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

2015AP2126-CRNM	State of Wisconsin v. Jorge M. Lopeztegui, Jr. (L.C. # 2014CF3457)
2015AP2127-CRNM	State of Wisconsin v. Jorge M. Lopeztegui, Jr. (L.C. # 2014CF4103)

Before Brennan, Brash and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jorge M. Lopeztegui, Jr., entered a no-contest plea to a misdemeanor charge of failing to comply with the duties imposed on a motor vehicle operator involved in an accident with an occupied vehicle resulting in property damage (hit and run). *See* WIS. STAT. § 346.67(1) (2013-

14).[1] He also entered a guilty plea to a felony charge of possessing a narcotic drug, oxycodone, without a valid prescription. *See* WIS. STAT. § 961.41(3g)(am) (2013-14). For the crime of hit and run, the circuit court imposed six months in the House of Correction and a $300 fine. For the crime of possessing a narcotic drug, the circuit court imposed and stayed an evenly bifurcated two-year term of imprisonment, placed Lopeztegui on probation for a period of three years consecutive to his sentence for the misdemeanor offense, and imposed and stayed six months in jail as a condition of probation. The circuit court set restitution at zero and ordered that if Lopeztegui successfully completed his probation and his sentence, the convictions would be eligible for expungement.[2] Lopeztegui appeals.

Lopeztegui's predecessor appellate counsel, Attorney Gregg H. Novack, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32.[3]

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

[2] The circuit court also imposed two mandatory DNA surcharges. In light of those surcharges, we previously put these appeals on hold pending the Wisconsin Supreme Court's decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of the plea that he or she faced multiple mandatory DNA surcharges. The supreme court granted voluntary dismissal in ***Odom*** before oral argument. We then held these appeals pending a decision in ***State v. Freiboth***, 2018 WI App 46, ___ Wis. 2d ___, ___ N.W.2d ___. ***Freiboth*** holds that "plea hearing courts do not have a duty to inform defendants about the mandatory DNA surcharge." *See* ***id.***, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges. We therefore lift the hold imposed in these matters and proceed to resolve these appeals.

[3] After Attorney Novack filed the no-merit report in this court, he withdrew from these cases and the state public defender appointed Attorney Kiley Zellner as successor appellate counsel for Lopeztegui.

Lopeztegui did not file a response. Based upon our review of the no-merit report and the records, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint filed in Milwaukee County case No. 2014CF3457, which underlies appeal No. 2015AP2126-CRNM, police stopped a car on August 3, 2014, after observing that the occupants were not wearing seatbelts and the vehicle registration stickers were not properly displayed. During the stop, officers smelled the odor of burnt marijuana emanating from the vehicle and then observed marijuana near the passenger, subsequently identified as Lopeztegui. Police arrested him and found twenty-nine oxycodone pills concealed in his shoe.

Lopeztegui was released from custody on a signature bond in case No. 2014CF3457. While that matter remained pending, the State filed a criminal complaint in Milwaukee County case No. 2014CF4103, which underlies appeal No. 2015AP2127-CRNM. The complaint alleged that on September 15, 2014, while charged with a felony and out of custody on bond in case No. 2014CF3457, Lopeztegui drove a car, collided with an occupied vehicle causing property damage, and fled the scene. The State charged Lopeztegui with a misdemeanor count of hit and run and a felony count of bail jumping.

Lopeztegui filed a motion to suppress the evidence in Milwaukee County case No. 2014CF3457, alleging an improper traffic stop. On the date of the motion hearing, however, Lopeztegui personally and by counsel advised the circuit court that he wanted to withdraw the suppression motion and resolve both of his pending cases with a plea bargain. He entered his pleas approximately two weeks later, on February 18, 2015, and the matters proceeded to sentencing on March 10, 2015.

We first consider an issue that appellate counsel did not discuss in the no-merit report, namely, whether Lopeztegui could pursue an arguably meritorious challenge to his pleas of guilty and no contest in these matters. We conclude he could not.

At the outset of the plea hearing, counsel for the State and the defense advised the circuit court that Lopeztegui would plead guilty to possessing a narcotic drug and no-contest to the charge of hit and run, and the State would recommend a global disposition of eighteen to twenty-four months of probation, restitution as warranted, and "condition time if any up to the [c]ourt." The State also agreed to move to dismiss and read in the charge of felony bail jumping and to take no position on expungement. Lopeztegui confirmed that the lawyers accurately described the plea bargain. The circuit court then clarified that a conviction for the misdemeanor offense of hit and run carried a mandatory minimum fine of $300. Lopeztegui said he understood.

