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September 28, 2016

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

2015AP2516-CRNM State of Wisconsin v. Alberto Carlos Rabell (L.C. # 2014CF4170)

Before Kessler, Brennan and Brash, JJ.

Alberto Carlos Rabell appeals from a judgment of conviction, entered upon his guilty pleas, on one count of homicide by intoxicated use of a vehicle while under the influence of an intoxicant with a prior intoxicant-related conviction and one count of operating a motor vehicle while his operating privileges were revoked, causing death. Appellate counsel, Steven W. Zaleski, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and

WIS. STAT. RULE 809.32 (2013-14).[1] Rabell was advised of his right to file a response, and he has responded, raising three issues. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Rabell's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

On September 6, 2014, Milwaukee police responded to the scene of a fatal motor vehicle crash. A 1994 Mercury Tracer was found with severe damage to the driver's side.[2] The driver, Carlton Johnson, was declared dead at the scene. Johnson's two passengers, C.J. and T.H., were transported to the hospital with serious injuries: C.J. was suffering from a brain bleed, pelvic fractures, and rib fractures and needed a vent to help him breath, while T.H. had internal injuries and pelvic fractures requiring surgery.

A 2007 Hyundai Sonata was also found, with significant front-end damage.[3] Rabell was on the ground with a leg injury outside the Sonata's driver's door. The Sonata's registered owner, Rebecca Sanchez, had been in the car. While she initially told police she had been driving, she later admitted that Rabell was the actual driver and that he had asked her to say she was driving because he had no valid license. A witness confirmed seeing Sanchez exit from the passenger side of the vehicle.

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[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[2] Two legally parked cars were also damaged.

[3] The criminal complaint does not so state, but the Sonata evidently ran a stop sign, colliding with the Tracer, which had the right-of-way.

Sanchez also told police that she and Rabell had been drinking at Brew City Tap prior to the accident. Rabell was unable to perform field sobriety tests because of his injury, but a later blood test revealed a blood-alcohol concentration of .12. Rabell's driver's record showed a prior operating-while-intoxicated (OWI) conviction from September 2010, and further indicated his license status was "revoked."

Rabell was charged with six offenses: (1) homicide by intoxicated use of a vehicle while under the influence of an intoxicant with a prior intoxicant-related conviction or revocation; (2) homicide by intoxicated use of a vehicle with a prohibited alcohol concentration with a prior intoxicant-related conviction or revocation; (3) injury by intoxicated use of a vehicle while under the influence of an intoxicant, causing great bodily harm; (4) injury by intoxicated use of a vehicle with a prohibited alcohol concentration, causing great bodily harm; (5) operating a motor vehicle while operating privileges are revoked, causing death; and (6) operating a motor vehicle while operating privileges are revoked, causing great bodily harm.

Rabell agreed to resolve his case through a plea. In exchange for his guilty pleas to counts 1 and 5, the State would recommend nine years' initial confinement and five years' extended supervision. The remaining four offenses would be dismissed and read in. The circuit court accepted Rabell's pleas. On the homicide charge, the circuit court imposed eleven years' initial confinement and six years' extended supervision. On the operating while revoked charge, the circuit court imposed a consecutive two years' initial confinement and a year of extended supervision.

DISCUSSION

I. Multiplicity

One of the issues that Rabell raises in his response is double jeopardy. "The double jeopardy clauses of the federal and state constitutions are 'intended to provide three protections: protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense.'" ***State v. Derango***, 2000 WI 89, ¶26, 236 Wis. 2d 721, 613 N.W.2d 833 (citations omitted). Despite Rabell's reliance on "successive prosecution" cases, it appears that he actually means to raise a multiplicity challenge to the offenses to which he pled. Multiplicity challenges usually arise in two different ways: when a single course of conduct is charged in multiple counts of the same offense and when a single criminal act encompasses the elements of more than one distinct crime. *See* ***id.***, ¶27. Rabell's challenge relates to the second situation.

To determine whether charges are multiplicitous, we apply the well-established, two-part multiplicity test. *See* ***State v. Trawitzki***, 2001 WI 77, ¶21, 244 Wis. 2d 523, 628 N.W.2d 801. First, we determine whether the charged offenses are identical in fact and law; if so, they are multiplicitous. *See* ***id.***; *see also* **Blockburger v. United States**, 284 U.S. 299 (1932). If the charges are not identical in fact and law, we then determine whether the legislature intended to allow multiple punishments for the same act. *See* ***Derango***, 236 Wis. 2d 721, ¶28; ***Trawitzki***, 244 Wis. 2d 523, ¶21. However, if the charges satisfy the first prong of the test, we presume the legislature intended multiple, cumulative punishments. *See* ***State v. Kuntz***, 160 Wis. 2d 722,

755, 467 N.W.2d 531 (1991). Whether a multiplicity violation exists is a question of law. *See* ***State v. Reynolds***, 206 Wis. 2d 356, 363, 557 N.W.2d 821 (Ct. App. 1996).

Rabell was convicted of: (1) homicide by intoxicated use of a vehicle while under the influence of an intoxicant with a prior intoxicant-related conviction or revocation, and (2) operating a vehicle while operating privileges are revoked, causing death. Although some of the elements obviously overlap, merely describing the offenses should make it clear that the crimes are not identical. For the homicide offense, the State would have had to prove, among other things, that Rabell was under the influence of an intoxicant at the time he operated the vehicle that killed Johnson. *See* WIS JI—CRIMINAL 1185; WIS. STAT. § 940.09(1)(a). Rabell's state of impairment, however, is irrelevant to the operating-while-revoked charge, for which the State would have had to prove that Rabell's operating privileges were revoked at the time he operated the motor vehicle that killed Johnson and that Rabell knew his privileges were revoked. *See* WIS JI—CRIMINAL 2623B; WIS. STAT. § 343.44(1)(b) & (2)(ar).[4] There is no arguable merit to a multiplicity challenge.[5]

II. Guilty Pleas

The first issue appellate counsel discusses is whether there is any basis for a challenge to the validity of Rabell's guilty pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Rabell completed a plea questionnaire

[4] Additionally, the homicide offense uses the term "vehicle" while the operating-while-revoked offense uses the term "motor vehicle." These terms are not identical. *See* ***State v. Smits***, 2001 WI App 45, ¶¶12-16, 241 Wis. 2d 374, 626 N.W.2d 42.

[5] We are also satisfied that the original six offenses, as charged, are not multiplicitous.

and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. Attached to the questionnaire were jury instructions for all six of the offenses with which Rabell had been charged. The plea questionnaire form correctly acknowledged the maximum penalties Rabell faced, and the form, along with an addendum, also specified the constitutional rights he was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262, 271. The circuit court conducted a plea colloquy, which complied with the requirements of WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, for ensuring that a defendant's pleas were knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the pleas' validity.

III. Prior Convictions

Homicide by intoxicated use of a vehicle while under the influence of an intoxicant is a Class D felony unless the defendant has one or more prior intoxicant-related convictions, suspensions, or revocations, in which case, the offense is a Class C felony. *See* WIS. STAT. § 940.09(1c)(a)-(b). Rabell was charged with and pled guilty to the enhanced felony, so counsel discusses whether there is any arguable merit to a challenge to the State's proof of Rabell's predicate prior offense. The criminal complaint simply alleged that a review of Rabell's driver's record showed an operating while intoxicated conviction from 2010, and counsel suggests that "ideally," the State should have presented a record of some sort from the Department of Transportation.

But counsel also concludes that the presentence investigation report (PSI) in this matter is sufficient proof of the prior conviction and, in any event, that Rabell's plea constitutes an

admission to the prior offense. We agree with counsel that Rabell's valid guilty plea, and the concomitant stipulation to the criminal complaint as a factual basis for the plea, is sufficient to establish the prior OWI offense. *See* ***State v. Saunders***, 2002 WI 107, ¶22, 255 Wis. 2d 589, 649 N.W.2d 263 ("[A] defendant who pleads no contest can be held to have admitted to a prior conviction for enhancement purposes[.]"); *see also* ***State v. Spaeth***, 206 Wis. 2d 135, 148, 556 N.W.2d 728 (1996); ***State v. McAllister***, 107 Wis. 2d 532, 535, 319 N.W.2d 865 (1982).

IV. Sentencing

Appellate counsel discusses whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a 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 determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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 may consider several subfactors. *See* ***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 circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

We are satisfied that the circuit court properly exercised its sentencing discretion. It considered certain factors in Rabell's favor, like the fact that he cooperated with the PSI author and that he demonstrated some remorse. However, the circuit court also noted that punishment was a "big factor" in a case like this, as was deterrence to both Rabell and others. The circuit

court noted that twenty-three-year-old Rabell's criminal record began at the age of fourteen, that he had been on supervision previously but failed, and that there was an active warrant for Rabell at the time of this incident.

In his response, Rabell complains that his sentences were consecutive, even though there was a single course of conduct. We presume the circuit court acted reasonably when imposing sentence; there is a strong public policy against interfering with the circuit court's sentence. *See* ***State v. Spears***, 227 Wis. 2d 495, 506, 596 N.W.2d 375 (1999). The circuit court expressly stated that it believed the operating-while-revoked sentence should be consecutive, although it did not articulate precisely why.

Nevertheless, we conclude that the record supports the consecutive sentences. *See* ***State v. Pharr***, 115 Wis. 2d 334, 347, 340 N.W.2d 498 (1983) (we may search record for reasons supporting circuit court's discretionary decision). Consecutive sentences further the circuit court's objectives of punishment and deterrence, which are appropriate sentencing considerations. *See* ***Gallion***, 270 Wis. 2d 535, ¶41. Moreover, Rabell tried to have Sanchez take the blame as the driver not because he was intoxicated but because he knew he had no valid license. This was a new, independent decision made after the consequences of driving while intoxicated and without a valid license were already apparent.

Ultimately, the maximum possible sentence Rabell could have received was forty-six years' imprisonment. The consecutive sentences totaling twenty years' imprisonment are well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are not so excessive so as to shock the public's sentiment, *see* ***Ocanas v.***

State, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.[6]

V. Ineffective Assistance of Trial Counsel

Appellate counsel also concludes that there is no basis for challenging trial counsel's performance. Rabell's response, however, raises an issue that is properly characterized as a possible ineffective-assistance claim. Specifically, Rabell complains that trial counsel told him, "'I've known this judge for 20+ years and you're only gonna get 5 years'" instead of the nine years of initial confinement that the State was recommending under the plea agreement.

We are not persuaded that trial counsel's comments constitute any sort of promise of a sentence to Rabell. Rather, it appears that trial counsel made a prediction, which turned out to be inaccurate. However, an incorrect sentencing prediction is insufficient to support a claim of ineffective assistance of counsel. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. Moreover, Rabell expressly acknowledged, during the plea colloquy, that the circuit court was not bound by any sentencing negotiations and could impose up to the maximum sentence available. Thus, we conclude that there is no arguable merit to a claim of ineffective assistance of trial counsel regarding Rabell's possible sentence.

[6] In the no-merit report, counsel also addresses whether there is any arguable merit to the imposition of $500 in mandatory DNA surcharges, the imposition of restitution, and the award of sentence credit. We agree that there is no arguable merit to any of these issues: the law requiring the DNA surcharges went into effect before Rabell's offenses so there is no *ex post facto* concern, Rabell stipulated to restitution, and we see no basis for challenging the sentence credit calculation.

We further note that while the PSI included a COMPAS risk evaluation, "which the Court [took] into consideration," we are satisfied that such consideration does not run afoul of the limitations placed on the COMPAS evaluation by ***State v. Loomis***, 2016 WI 68, 881 N.W.2d 749.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven W. Zaleski is relieved of further representation of Rabell in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals