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

September 19, 2018

To:

Hon. Stephanie Rothstein
Circuit Court Judge
Criminal Justice Facility
949 North 9th Street
Milwaukee, WI 53233

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

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

Mark A. Schoenfeldt
Law Firm of Mark Schoenfeldt
230 W. Wells St., Ste. 706
Milwaukee, WI 53203

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

Michael F. Hobbs 626259
Dodge Corr. Inst.
P.O. Box 700
Waupun, WI 53963-0700

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

2016AP1187-CRNM State of Wisconsin v. Michael F. Hobbs (L.C. # 2015CF908)

Before Lundsten, P.J., Blanchard and Kloppenburg, 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).

Michael Hobbs appeals an amended judgment convicting him of two counts of second-degree reckless homicide and one count of hit and run involving death. He also appeals an order that denied his postconviction motion to modify his sentences. Attorney Mark Schoenfeldt has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32

(2015-16);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses the validity of Hobbs's pleas and sentences and the assistance of counsel. Hobbs was sent a copy of the report, and has filed a response alleging that trial counsel pressured him into accepting a plea deal and led him to believe that the circuit court would not impose a sentence longer than fifteen years of initial confinement. Counsel has filed a supplemental no-merit report and Hobbs has filed an additional response to the supplement. By prior order, we placed this case on hold to await an opinion determining whether a defendant who was not advised at the time of the plea that he or she faced multiple mandatory DNA surcharges has grounds for plea withdrawal. This court has now issued a published decision concluding that recent decisions by the Wisconsin Supreme Court defeat any such claim. ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __.

Upon reviewing the entire record, as well as the no-merit report, response, supplement, and additional response, we conclude that there are no arguably meritorious appellate issues. First, we see no arguable basis for plea withdrawal. The circuit court conducted a plea colloquy, inquiring into Hobbs's ability to understand the proceedings and the voluntariness of his pleas, and further exploring his understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. In addition, Hobbs provided the court with a signed plea questionnaire and addendum.

The facts set forth in the complaint, which Hobbs acknowledged to be true at the plea hearing—namely that: after smoking marijuana, Hobbs stole a vehicle, drove it through a

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

residential neighborhood at a high rate of speed, went through a stop sign and hit another vehicle resulting in the deaths of two people, and then fled the scene—provided a sufficient factual basis for the pleas. In conjunction with the plea questionnaire and complaint, the colloquy was sufficient to satisfy the circuit court's obligations under WIS. STAT. § 971.08. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 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).

Hobbs asserts that trial counsel erroneously told him: (1) he had a reasonable chance of receiving concurrent sentences of less than fifteen years in prison based on the sentences imposed in similar cases, the fact that the charges arose out of one incident, and the fact that Hobbs had not previously served time in prison; and (2) he had no choice but to take the plea deal because if he didn't the D.A. could increase the charges to first-degree reckless homicide and things would get a whole lot worse. However, an incorrect prediction or mistaken estimate of a defendant's sentence do not provide grounds for an ineffective assistance of counsel claim. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. Nor can counsel be faulted for relaying to Hobbs the potential negative consequences of refusing a plea deal. To the contrary, it was counsel's duty to do so. Here, the allegations in the complaint were sufficient to have supported charges of first-degree reckless homicide, and therefore counsel accurately advised Hobbs that his situation could get worse if the State decided to amend the charges. Moreover, the plea deal reduced Hobbs's sentence exposure by twenty-eight and one-half years. In short, Hobbs has not alleged any facts about counsel's performance in advising Hobbs to take the plea deal that would constitute a manifest injustice warranting plea withdrawal.

A challenge to Hobbs's sentences would also lack arguable merit. The record shows that the circuit court considered relevant sentencing factors and rationally explained their application to this case, emphasizing that the offenses were "extremely aggravated" by the facts that Hobbs had stolen the vehicle, that he had no driver's license, that he had marijuana in his system, that he was driving at an extremely high rate of speed in a residential area, that he had younger teenagers in the car with him, and that he was on probation at the time of the incident. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court then sentenced Hobbs to terms of fifteen years of initial confinement and ten years of extended supervision on each of the three counts, with the reckless homicide sentences being concurrent to one another but consecutive to the hit and run charge. The court also awarded 145 days of sentence credit; ordered restitution in the amount of $25,475.56; and imposed standard costs and conditions of supervision.

The sentences imposed did not exceed the maximum available penalties. *See* WIS. STAT. §§ 940.06(1) (classifying second-degree reckless homicide as a Class D felony); 346.67(1) and 346.74(5)(d) (classifying hit and run involving death as a Class D felony); 973.01(2)(b)4. and (d)3. (providing maximum terms of fifteen years of initial confinement and ten years of extended supervision for a Class D felony). Nor were the sentences unduly harsh, taking into account that two people died and that the circuit court structured two of the sentences to be concurrent. *See generally* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

Hobbs filed a postconviction motion for sentence modification alleging that the circuit court had improperly treated the fact that Hobbs had experienced "very few consequences" from his prior criminal case, and had not yet even met with his probation agent, as aggravating factors—essentially punishing Hobbs for "the system's breakdown, overload and failure to

work." The court denied the motion, deeming Hobbs's assertion that he had been punished for the system's failure to be a gross mischaracterization, and reiterating the aggravating factors upon which the court had actually relied. We agree that the postconviction motion mischaracterized the court's decision, and that the sentencing factors discussed and relied upon by the court were proper.

Finally, Hobbs faults trial counsel for failing to understand or appreciate the significance of his injuries in relation to the hit and run charge. Specifically, Hobbs asserts that his decision to flee the scene was greatly influenced by a head injury that he suffered in the accident, which caused him to lose consciousness and left him dazed, confused, and disoriented. However, the transcripts show that defense counsel made the following argument at the sentencing hearing, in response to a question from the circuit court as to how to reconcile Hobbs's decision to leave the scene with his assertion of remorse:

> He was in pretty bad shape himself. He was concussed, he received staples to his head, he was injured, he was knocked out for a brief period of time, and it took him a little bit of time to come to. He was hobbling away.
>
> There were voices, and some of those were external saying: Come on, we got to get out of here. I'm sure some of them were internal as well. Just an instinctual act on his part to get away knowing that he was in trouble. I don't think it was made with the conscious thought that two good people were victims of what he had done right in front of him. I don't think that registered. I can say -- I guess a different way of putting it is that his leaving the scene of the accident was not really the product of a rationally-generated decision. Really, I don't think it was a decision at all. I think it just kind of happened, and it happened quickly.

Counsel's statement demonstrates that counsel did understand the impact that Hobbs's injuries had on his conduct. Moreover, the court plainly accepted counsel's argument that fleeing the

scene was not inconsistent with subsequent remorse, because the court ultimately determined that Hobbs's remorse was sincere.

Upon an independent review of the record, we have found no other arguable basis for reversing the judgment of conviction or postconviction order. 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 amended judgment of conviction and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark Schoenfeldt is relieved of any further representation of Michael Hobbs in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals