STATS.

The trial court sentenced Whitaker to forty-five years in prison on the first count, fifteen years on the second count, five years on the third count, two years on the fourth count, and one year on the fifth count. The trial court ordered the sentences to be served consecutively, with the exception of the sentence on the fifth count, which the trial court ordered Whitaker to serve concurrently with the two-year sentence on the fourth count.

The state public defender appointed Attorney Toni H. Laitsch to represent Whitaker on appeal. Attorney Laitsch has filed a no merit report with this court pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32, STATS. Attorney Laitsch provided Whitaker with a copy of the report, and Whitaker was informed that he could file a response. He has filed two responses.[1] Attorney Laitsch has filed a reply addressing some of the issues Whitaker raises in his responses. The court has reviewed counsel's and Whitaker's submissions, and has independently reviewed the record. We conclude that there would be no

[1] In his second response, Whitaker focuses on the performance of Attorney Laitsch and requests new counsel. The court referred Whitaker's concerns and request for new appellate counsel to the office of the state public defender, but the public defender declined to appoint Whitaker new counsel. The public defender indicated that it would appoint new counsel if this court disagreed with counsel's assessment that there would be no merit to further postconviction proceedings in this matter.

arguable merit to any issue that could be raised on appeal. We therefore affirm the judgment of conviction.

Whitaker was charged with intentionally running down a bicyclist with an automobile, while traveling at high speed. The bicyclist was seriously injured and Whitaker did not remain at the scene or stop to render aid to the bicyclist. Whitaker then abandoned the car he was driving, attempting to drive it into a lake. The car had been heavily damaged by contact with the bicyclist, and police subsequently removed hairs from the windshield consistent with those of the bicyclist. Whitaker stole another automobile, and then led police on a brief, high-speed chase in downtown Madison. At the time of his arrest, Whitaker gave several statements to police regarding, among other things, his journey to Madison from Aurora, Indiana in a stolen vehicle and his actions in running down the bicyclist.

During their investigation, Madison police attempted to identify Whitaker's automobile as the one that had been stolen in Indiana, but they were unable to do so. During trial, however, the district attorney directed a police officer to search the impounded vehicle for any registration papers. A crumpled registration slip was discovered under the carpet on the driver's side of the vehicle that corroborated some of the information Whitaker had given to police in his initial statements. Whitaker objected to admission of this evidence at trial, but the trial court admitted the evidence.

Also admitted at trial was a handwritten letter received by the victim shortly before trial. That letter had a return address from the Dane County jail, and was signed "Vince Whitaker." The State produced expert testimony that the letter had been written and handled by Whitaker. The letter stated that it had been

written by the victim's "worst nightmare Vincent D. Whitaker." The letter stated, "I wish you would have died," and that "I should of ran over you while you was on the ground." It stated that "I know your address and your mother's name," and "I'm going to hire a hit man to kill you both." The letter further stated that "I was going 75 mph" and that "I couldn't believe you didn't die when I hit you that night." The letter concluded:

> I laughed the whole time while I ran over your punk ass…. I set in here everyday and I'll probably go to prison for the rest of my life. I didn't get the job done I really thought I killed your punk ass. I bet you won't ride a bicycle again either mother fucker…. I'm not guilty of anything. I just used your punk-ass like a garbage can. I smacked your ass (Bulls-eye). I've been in jail most of my young life. This is the only life I know how to live. You can't hurt me by coming to court and being on the prosecutor's side because I don't care what happens to me. I'm straight Mafia insane psycho. Their (*sic*) won't be a day that I not (*sic*) think of a way to get free and then I'll come and kill your ass and your mother Jane….

The no merit report does not directly address the question of whether the State produced sufficient evidence to support the conviction. In his response to the no merit report, Whitaker suggests that there was insufficient evidence to sustain the jury's verdicts, and that the State and the jury had "over-relied" on the letter to the victim.

This court reviews the sufficiency of evidence using the following standard:

> An appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier

> of fact should not have found guilt based on the evidence before it.

See ***State v. Poellinger***, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted).

The record shows that the State produced ample evidence of Whitaker's guilt on all counts. Even if we were to conclude that the letter should have been excluded, the State presented evidence of Whitaker's inculpatory statements to police, and linked him to the car found by the lake. The car contained a slip showing that it was registered in Indiana, a fact consistent with Whitaker's statements. The State showed that hairs extracted from the windshield of the car were consistent with those of the victim. Whitaker was stopped by police while driving a car without the owner's permission and there is no serious dispute that Whitaker had attempted to elude police. We are satisfied, however, that there was nothing improper in the introduction and admission of the letter to the victim, nor was there anything improper in the State's decision to use the letter in its case-in-chief. There would be no merit to an appeal challenging the sufficiency of the evidence.

Next, we examine Whitaker's contention that the trial court improperly admitted the Indiana vehicle registration found by police during the trial. Whitaker maintains that admission of that evidence at trial was not anticipated by the defense and therefore "unfair." Attorney Laitsch has addressed this issue in her reply to Whitaker's response. We agree with counsel's analysis that the record shows that the trial court's decision to admit the evidence represented a proper exercise of its discretion. As the trial court noted, even though the police work had been "sloppy" and the document found prior to trial, the registration was essentially cumulative evidence that merely corroborated

voluntary assertions Whitaker had made to police at the time of his arrest. We see no erroneous exercise of discretion in the trial court's determination that the prejudicial effect of the new evidence did not outweigh its probative value.

Next, we turn to Whitaker's assertion that trial counsel was ineffective for failing to investigate his mental health prior to trial. Presumably, Whitaker is suggesting that mental health examinations would have established that a mental disease or defect deprived him of "substantial capacity either to appreciate the wrongfulness of his … conduct or conform his … conduct to the requirements of the law." *See* § 971.15(1), STATS. Whitaker also suggests that Attorney Laitsch, by failing to raise this issue on appeal, has not provided him effective assistance.

Contrary to Whitaker's suggestion that trial counsel failed to assess his mental health, the record establishes that Dr. Rick Beebe conducted a mental health examination of Whitaker shortly after Whitaker's arrest.[2] The examination was undertaken at the request of defense counsel. Dr. Beebe examined Whitaker's mental health history, including treatment Whitaker received as a juvenile. Dr. Beebe also administered tests and examined Whitaker. Dr. Beebe ruled out a major mental illness at the time of the crimes and also ruled out mental retardation as a "legally debilitating circumstance." The presentence report writer quoted Dr. Beebe's conclusion that "there is no evidence to support a loss of cognitive or behavioral control which precluded [Whitaker] from conforming his behavior to the requirements of the law had he chosen to do so."

[2] The record does not include Dr. Beebe's report. There is nothing to show that it was ever filed with the circuit court. The presentence investigation report discusses Dr. Beebe's findings at length, however, and Whitaker did not object to the accuracy of this portion of the presentence report.

In addition, Whitaker was examined prior to sentencing by psychologist Dr. Joy Kenworthy. Although she concluded that Whitaker has an "antisocial personality disorder" with "markedly deficient impulse control," she did not conclude that Whitaker suffered a mental illness that prevented him from understanding or conforming his conduct to the requirements of the law. Given these psychological analyses, we can see no possibility that there would be arguable merit to Whitaker's claim that trial counsel failed to adequately investigate his mental health.[3]

Finally, the no merit report addresses the question of whether the trial court erroneously exercised its discretion when it sentenced Whitaker. Whitaker suggests that the sentences imposed were too harsh. He contends that the trial court's statements regarding his "amorality" and lack of repentance were unwarranted, and that the trial court assigned too much weight to the effect of the crime on the victim and the need for protection of the public.

[3] Given this conclusion, there seem to be no ground for a claim of ineffective appellate counsel on this basis. Even assuming that Whitaker could show that appellate counsel has not adequately investigated his mental health history, we cannot see how, in light of the psychological analyses done prior to and after trial, he could show that he was prejudiced by appellate counsel's failure. *See* ***Strickland v. Washington***, 466 U.S. 668, 686-87 (1984) (to establish ineffective assistance of counsel, defendant must show both deficiency of counsel's performance and prejudice resulting from that deficient performance).

Sentencing lies within the trial court's discretion and our review is limited to whether the trial court misused its discretion. ***State v. Larsen,*** 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection. ***Id.*** at 427, 415 N.W.2d at 541. We are satisfied by our independent review of the record that appellate counsel's analysis of this issue is correct and that the trial court properly exercised its discretion when it imposed maximum sentences on Whitaker.[4] In regard to the trial court's comments on Whitaker's character, we note that the trial court based its assessment on Whitaker's comments to the presentence report writer regarding his background and regarding the crimes of which he had been convicted. Whitaker did not challenge the accuracy of those statements as reported in the presentence report.

We are satisfied by our independent review of the record that there are no other issues of arguable merit that could be raised on appeal.[5] Attorney Laitsch is relieved of further representation of Whitaker in this appeal.

By the Court.—Judgment affirmed.[6]

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[4] We should note that, prior to sentencing, Whitaker apparently wrote threatening letters to several individuals, including the sentencing judge. According to the no merit report, Whitaker believes that the sentencing judge became biased against him because of that threatening letter. Whitaker does not raise this issue in his replies, however.

In regard to this potential issue, we note that the trial judge stated at sentencing that he had learned that Whitaker had been successful in other cases in having judges removed by writing them "various correspondence." Consequently, the trial judge indicated that he had not read any of Whitaker's correspondence at the time of sentencing.

[5] Whitaker indicates that he believes the rules of evidence were violated at trial. Other than his argument regarding the admission of the Indiana registration, however, he offers no examples of rulings that he believes are erroneous. Our independent review of the record reveals no arguably erroneous evidentiary rulings.

[6] As a final matter, we note that after he filed his responses, Whitaker moved this court to provide him with a copy of the transcripts and other record documents in this matter. It appears that he wishes these documents for his records.

This court does not, as a general rule, provide copies of record documents to litigants. Whitaker is advised to seek a copy of the record from counsel.