The circuit court explained to Lopeztegui that upon conviction for hit and run, he faced maximum penalties of a $1000 fine and six months in jail. *See* WIS. STAT. §§ 346.67(1) (2013-14), 346.74(5)(a) (2013-14). Lopeztegui said he understood. The circuit court further explained that upon conviction for possessing a narcotic drug, he faced maximum penalties of $10,000 and a three-and-a-half year term of imprisonment. *See* WIS. STAT. §§ 961.41(3g)(am) (2013-14), 939.50(3)(i) (2013-14). Lopeztegui again said he understood. The circuit court advised Lopeztegui that it was not bound by the plea bargain and could impose sentences up to the maximums allowed by statute. Lopeztegui said he understood. He told the circuit court that he had not been promised anything outside the terms of the plea bargain to induce his pleas of guilty and no contest and that he had not been threatened.

The record in each of these appeals contains a signed plea questionnaire and waiver of rights form with attachments. Lopeztegui confirmed that he reviewed the forms and attachments with his trial counsel and that he understood them. The plea questionnaires reflect that Lopeztegui was twenty-one years old and had a high school education. The questionnaires further reflect his understanding of the charges he faced, the rights he waived by entering a plea other than not guilty, and the penalties he faced upon conviction. The signed addenda to the plea questionnaires reflect Lopeztegui's acknowledgment that by entering a plea other than not guilty he would give up his right to raise defenses, to challenge the sufficiency of the complaints, and to seek suppression of the evidence against him.

The circuit court told Lopeztegui that by entering pleas other than not guilty he would give up the constitutional rights listed on the plea questionnaires, and the circuit court reviewed those rights on the record. Lopeztegui said he understood his rights. The circuit court explained that if he was not a citizen, a plea other than not guilty exposed him to the risk of deportation, exclusion from admission to this country, or denial of naturalization. *See* WIS. STAT. § 971.08(1)(c). Lopeztegui said he understood.[4] The circuit court explained that by entering pleas of guilty and no contest, Lopeztegui would give up the right to bring motions and to raise defenses. Lopeztegui said he understood. Additionally, defense counsel advised that Lopeztegui

[4] The circuit court did not caution Lopeztegui about the risks described in WIS. STAT. § 971.08(1)(c) using the precise words required by the statute, but minor deviations from the statutory language do not undermine the validity of a plea. *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173. Moreover, before a defendant may seek plea withdrawal based on failure to comply with WIS. STAT. § 971.08(1)(c), the defendant must show that "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). Nothing in the record suggests that Lopeztegui could make such a showing.

had discussed with counsel the suppression motion filed in case No. 2014CF3457, and that Lopeztegui chose to withdraw the motion in favor of pursuing a plea bargain.

"[A] circuit court must establish that a defendant understands every element of the charges to which he pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court may establish the defendant's requisite understanding in a variety of ways: "summarize the elements of the offenses on the record, or ask defense counsel to summarize the elements of the offenses, or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." *See* ***id.***, ¶56. Here, copies of the jury instructions describing the elements of hit and run and possessing a narcotic drug were attached to the plea questionnaires. Lopeztegui told the circuit court he had reviewed the attached instructions with his trial counsel and that he understood them.

A plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crimes charged. *See* WIS. STAT. § 971.08(1)(b). Here, Lopeztegui told the circuit court that the facts in the criminal complaints were true. Additionally, trial counsel stipulated to the facts in the criminal complaints. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363 (factual basis established when trial counsel stipulates on the record to the facts in the criminal complaint). The circuit court properly established a factual basis for Lopeztegui's pleas of guilty and no contest.

The record reflects that Lopeztegui entered his pleas of guilty and no contest knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765

N.W.2d 794 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the plea.

We next consider a second issue that appellate counsel did not discuss, namely, whether Lopeztegui could pursue an arguably meritorious challenge to the sufficiency of the complaint in case No. 2014CF3457, alleging hit and run. The circuit court expressed concern during a pretrial hearing that the probable cause section of the complaint in that case did not make sufficiently clear that Lopeztegui struck an occupied vehicle and did not describe with particularity the property damage that he caused in the collision. The circuit court advised that it would require additional information establishing the factual basis for the charge before accepting a plea to the crime of hit and run. Ultimately, however, the circuit court did not elicit any additional information about the facts of the hit and run during the plea hearing. Nonetheless, we are satisfied that an arguably meritorious challenge to the sufficiency of the complaint cannot be raised.

"The sufficiency of a complaint is a question of law that is reviewed *de novo*." ***State v. Smaxwell***, 2000 WI App 112, ¶5, 235 Wis. 2d 230, 612 N.W.2d 756 (italics added). A complaint is sufficient if the facts alleged "give rise to reasonable inferences which are sufficient to establish probable cause," and the document need only "meet the test of minimal adequacy." *See* ***State ex rel. Evanow v. Seraphim***, 40 Wis. 2d 223, 226, 161 N.W.2d 369 (1968). Accordingly, a complaint must answer "basically essential queries," namely, "'what, who, where, when, why,'" and "'[w]ho says so?'" *See* ***id.*** at 230. Here, the criminal complaint filed in case No. 2014CF4103 alleged that Lopeztegui was operating a motor vehicle and failed to stop after he was "involved in an accident resulting in damage to a vehicle being driven by

victim." The complaint went on to say that Officer Adrian Harris observed the collision, followed Lopeztegui after he failed to stop, and arrested him. We are satisfied that Lopeztegui cannot pursue an arguably meritorious claim that the criminal complaint fails to establish a factual basis to believe that he committed the crime of hit and run.

