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 IV

May 23, 2017

To:

Hon. Brian A. Pfitzinger
Circuit Court Judge
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

Kurt F. Klomberg
District Attorney
Dodge County
210 W. Center Street
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge Co. Justice Facility
210 West Center Street
Juneau, WI 53039

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

Philip J. Brehm
23 W. Milwaukee St., #200
Janesville, WI 53548

Kriscilla K. McHenry 634522
Taycheedah Corr. Inst.
P.O. Box 3100
Fond du Lac, WI 54936-3100

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

2016AP1403-CRNM State of Wisconsin v. Kriscilla K. McHenry (L.C. # 2014CF414)

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

Kriscilla K. McHenry appeals a judgment of conviction entered upon her no-contest plea to second-degree intentional homicide. McHenry's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),[1] and ***Anders v. California***, 386 U.S. 738 (1967). McHenry received a copy of the report and filed a response.[2] Appellate counsel then filed a

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

[2] McHenry's response was received on December 8, 2016, well outside the thirty-day deadline set forth in WIS. STAT. RULE 809.32(1)(e). Regardless, we accept McHenry's response to the no-merit report.

supplemental no-merit report addressing McHenry's response. Upon consideration of the original and supplemental no-merit reports, McHenry's response, and our independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The victim in this case was stabbed 38 times and died from exsanguination. McHenry was originally charged with first-degree intentional homicide. The parties reached a negotiated settlement agreement which was reduced to writing, signed, and filed in court. In exchange for McHenry's plea to a reduced charge of second-degree intentional homicide, the State agreed to cap its initial confinement recommendation at 25 years. The court imposed a 40-year bifurcated sentence, with 20 years of initial confinement and 20 years of extended supervision.

The no-merit report analyzes the validity of McHenry's plea and sentence, if there is a basis for McHenry to seek sentence modification, and whether there exist arguably meritorious challenges to trial counsel's effectiveness, to McHenry's competence, or to the incriminating statements she made to law enforcement. We agree with appellate counsel's description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will further address the plea-taking procedures and the sentencing hearing, as well as the issues raised in McHenry's response.

We first conclude that there is no arguable basis to allege that McHenry's no-contest plea was unknowing, unintelligent, or involuntary. The circuit court engaged in an appropriate plea colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The court took care to ensure

that McHenry understood the proceedings and asked questions to confirm that neither her mental status nor her prescribed medications negatively impacted her comprehension. Additionally, the circuit court properly relied upon McHenry's signed plea questionnaire to establish her knowledge and understanding of her plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Any challenge to the plea-taking procedures in this case would be without arguable merit.

In her response to counsel's no-merit report, McHenry asserts that she entered her plea thinking she would "only have to do twelve years in prison." As appellate counsel pointed out in both his original and supplemental no-merit reports, McHenry does not allege that trial counsel told her that she was guaranteed to receive a twelve-year sentence. Moreover, such an assertion is inconsistent with the record. McHenry submitted a signed settlement agreement and completed plea questionnaire acknowledging her understanding that the court was not bound by the parties' recommendations and could impose the maximum sentence. McHenry confirmed this understanding on the record at the plea hearing. Pursuant to the parties' agreement, the State recommended 25 years of initial confinement; McHenry did not object. Nothing in the record, counsel's original or supplemental no-merit reports, or McHenry's response supports an arguably meritorious plea withdrawal claim premised on the notion that McHenry pled with the understanding that she was guaranteed a lesser sentence.

Though not mentioned in McHenry's response, appellate counsel's no-merit report discusses whether there exists any arguably meritorious issue concerning McHenry's statements to law enforcement. We observe that at a status hearing and the plea hearing, trial counsel gave a detailed on-the-record explanation of his analysis and subsequent discussions with McHenry

concerning this issue. At the status hearing, the court verified those discussions with McHenry. In taking McHenry's plea, the circuit court personally ascertained her understanding that she was giving up the right to challenge admission of her statements at a trial and to present other defenses. McHenry's no-contest plea forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886.

Next, the no-merit report 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. In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court focused on the severity of the offense including its impact on the victim's family, stating that while it did not know exactly "what happened here," nothing justified the end result and no one had the right to take another person's life. The court acknowledged McHenry's own childhood trauma and that she suffered from a debilitating physical illness that reduced her life expectancy but determined that,

> to do anything but to confine would seriously undercut, depreciate the seriousness of this offense, [and] that confinement is necessary to protect the public. And I do understand that the sentence that I'm about to hand down is, Ms. McHenry may very likely spend the rest of her days in the Wisconsin prison. I understand that. I've wrestled with it, but on balance, the Court feels it has no other option.

The court permissibly gave weight to the gravity of the offense and the need for public protection. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23 (the weight to be given each factor is committed to the circuit court's discretion). Further, the sentence imposed is well within the statutory

maximum, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive as to shock the public sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (citation omitted). We see no arguably meritorious challenge to the sentencing court's exercise of discretion.

In her response, McHenry asserts that she had accomplices in the crime who "got off scott free." Appellate counsel's supplemental no-merit report states: "While there are indications others were involved in the crime, Kriscilla has never given a statement specifically implicating others in this crime." We agree with appellate counsel that it appears that McHenry could have provided relevant information to authorities prior to sentencing but decided not to do so, and that McHenry has not set forth grounds supporting an arguably meritorious sentencing claim.[3]

Pointing to her poor physical health and the fact that her only child has now been adopted, McHenry's response asks that we "consider taking some time" off of her sentence. Our role in a no-merit appeal is to determine whether there is any arguable merit to an appeal. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 606, 516 N.W.2d 362 (1994). If we discern an issue that has arguable merit, we will order additional postconviction or further appellate proceedings as appropriate. *See* ***Anders***, 386 U.S. at 744; ***State v. Tillman***, 2005 WI App 71, ¶¶16-18, 281 Wis. 2d 157, 696 N.W.2d 574. A motion seeking sentence modification is properly directed to the circuit court. We express no view as to the potential merits of a motion in this

[3] The supplemental no-merit report points out that McHenry "still could" provide information to authorities which might "provide a basis [to] seek relief in the future." Appellate counsel states he "has had no access to such information at this point."

case, only that any such motion would be presented in the first instance to the circuit court and would not be pertinent to this no-merit report.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent McHenry in this 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 Philip J. Brehm is relieved from further representing Kriscilla K. McHenry in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals