OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/IV

January 24, 2017

To:

Hon. Charles F. Kahn, Jr.
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

Angela Conrad Kachelski
Kachelski Law Office
7101 N. Green Bay Ave., Suite 6A
Milwaukee, WI 53209

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Martin F. Bryant 393750
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

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

2013AP1880-CRNM State of Wisconsin v. Martin F. Bryant (L.C. # 2010CF3369)

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

Attorney Angela Kachelski, appointed counsel for Martin Bryant, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Bryant was sent a copy of the report and filed a response. Counsel filed a supplemental no-merit report. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the entire record, as

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

well as the no-merit reports and Bryant's response, we conclude there is no arguable merit to any issue that could be raised on appeal.

Bryant was originally charged with two counts of attempted first-degree intentional homicide and one count of felon in possession of a firearm. The charges were based on an incident in which Bryant fired an assault rifle when he fled from a car that had been pursued by police. Pursuant to a plea agreement, Bryant pled guilty to one count of first-degree reckless injury, one count of first-degree recklessly endangering safety, and one count of felon in possession of a firearm, all as a repeater. The court imposed maximum consecutive sentences on each count, for a total of fifty-one years of initial confinement and twenty years of extended supervision.

We first address the issues raised by Bryant in his response to the no-merit report.

Bryant argues that the circuit court violated its mandatory plea-taking duties because the court did not provide him with a definition of the term "utter disregard," as used in both the reckless injury and recklessly endangering safety statutes. This argument is frivolous because there is no formal legal definition of "utter disregard." The statutes for those offenses do not contain a definition, and the standard jury instructions used for those offenses also do not contain a definition. *See, e.g.*, WIS JI—CRIMINAL 1250. Bryant misreads earlier cases regarding the term "depraved mind" as providing a definition, but they do not, and instead provide only examples of such conduct.

However, even if Bryant fails to establish that the plea colloquy was inadequate on this point, Bryant's claim of failing to understand the meaning of "utter disregard" could still be framed as a claim in which he would bear the burden of proof. *See* ***State v. Bentley***, 201 Wis. 2d

303, 313-14, 548 N.W.2d 50 (1996). Bryant could allege that he did not understand that concept. However, as we stated, Bryant is relying on what he asserts is a definition of that term, but which is not a definition. Bryant alleges that he failed to understand this non-existent definition of "utter disregard," but not that he failed to understand the term "utter disregard," as used in everyday language. Therefore, it would be frivolous to argue that he is entitled to a hearing on this issue.

Bryant makes several legal arguments that are based on what he suggests is the possibility that he did not fire his gun intentionally, but only unintentionally and reflexively after being struck by an officer's bullets. However, we conclude that any legal argument based on this theory would be frivolous. Bryant does not suggest any reason to believe that his theory about firing unintentionally and reflexively is more than mere speculation. Bryant does not dispute that his gun fired several times. He does not point to any form of scientific evidence suggesting that such a reflexive response can occur or, if it can, that it may lead to multiple firings. Therefore, we do not further consider legal theories based on this speculation.

We next discuss Bryant's arguments that he should be allowed to withdraw his pleas due to lack of a factual basis. As we understand these arguments, they are all based on evidence that Bryant became aware of after he pled guilty.

Although Bryant is correct that there must be a factual basis for his plea, the factual basis for a plea is normally determined based on the information that was available at the time of the plea. We are not familiar with any law that allows a defendant to claim that his plea lacked a factual basis because the defendant learned information *later* that casts doubt on the facts as they were believed to exist at the time of the plea. And, Bryant does not cite any law that allows this

approach. However, information that a defendant learns later may become a basis for plea withdrawal by using some legal theory other than the lack of a factual basis.

The most obvious other legal theory is ineffective assistance of counsel. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We need not address both components of the analysis if a defendant makes an inadequate showing on one. ***Id.*** at 697. To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

When a defendant obtains new evidence after a guilty plea, and the evidence could have been obtained by counsel *before* the defendant's plea, a defendant can allege that counsel's performance was deficient by not properly investigating or otherwise developing evidence. For purposes of this order, we assume that Bryant's trial counsel was deficient by not obtaining the evidence that Bryant now relies on as a basis to withdraw his plea.

We next summarize the three parts of the potential new evidence, as described by Bryant. The first evidence is that the bullet wound to the officer's foot is more consistent with a bullet from a .40 caliber pistol, as carried by the officers, than it is with a whole bullet from the assault rifle carried by Bryant, or instead with a ricocheted bullet from Bryant's rifle, as the complaint alleged to have caused the injury. More specifically, the evidence is in the form of a photograph of the entry wound and what Bryant presents as two opinions by medical examiners in other

jurisdictions that the wound is more consistent with the .40 caliber pistol than Bryant's assault rifle.

The second part of the new evidence is that, according to Bryant, a careful examination of still frames from the dashboard camera video shows that the officer shot first, contrary to what was alleged in the complaint. The third part of the new evidence is also based on that dashboard video, which Bryant claims provides visual support for the idea that his gun was not pointed toward the officers when he fired.

We begin with the question of which direction Bryant's gun may have been pointing. Even if Bryant is correct that the video gives reason to believe his gun was not at all times pointed at officers, there is still compelling evidence that his gun *was* pointed at officers, at least at one point. In particular, we refer to the bullet damage to the car Bryant was driving. According to the complaint, a bullet entered that car on the driver's side, at the gas cap, and was found in the left tail light assembly. That direction of movement implies that the gun was pointed in the general direction of the officers, who had pulled up behind Bryant's car.

Bryant has not suggested any reason to disregard this bullet evidence. Therefore, we conclude that even if Bryant is correct about what is shown in the video, this new video evidence would not have had a significant effect on his decision to accept the plea offer, because there was still strong evidence that his gun was fired in the general direction of the officers.

We turn now to the remaining two parts of the new evidence. We assume, for purposes of this order, that these two parts give rise to reasonable inferences that the officer's injury was from his own pistol, and that Bryant did not shoot first. The question then becomes, what significance would the availability of these inferences have had on Bryant's plea decision?

As far as we can see, these inferences do not significantly improve Bryant's potential defense to the original charges of attempted first-degree intentional homicide. The core facts that support those charges are not altered. The State's evidence would still remain strong that Bryant intentionally fired his rifle in the direction of the officers. Even if it is true that Bryant did not shoot first, if Bryant, having pointed a rifle at police and thereby provoked them to shoot at him, then returned fire, this would be a basis for a conviction on these counts. And, even if it is true that the officer's injury was self-inflicted under the circumstances, that does not weaken the conclusion about Bryant's own action and intent. Therefore, we see no basis on which to conclude that this evidence, if Bryant had known of it at the time, might have led him to reject the plea offer and go to trial on the original charges of attempted homicide.

A question may still remain as to whether this new evidence would have led Bryant to reject the existing plea offer and negotiate further for a better one. However, Bryant does not suggest any reason to believe that this new evidence would have caused the State to make a more generous offer. Even if Bryant was able to use the new evidence to convince the State that he had a strong defense to the reckless injury and endangerment charges in the plea offer, there is no reason to think that this would have led the State to offer an even greater reduction in the charges. Instead, the State would have gone to trial on the original attempted homicide charges which, as we discussed above, are not significantly affected by the new evidence.

In summary, we conclude that it would be frivolous for Bryant to argue that, if he had been aware of this new evidence at the time of his plea decision, he would have rejected the offer he accepted and instead gone to trial on the original attempted homicide charges, or tried to negotiate a better plea offer. We reach this conclusion because the new evidence does not

significantly affect the original charges, and does not provide a reasonable basis for Bryant to believe he could have used it to extract a better plea offer.

Bryant also briefly suggests that, regardless of any effect on his plea, evidence that the officer's foot injury was self-inflicted would have been valuable for mitigation at sentencing. It would have been mitigating, Bryant suggests, because it would have shown that Bryant did not cause the officer's injury.

We conclude that it would be frivolous to argue that Bryant was prejudiced by the absence of this information at sentencing. Even if it is true that the officer's injury was caused by his own weapon, Bryant's criminal conduct was still a substantial factor in causing the officer to handle that weapon in a high-pressure situation that could lead to this type of injury. It would be frivolous to argue that the result of sentencing might be different with this information available.

Bryant next argues that the "utter disregard" element of the reckless injury and reckless endangerment charges to which he pled guilty is unconstitutionally vague. Because he did not raise this issue before pleading guilty, this argument would be considered waived by the guilty plea. To raise the issue, it must be framed as ineffective assistance of counsel, that is, that Bryant's trial counsel was ineffective by not challenging the constitutionality of the charges offered in the plea agreement.

The reckless injury and endangerment charges were substantial reductions from the original attempted homicide counts. It is not apparent to us what a defendant would gain by challenging the constitutionality of the reduced charges, if the defendant otherwise sees the

reduction in the available penalty ranges as sufficient to induce his guilty plea. Such a challenge, if successful, would only have the effect of scuttling an otherwise attractive plea offer.

Here, Bryant pled guilty, and therefore he apparently believed that the bargain was sufficient. The test for deficient performance is an objective one that asks whether trial counsel's performance was objectively reasonable under prevailing professional norms. ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. It would be frivolous to argue that Bryant's counsel was not objectively reasonable by not raising a constitutional challenge to the reduced charges in the plea offer.

Turning to the no-merit report itself, the no-merit report addresses whether Bryant's pleas were entered knowingly, voluntarily, and intelligently. The plea colloquy sufficiently complied with the requirements of ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, and WIS. STAT. § 971.08 relating to the nature of the charge, the rights Bryant was waiving, and other matters. The record shows no other ground to withdraw the plea. There is no arguable merit to this issue.

The no-merit report addresses whether the court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well-established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

Our review of the record discloses no other potential issues for appeal.

Therefore,

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

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

Diane M. Fremgen
Clerk of Court of Appeals