Moreover, "[l]ike the reviewing [circuit] court, we review the entire record to see if a factual basis exists for the crime" charged. *See* ***State v. Higgs***, 230 Wis. 2d 1, 13-14, 601 N.W.2d 653 (Ct. App. 1999). Here, the record of the preliminary examination conducted in case No. 2014CF4103 includes Harris's testimony. Harris described talking to the driver of the maroon vehicle that Lopeztegui struck on September 15, 2014, and Harris further described the damage to the maroon vehicle that he observed after the accident. Accordingly, even were we to conclude that the criminal complaint failed to allege sufficient facts—and we do not—nonetheless a factual basis existed for Lopeztegui's no-contest plea to the charge of hit and run because the testimony at the preliminary examination established that Lopeztegui drove a car that struck an occupied vehicle, causing property damage, and that he failed to stop. *See* ***Higgs***, 230 Wis. 2d at 14. Further pursuit of this issue would lack arguable merit.

A defendant who enters a valid plea of guilty or no contest normally forfeits all nonjurisdictional defects and defenses to the criminal charge. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *see also* ***Higgs***, 230 Wis. 2d at 9 (holding that a challenge to personal jurisdiction is forfeited by a plea other than not guilty). Accordingly, no arguably meritorious basis exists to pursue issues arising prior to the pleas in these cases.

We next consider whether Lopeztegui could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to

determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

We agree with appellate counsel's conclusion that the records here reflect an appropriate exercise of sentencing discretion. The circuit court indicated that the goals of its sentences were community protection, deterrence, rehabilitation, and punishment, and the circuit court discussed the factors it deemed relevant to those goals. In assessing the gravity of the offenses, the circuit court viewed Lopeztegui's possession of narcotics as a crime of "lower intermediate" severity, mitigated by the nature of the narcotic, the absence of any indication that Lopeztegui was selling the drug, and his level of cooperation. On the other hand, the circuit court viewed the hit and run

as aggravated because Lopeztegui was on bond at the time of the offense and because he falsely stated to the arresting officer that he was fleeing from a shooting.

The circuit court noted many positive aspects of Lopeztegui's character, praising him for obtaining a high school diploma, for maintaining employment, and for pursuing postsecondary school education. The circuit court also recognized that at the time of his sentencing, he had no prior criminal convictions and no history of violence. Nonetheless, the circuit court was concerned that Lopeztegui failed to appreciate his obligation to follow the law, emphasizing that in addition to the crimes for which he was before the court, he was also facing a new charge that arose after he entered his pleas in the instant cases.

The circuit court went on to find "a strong need to protect the community" in light of Lopeztegui's ongoing criminal conduct. Although the circuit court believed Lopeztegui would benefit from the support of his family, the circuit court concluded that his "poor decisions" reflected that he presented a high risk to reoffend.

The circuit court identified the factors that it considered in choosing sentences in this matter. The factors are proper and relevant. Moreover, the sentences are not unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense 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, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Here, the circuit court imposed lawful sentences that were less than the aggregate penalties Lopeztegui faced upon conviction for the two crimes. We are satisfied that Lopeztegui cannot pursue an arguably meritorious claim that his sentences are so excessive as to shock public

sentiment. *See* ***id.*** A challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.[5]

Finally, appellate counsel states in the no-merit report that, in counsel's view, nothing in the record would support a claim that trial counsel was ineffective. To prevail on a claim of ineffective representation, a defendant must prove both that the lawyer's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We agree with appellate counsel's conclusion that the record reveals no arguably meritorious basis for a challenge to trial counsel's effectiveness.

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the hold previously imposed in these matters is lifted.

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

IT IS FURTHER ORDERED that successor appellate counsel, Attorney Kiley Zellner, is relieved of any further representation of Jorge M. Lopeztegui, Jr., on appeal. *See* WIS. STAT. RULE 809.32(3).

[5] We observe that the specifics of Lopeztegui's sentences suggest, and electronic docket entries appear to confirm, that Lopeztegui has completed his sentences in these matters. Accordingly, any challenge to the sentences appears moot. *See* ***State v. Walker***, 2008 WI 34, ¶¶13-14, 308 Wis. 2d 666, 747 N.W.2d 673. Normally, a party cannot pursue moot issues on appeal. *See* ***id.***, ¶14.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals