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September 8, 2014

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

2013AP2024-CRNM State v. James Francis Brown
2013AP2025-CRNM (L.C. # 2011CF006113)
(L.C. # 2012CF002819)

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

James Francis Brown appeals from two judgments of conviction, each for one count of second-degree sexual assault with use of force, contrary to WIS. STAT. § 940.225(2)(a) (2009-10; 2011-12).[1] Both judgments were entered on Brown's guilty pleas after he stipulated to the facts in the criminal complaints. Brown's postconviction/appellate counsel, Mark S. Rosen, has filed

[1] One assault was committed in 2010 and the other was committed in 2011. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

By order dated September 16, 2013, we granted Brown's motion to consolidate the two appeals.

a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Attorney Rosen also filed two supplemental no-merit reports and additional letters. Brown filed a response to both the no-merit report and the second supplemental no-merit report. We have independently reviewed the record, the no-merit report, the supplemental no-merit reports and letters, and Brown's responses as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

BACKGROUND

The first of two criminal complaints was filed in December 2011. *See* Milwaukee County Case No. 2011CF6113 (appeal No. 2013AP2024). It alleged that on December 21, 2011, a woman, O.K., was walking down the street when two men in a van parked beside her and quickly pulled her into the van. They drove to a nearby alley and parked. One man left the van and the other man, later identified as Brown, took money and property from O.K.'s pockets. Then Brown told O.K.: "If I can't get any more money from you then I'll take the pussy." The complaint continued:

> [Brown] removed her pants partially, and her underwear. [O.K.] was crying, and he told her to stop. He put his hands on her neck and choked her. He put his penis into her vagina without her consent…. He also kept telling her that he was wanted by the police, and that his face was all over TV. After he ejaculated he used her underwear to clean both her and him, and he kept the underwear, telling her that he would do time for a robbery but he was no[t] a "rapist." He dumped her out of the car and left.

The complaint stated that a detective later interviewed Brown, who said "that he was flagged down by a 'prostitute.'" The complaint continued: "[Brown] picked [O.K.] up and drove to a nearby alley, where they had sex. He says he told her he did not have much money,

but she just said they'd 'work it out.' When she learned he only had $12, she got angry because her fee is $40."

The complaint alleged three crimes: kidnapping, robbery with use of force, and second-degree sexual assault. On January 4, 2012, O.K. testified at Brown's preliminary hearing. She provided additional details about the sexual assault. Based on O.K.'s testimony, the trial court bound Brown over for trial.

While case No. 2011CF6113 was pending, the State filed a second complaint, in June 2012. *See* Milwaukee County Case No. 2012CF2819 (appeal No. 2013AP2025). The complaint stated that the police interviewed a woman named V.R.M., who said that on May 16, 2010, she was walking home when a man came up behind her, hit her on the head, and "knocked her to the ground." She said the man dragged her to a car that was parked in a nearby alley and "threw her into the passenger front seat." V.R.M. told the officer that she struggled, but the man "was strangling her so hard she was shaking and it was like she was about to have a seizure." The complaint continues:

> He began feeling all over her body, and said[,] "Where's the money, b[]itch?" She told him she had none, and he said[,] "You do got money, out here selling your pussy." [V.R.M.] told Brown she was not a prostitute … and was yelling "You're not gonna rape me!" He then choked her harder, again causing her to shake and to not be able to breathe…. He successfully removed one leg of her pants and underwear, and then he forced his penis into her vagina against her will. He pushed her out of the car when he was done.

The complaint indicates that DNA was recovered from the victim's pants. The semen was ultimately matched to Brown's profile in the DNA database. The State later explained to the trial court that the 2010 assault of V.R.M. was charged in 2012 after the DNA link was made and the police were finally able to locate V.R.M.

The complaint in case No. 2012CF2819 alleged five crimes: kidnapping, attempted robbery, false imprisonment, strangulation and suffocation, and second-degree sexual assault. On June 25, 2012, V.R.M. testified at Brown's preliminary hearing. She provided additional details about the sexual assault. Based on her testimony, the trial court bound Brown over for trial.

The State moved to join the two cases for trial, asserting that joinder was appropriate because the two crimes "are of the same or similar character," *see* WIS. STAT. § 971.12(1), and because each "set of crimes would be admissible in the case of the other as 'other acts.'"

Brown opposed the motion, arguing that joinder would "substantially prejudice" Brown because he "intends to testify in his own defense in one of the pending cases but not in the other." Brown also noted that the alleged crimes occurred approximately nineteen months apart and that the crimes were not part "of a common scheme or plan." *See* ***id.***

The trial court granted the State's motion.[2] It concluded that joinder was appropriate pursuant to WIS. STAT. § 971.12(1), which provides in relevant part:

> Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged … are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.

[2] The Honorable Rebecca F. Dallet granted the motion to join the cases. The Honorable Ellen R. Brostrom accepted Brown's pleas and sentenced him.

The trial court found "that there are numerous similarities between these two offenses in terms of making them of the same or similar character." It rejected the argument that the nineteen months between the crimes made joinder improper.

After finding that joinder was proper, the trial court rejected Brown's argument that he would be prejudiced by the joinder. The trial court concluded that evidence of each crime would be admissible in the other trial as other acts evidence. It also said that the fact Brown may ultimately decide to testify did not affect whether joinder should be granted.

After the cases were joined, Brown entered a plea agreement with the State pursuant to which Brown pled guilty to one count of second-degree sexual assault by use of force for each case. In exchange, the State agreed to move to dismiss the remaining charges outright and "to recommend prison" and leave "the amount and all the particulars up to the discretion of the Court." The State also agreed not to seek a presentence investigation report.

The trial court accepted Brown's pleas and found him guilty. The trial court did not order a presentence investigation, but the defense was allowed to file its own presentence investigation report, which contained Brown's version of the offenses. As to the offense against O.K., Brown said that "he was driving around with a friend that evening when they noticed a woman walking." The report continues:

> They both confronted the victim and demanded her money. She gave them $42.00 in cash. [Brown] and his friend took the money and left the scene.
>
> Mr. Brown acknowledges that they had sexual intercourse. Mr. Brown explained that his memory is unclear regarding exactly what happened. He claims that everything is confused in his head and he cannot remember anything because he was so high on [the drug] ecstasy.

Brown's version of the assault against V.R.M. also includes his assertion that he was high on the drug ecstasy. The report states that he "remembers picking up a girl" and that they "drove around for sometime." The report continues:

> Mr. Brown claims that the victim told him she was a working prostitute. Mr. Brown acknowledges they had sexual intercourse. Mr. Brown explained that after that point in time his memory is unclear. He claims that everything is a blur and he cannot remember anything because he was so high on ecstasy.

At sentencing, the trial court imposed two sentences of seven years of initial confinement and five years of extended supervision, consecutive to each other and any other sentence.[3] It also ordered Brown to provide a DNA sample and pay the DNA surcharges. The trial court set a restitution hearing and ultimately granted restitution of $2056.09 to O.K. Brown's trial counsel did not contest the amount of restitution, but argued that Brown lacked the ability to pay it. The trial court took testimony from Brown and found that Brown has the ability to pay, based in part on his GED and his work experience at Goodwill.

The no-merit report and first supplemental no-merit report addressed four issues: (1) whether Brown's guilty pleas waived his right to appeal the grant of joinder; (2) whether the guilty pleas were voluntarily, knowingly, and intelligently entered; (3) whether the trial court erroneously exercised its sentencing discretion; and (4) whether there would be any merit to challenging the imposition of the DNA surcharges. Brown's response to the no-merit report addressed some of those same issues, and also alleged that trial counsel had provided ineffective assistance by not properly investigating an alleged recantation letter from O.K. We directed

[3] Brown's parole in an earlier case was revoked and at the time of sentencing, he was serving a prison sentence.

postconviction counsel to file a second supplemental no-merit report, to which Brown again filed a response. Having reviewed all of the filings, this court agrees that there would be no merit to the original four issues raised by postconviction/appellate counsel, or to the additional issues Brown raised in his responses. We will briefly address each of the issues.

DISCUSSION

I. Joinder.

We begin with the trial court's decision to grant the State's motion to join the cases. We agree with appellate counsel that by entering guilty pleas, Brown forfeited the right to appeal the trial court's decision to grant the State's motion. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 ("The general rule is that a guilty, no contest, or ***Alford*** plea 'waives all nonjurisdictional defects, including constitutional claims.'") (citation and footnote omitted). Moreover, we have examined the trial court's ruling and have not identified an issue of arguable merit concerning the trial court's decision to join the cases.

II. Guilty pleas.

The second issue addressed by the no-merit report is the validity of the pleas. There is no arguable basis to allege that Brown's guilty pleas were not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form for each case, which the trial court referenced during the plea hearing.[4] *See* ***State v. Moederndorfer***, 141

[4] Contrary to Brown's allegation in his response to the no-merit report, there is a signed guilty plea questionnaire in both sets of case records.

Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The trial court conducted a thorough plea colloquy addressing Brown's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his pleas. *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72. The trial court went through the elements and penalties of the crime with Brown. It also provided trial counsel with a copy of the applicable jury instruction, WIS JI—CRIMINAL 1208, and gave trial counsel time to go over the instruction with Brown in court. The trial court told Brown that it was not bound by the parties' recommendations, and it confirmed that Brown had not been coerced into pleading guilty.

The trial court also found that there was a factual basis for the pleas after it reviewed the criminal complaints, which both parties stipulated provided a factual basis for the pleas. Despite Brown's denial, in his own presentence investigation report, of any memory of non-consensual sexual intercourse involving either victim, he does not argue in his response to the no-merit report that the factual basis in the record for either plea is insufficient. We conclude there would be no merit to challenging the factual basis for the two pleas.

In sum, we conclude that the plea questionnaires, waiver of rights forms, and the trial court's colloquy appropriately advised Brown of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the pleas were knowing, intelligent, and voluntary. There would be no basis to challenge Brown's guilty pleas.

In his response to the no-merit report, Brown argued that the trial court failed to "'[d]etermine the extent of the defendant's education and general comprehension so as to assess

the defendant's capacity to understand the issues at the hearing.'" *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794 (citation omitted). He asserted that "[t]he record is silent as to this mandate" and that the need to determine "Brown's general comprehension is exacerbated" because he has been diagnosed with ADHD and took special education classes.

We do not agree that there would be any merit to alleging a ***Bangert*** violation. The signed guilty plea questionnaires that the trial court reviewed both indicated that Brown had completed twelve years of schooling and had achieved "a high school diploma, GED, or HSED."[5] Further, the questionnaires indicated that Brown had not taken drugs or alcohol in the last twenty-four hours, and the trial court explicitly confirmed that with Brown. The trial court asked Brown numerous questions to confirm that he understood the proceedings and also explicitly inquired whether he had "any questions about what we are doing here today." Brown's answers all indicated he understood.[6] While the trial court did not comment on Brown's education, it is apparent that the trial court assessed Brown's comprehension and determined that he understood the proceedings, which led the trial court to explicitly find that Brown was "entering these pleas freely, voluntarily, and intelligently, with a full understanding of the nature of the charges against [him], their maximum possible penalties, and all the rights that [he gave] up by pleading [guilty]."

[5] Although the presentence investigation report that Brown submitted indicated that he had not yet finished his GED, trial counsel told the trial court that Brown has "received his GED," and he confirmed that again when the trial court asked if Brown had earned the GED.

[6] At no time did Brown indicate that he had any confusion or questions about the proceeding. In answer to the trial court's question, he also indicated that he was satisfied with trial counsel's representation.

III. Sentencing.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial 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 it may consider several subfactors. ***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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court discussed the offenses, which the trial court called "very aggravated." The trial court said: "The level of violence and the lethality factors present are astonishing." The trial discussed Brown's use of ecstasy and his need for sex offender evaluation and treatment. The trial court said that it did not "think the community is safe" until Brown has treatment. It concluded that sentences of anything less than it was imposing would not meet the trial court's sentencing goals, including punishment, "the safety of the community," and "sex offender treatment in a confined

setting." We conclude that based on the trial court's explanation of its sentences, there would be no merit to challenge the trial court's compliance with ***Gallion***.

Further, there would be no merit to assert that the sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Brown was facing up to forty years of imprisonment on each count and was ordered to serve only twelve years on each count, consecutive. The total amount of confinement of twenty-four years was about a third of what could have been imposed and is not excessive. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Given the violent nature of the assaults—which included strangling the women and penis-to-vagina sexual intercourse—the sentences do not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Ocanas***, 70 Wis. 2d at 185. For these reasons, we conclude that there would be no arguable merit to a challenge to the trial court's sentencing discretion and the severity of the sentences.

We also note with respect to sentencing that the trial court ordered restitution of $2056 in one of the cases. As discussed above, trial counsel did not contest the validity of the claim, but he argued that Brown lacked the ability to pay restitution. Having reviewed the testimony and the trial court's analysis, we conclude there would be no merit to challenge the trial court's conclusion that Brown had the ability to pay this amount of restitution through employment, based in part on his GED and his work experience at Goodwill. *See* WIS. STAT. § 973.20(13)(a) (outlining factors a court considers when "determining whether to order restitution and the amount thereof," including "[t]he present and future earning ability of the defendant").

In his response to the no-merit report, Brown argued that the "[S]tate violated the plea agreement at the sentencing hearing" and that his trial counsel was ineffective for not objecting to that violation. Brown's response correctly restated the plea agreement; the State told the trial court that it had agreed to "recommend prison" and "leav[e] the amount and all the particulars up to the discretion of the Court." Brown's response asserted that the State should not have been allowed to discuss Brown's criminal history or talk about the harm to the victims. We reject this argument. The plea agreement did not require the State to stand silent. Moreover, even in cases where the State has agreed to "stand silent," the State is simply obligated "to refrain from offering a sentencing recommendation." ***State v. Neuaone***, 2005 WI App 124, ¶14, 284 Wis. 2d 473, 700 N.W.2d 298. ***Neuaone*** explained: "Such an agreement does not obligate or permit the State to withhold relevant factual information that bears on the sentence." ***Id.*** (italics omitted). Here, the State's sentencing remarks did not offer a recommendation on the length of the sentences or conditions of extended supervision. We conclude there would be no arguable merit to allege that the State violated the plea agreement or that trial counsel should have raised an objection based on the State's comments.

IV. DNA surcharge.

The fourth issue, concerning the DNA surcharges that were imposed in both cases, was addressed by postconviction/appellate counsel in his first supplemental no-merit report. After sentencing, counsel filed a request with the trial court, asking it to waive the surcharges because Brown had already paid the DNA surcharge in the past. The trial court denied the request

because the DNA surcharge was mandated for both cases, pursuant to WIS. STAT. § 973.046(1r).[7] Because the statute unambiguously requires payment of the DNA surcharge for violations of WIS. STAT. § 940.225, there would be no merit to challenge the imposition of the surcharge in both cases.

V. Allegations of ineffective assistance of counsel related to alleged recantation letter.

Brown's responses alleged that his trial counsel provided ineffective assistance in several ways with respect to one victim's alleged recantation letter.[8] He argued that trial counsel should have properly investigated and then filed a motion challenging statements made by O.K. after O.K. "sent a notarized letter to [Brown's] [m]other, recanting her accusation against" him. Brown also faulted trial counsel for not informing the trial court or the State about the letter and asserted that the letter should have been made part of the circuit court file. Finally, Brown contended that his postconviction/appellate counsel should file a postconcoviction motion "on the matter of the recantation of this witness." Brown's response to the no-merit report included what he claims is a copy of the letter.

The record indicates that O.K. testified at the preliminary hearing on January 4, 2012. The alleged recantation letter is dated February 7, 2012. The letter states, *verbatim*:

[7] The Honorable Stephanie G. Rothstein issued the order denying the request to vacate the DNA surcharges.

[8] Several times in his responses to the no-merit report and second supplemental no-merit report, Brown also faults postconviction/appellate counsel for not raising certain issues. We do not consider the effectiveness of postconviction/appellate counsel during a direct appeal, but where, as here, a no-merit report has been submitted, we do consider whether there is any issue of potential merit that could by raised by postconviction/appellate counsel. If we identify an issue of potential merit, we reject the no-merit report. In this case, we have not identified any issues of potential merit, including those raised in Brown's responses.

> [I am] writing this letter on behalf of James Brown. We had a serious situation that I truely regret resulting in the way it did. I made up the story about Mr. Brown assulting me, Kidnapping & robbery me. Everything was a Lie because I was upset about a whole other situation. Mr. Brown did not harm me in any Kind of way, I just wanted him to Feel how upset I was so I lied & got him locked up. I would like to apologize to the courts For waisting your time with this big Fabrication. I was not threaten nor Forced, nor bribed to write this letter. I'm writing this letter with my own Free will, because now that I have had time to calm down I can not let an innocent man sit in jail over a lie I made up. I don't want to press charges or Further these proceedings. Sorry For the lie and waisting the courts time.

O.K.'s signature at the bottom of the letter is notarized.

On April 3, 2012, trial counsel introduced the letter at a revocation hearing concerning Brown's prior sentence.[9] The ALJ issued a written decision on April 16, 2012; that decision was appended to the presentence investigation report that Brown submitted at sentencing. In that decision, the ALJ states in relevant part:

> I note that the defense provided as an exhibit a notarized letter purportedly from O.K. that was signed February 7, 2012 in which she recanted her previous account. In the letter, she apologized for making up a lie to get Brown locked up…. This exhibit does not persuade me to reach a different conclusion than that stated above. Contrary to the police interview of O.K. immediately following the incident, no one testified at the [revocation] hearing to verify the authenticity of the hearsay in the letter. Even if it was written by O.K., it was created months after the incident and consequently is far less reliable than a statement given immediately following the incident.

Subsequently, status conferences on the case involving O.K. were held on May 31, 2012 and June 20, 2012; the letter was not mentioned. At the May 31, 2012 conference—at which Brown personally appeared—the State told the trial court that trial counsel had questioned

[9] O.K. did not testify at the revocation hearing. Instead, the police officer who interviewed her after the assault testified about what O.K. told her and what the police officer observed.

"whether the victim [O.K.] … is available" for trial. The State continued: "I will state unequivocally that she is. And that's part of the issue here, for me, is that we need to fly her in from Las Vegas." Trial counsel then discussed scheduling and also said:

> I had information previously that I shared with Mr. Brown that we thought the alleged victim on this case … had relocated and was completely absent, and no one could find her. But the [S]tate has been able to find her and evidentially she … is indicating that she is cooperative and will come back.

Trial counsel did not mention the alleged recantation letter from O.K.

On September 18, 2012, Brown pled guilty to one count of sexual assault involving O.K. As detailed above, he stipulated to the facts in the criminal complaint and also told the presentence investigation writer that while driving around, he and his friend saw O.K. walking down the street, confronted her, and "demanded her money." Brown also said that he and O.K. "had sexual intercourse," although "his memory is unclear regarding exactly what happened." No one mentioned the alleged recantation letter to the trial court at the plea hearing or at the sentencing, but the defense's alternative presentence investigation report included the hearing examiner's decision revoking Brown's extended supervision, which referenced the alleged recantation letter.

In response to orders from this court, postconviction/appellate counsel has now provided this court with an affidavit from trial counsel that provides additional information about the

letter. Trial counsel's affidavit explained that after he received the alleged letter from O.K., he asked an investigator "to investigate the authenticity of this letter."[10] The affidavit continued:

> The District Attorney's office has informed me that [O.K.] had informed that office that she had not written that letter. [My investigator] then sent me an investigation memo concerning an interview that he had with [O.K.] concerning that letter. The date of this memo is May 17, 2012. In that memo, [my investigator] had indicated that he spoke with [O.K.] concerning the letter. She had informed him that she had not written that letter and that she would return to Wisconsin for the trial. She had indicated that the letter had been fraudulently authored.
>
> In response to [my investigator's] May 17, 2012 memo, I met with Mr. Brown. I showed Mr. Brown that memo and its contents. This was prior to the September 18, 2012 combined guilty plea hearing in both of Mr. Brown's Milwaukee County cases…. So, by the time of that guilty plea hearing, Mr. Brown knew of [my investigator's] May 17, 2012 memo, its contents, and its information concerning [O.K.'s] alleged February 7, 2012 letter.

In Brown's reply to the additional information provided by postconviction/appellate counsel, he asserted that the investigator's report provided by postconviction/appellate counsel "has been fraudulently added on to." Brown explained: "The [r]eport by [the investigator] that Mr. Brown was given by his [trial counsel] … only has two (2) pages and ends with the record of 04/09/12." Brown also asserted that certain facts in the investigator's report were inconsistent with the facts in the case. For instance, O.K. told the investigator that her identification was stolen at the time of the assault, but her testimony at the preliminary hearing indicated that she grabbed her identification when she ran away from Brown.

[10] According to the investigation report that has been provided by postconviction/appellate counsel, the investigation began on March 26, 2012 and concluded on May 17, 2012, after the investigator spoke with O.K. by telephone on May 17, 2012.

We have carefully examined the record in this case. Many of the representations made in court and in the parties' filings support trial counsel's explanation of events concerning his receipt of, use of, and investigation of the letter. Notwithstanding the detailed information trial counsel has provided to postconviction/appellate counsel, Brown continues to suggest that O.K. wrote the letter.

When a defendant and his attorney "allege disputed facts regarding matters outside the record," this court has the authority to "remand the case to the circuit court for an evidentiary hearing and fact-finding on those disputed facts before proceeding to a decision" on the no-merit report. *See* WIS. STAT. RULE 809.32(1)(g). However, we will remand for such a hearing only if the defendant's "version of the facts, if true, would make resolution of the appeal under [RULE 809.32(3)] inappropriate." RULE 809.32(1)(g). Here, we conclude that a fact-finding hearing is unnecessary.

Specifically, even if we accept Brown's version of the facts as true, there would be no arguable merit to pursuing plea withdrawal or a postconviction motion based on the recantation letter, because Brown was aware of the letter when he chose to plead guilty to assaulting O.K. It is undisputed that he knew about the alleged recantation letter at the time he pled guilty in September 2012: the letter was introduced at his April 2012 revocation hearing and it was referenced in the April 2012 written decision revoking his extended supervision. Further, Brown admitted in his response to the supplemental no-merit report that his trial counsel gave him an investigation report with entries through April 9, 2012. Thus, at the time Brown pled guilty, he either knew the results of the investigation of the letter's authenticity—as his trial counsel claims—or he believed that there was a recantation letter that could potentially defeat the charge against him. Either way, he still chose to plead guilty. Brown never raised any concerns with

the trial court about the alleged recantation letter. Instead, he explicitly agreed at his plea hearing that "the facts in these Complaints [are] substantially true and correct."

When Brown chose to plead guilty, he forfeited his right to continue to litigate the authenticity of the letter, the victim's credibility, and the facts concerning the assault. *See* ***Kelty***, 294 Wis. 2d 62, ¶18. There would be no arguable merit to seek plea withdrawal based on the existence of a letter Brown was aware of at the time he pled guilty. Further, given the State's and trial counsel's belief that the letter was not authentic, there was no basis for either the State or trial counsel to raise the issue with the trial court. We conclude that there would be no arguable merit to pursuing an appeal based on Brown's allegations concerning the letter, and that there is no need for a fact-finding hearing pursuant to WIS. STAT. RULE 809.32(1)(g).

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Mark S. Rosen is relieved of further representation of Brown in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals