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September 9, 2014

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

2013AP946-CRNM State of Wisconsin v. Larry A. Schaffer (L.C. # 2011CF19)

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

Larry Schaffer appeals a judgment convicting him, after a plea of no contest, of two counts of second-degree reckless homicide, contrary to WIS. STAT. § 940.06(1) (2001-02). Attorney Patricia FitzGerald has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1]; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

(1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of the plea and sentence and whether there were any suppression issues that should have been raised. Schaffer was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 255-76, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Shaffer was originally charged with two counts of first-degree homicide with a weapons enhancer and two counts of hiding a corpse, as a party to a crime. Schaffer originally pled not guilty by reason of mental disease or defect. The court ordered a psychiatric evaluation. The psychiatrist's report did not support a plea of not guilty by reason of mental disease or defect, after which point Schaffer withdrew his plea.

Schaffer then entered into a plea agreement with the State, whereby he agreed to plead guilty or no contest to amended charges of two counts of second-degree reckless homicide, and the State agreed to cap its sentencing recommendation at sixteen years of initial confinement followed by extended supervision. The State agreed to dismiss and read in the two charges of hiding a corpse. No agreement was reached regarding the length of the extended supervision

recommendation. At the plea hearing, the terms of the plea agreement were presented in open court.

The circuit court conducted a standard plea colloquy with Schaffer, inquiring into his ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Schaffer's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure that Schaffer understood that it would not be bound by any sentencing recommendations. In addition, Schaffer provided the court with a signed plea questionnaire. Schaffer indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The court relied on the testimony presented at the preliminary hearing as a factual basis for the plea. Specifically, Schaffer's sister, Eunice Hogan, testified that she, her husband, Troy Hogan, and Schaffer went to the home of the two alleged victims, Connie DeGeorge and Kale Kvistad on the evening of March 31, 2002. The alleged victims got into the car. Troy drove the car and Schaffer sat in the backseat with DeGeorge and Kvistad. Eunice testified that she saw a gun in Schaffer's hand. They drove to a wooded area and Troy parked the car with the lights on. Eunice saw Schaffer give the gun to Troy. She saw Schaffer and DeGeorge on the ground. She saw Kvistad fight and yell, and then Troy hit him with the gun. She testified that Schaffer got up, took the gun from Troy, and shot DeGeorge and then Kvistad.

There is nothing in the record to suggest that counsel's performance was in any way deficient, and we are not aware of any other facts that would give rise to a manifest injustice. Therefore, Schaffer's plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

We agree with counsel's assessment that there are no suppression issues to be raised on appeal. In this case, the remains of the victims were discovered over two years after the homicides. No physical evidence was offered by the State that would connect Schaffer with the homicides, and no motions to suppress evidence were filed.

A challenge to Schaffer's sentence would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The court considered the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court emphasized the seriousness of the offenses and concluded that a prison term was necessary to protect the public.

The court then sentenced Schaffer to ten years of initial confinement and five years of extended supervision on each count, to be served consecutive to each other. The judgment of conviction reflects that the court determined that Schaffer was not eligible for the challenge incarceration program or substance abuse program.

The components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 940.06(1) (2001-02) (classifying second-degree reckless homicide as a Class C felony prior to February 1, 2003); 973.01(2)(b)3. and (d)2. (2001-02) (providing maximum terms of twenty-five years of confinement and fifteen years of extended supervision for a Class C felony). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.2(1).

IT IS FURTHER ORDERED that Patricia FitzGerald is relieved of any further representation of Larry Schaffer in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals