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

September 24, 2018

To:

Hon. Timothy M. Witkowiak
Circuit Court Judge
Safety Building Courtroom, #113
821 W. State St.
Milwaukee, WI 53233-1427

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

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

Urszula Tempska
Law Office of Urszula Tempska
P.O. Box 11213
Shorewood, WI 53211-0213

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

Wallace Anthony Stewart 590908
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

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

2016AP1350-CRNM State of Wisconsin v. Wallace Anthony Stewart
(L.C. # 2014CF2709)

Before Kessler, P.J., Brennan 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).

Wallace Anthony Stewart appeals from a judgment of conviction, entered upon his guilty pleas, on one count of second-degree reckless injury as a repeater and one count of hit and run involving great bodily harm as a repeater. Stewart also appeals from orders denying his postconviction motion and a reconsideration motion. Appellate counsel, Urszula Tempska, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT.

RULE 809.32 (2015-16).[1] Stewart was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and appellate counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On June 16, 2014, around 3:35 a.m., a marked Milwaukee Police Department wagon with four officers was transporting a combative prisoner to the hospital. A Dodge Caravan, traveling at a high rate of speed without its headlights illuminated, disregarded a flashing red light and struck the wagon. The force of the collision caused the wagon to strike a cement light pole. All four officers were injured, one of them seriously enough to require reconstructive surgery. Responding officers, who had been following the wagon in different vehicles, located three suspects nearby: Otis Green, Montel Wilson, and Stewart.

The Caravan had damage to the ignition, and police discovered it was stolen. When they made contact with the Caravan's owner, they discovered a Dodge Stratus parked at that location; the Stratus had also been stolen. Police then checked for other nearby incident reports and determined that a robbery had occurred in the vicinity around 2 a.m.; Wilson had the robbery victim's phone in his possession.

Green told police about the trio's activities that night, indicating that Stewart was driving the Caravan when it struck the police wagon. Stewart was charged with: operating a motor vehicle without the owner's consent, as a party to a crime and as a repeater; robbery with the use of force, as a party to a crime and as a repeater; second-degree reckless injury, as a repeater;

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

operating a motor vehicle while revoked causing great bodily harm; failure to investigate upon striking an occupied vehicle (hit and run) involving great bodily harm, as a repeater; and three counts of hit and run causing injury as a repeater. In exchange for his guilty pleas to second-degree reckless injury and hit and run involving great bodily harm, both as a repeater, the State agreed to dismiss and read in the remaining offenses, and to recommend prison but leave the length and structure to the sentencing court following a presentence investigation report. The State also requested full restitution.

The circuit court accepted Stewart's pleas and imposed seven years of initial confinement and five years of extended supervision on both counts, concurrent to each other but consecutive to any other sentence. The circuit court stated that Stewart was eligible for the challenge incarceration program after serving five years, but he would not be eligible for the substance abuse program. However, Stewart was statutorily ineligible for the challenge incarceration program, so the circuit court later amended the judgment of conviction to remove his eligibility. The circuit court also ordered $500 restitution to the owner of the Caravan, representing her insurance deductible, and $25,771.88 restitution to the Milwaukee Police Department for the damage to the police wagon and related expenses.

Stewart filed a postconviction motion raising two issues. First, he sought sentence modification on the "new factor" of his ineligibility for the challenge incarceration program and an alleged misrepresentation of how much revocation time he was facing. Second, Stewart challenged the restitution award to the Milwaukee Police Department, claiming the award was improper because the Department was not actually a victim and alleging trial counsel was

ineffective for agreeing to the full amount requested.[2] The circuit court denied the motion without a hearing. Stewart moved for reconsideration, claiming that the restitution award permitted double recovery. The circuit court also denied reconsideration, noting no evidence of double recovery. Stewart appeals.

Appellate counsel discusses five potential issues in the no-merit report. The first of these is whether there is any basis for a challenge to the validity of Stewart's guilty pleas.

There is no arguable basis for challenging Stewart's pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Stewart completed a plea questionnaire 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. The applicable jury instructions were attached. The form correctly acknowledged the maximum penalties Stewart faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262, 271. The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Our review of the record satisfies us that the circuit court adequately complied with its obligations for accepting guilty pleas. *See* ***State v. Brown***, 2006

[2] We note that while trial counsel and Wallace did not dispute the amount requested, trial counsel had challenged the award on the grounds that Stewart lacked the ability to pay that amount. *See* WIS. STAT. § 973.20(13)(a)2.

WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a challenge to the pleas' validity.[3]

The second issue appellate counsel discusses is whether the circuit court properly 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 primary factors including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several additional factors. *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.

The circuit court's sentencing remarks in this case are somewhat abbreviated, but they nevertheless reflect a proper exercise of discretion. The circuit court explained that probation was not appropriate given the seriousness of the crimes and that Stewart was on supervision

[3] Two mandatory DNA surcharges were assessed on the judgment of conviction. Because of the multiple DNA surcharges, we put this appeal 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 he was not advised at the time of the plea that multiple mandatory DNA surcharges would be imposed. ***Odom*** was voluntarily dismissed before oral argument. This case was then held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __. ***Freiboth*** holds that a circuit court does not have a duty during a plea colloquy to inform a defendant about mandatory DNA surcharges because the surcharge is not a punishment or a direct consequence of the plea. *See* ***id.***, ¶12. Thus, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

when these offenses occurred. It considered the possibility that Stewart might be subject to a revocation sentence. It acknowledged Stewart's concern that the presentence investigation report had evidently been written by the agent responsible for revoking his supervision, telling Stewart it would interpret the report "with a grain of salt." The circuit court noted that the Caravan had been purposefully stolen and driven recklessly, resulting in people getting hurt, and determined that Stewart had to be held accountable for that behavior. The circuit court considered Stewart's argument about his inability to pay $25,000 in restitution, but noted that he would have substantial extended supervision, resulting in an average obligation of about $5000 per year, and reminded Stewart that he was the one who caused the damage.

The maximum total sentence Stewart could have received was thirty-nine and one-half years' imprisonment. The concurrent sentences totaling twelve 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). Subject to our discussion herein regarding restitution and sentence credit, there is no arguable merit to a challenge to the sentencing court's discretion.

Appellate counsel next addresses whether the restitution award was proper. Whether the circuit court had authority to order restitution under WIS. STAT. § 973.20 is a question of law. *See* ***State v. Storlie***, 2002 WI App 163, ¶6, 256 Wis. 2d 500, 647 N.W.2d 926. We broadly construe the statute "to allow victims to recover their losses as a result of a defendant's criminal conduct." *See* ***id.***, ¶8. "[T]he government is entitled to restitution for losses incurred when it is a victim as a direct result of criminal conduct, but not for collateral expenses incurred in the normal course of law enforcement." ***Id.***, ¶10.

In the postconviction motion, Stewart claimed that the police department was only an indirect victim and that the expenses incurred were incurred in the ordinary course of law enforcement. But Stewart disregarded a traffic signal and drove a stolen van directly into the police wagon, then continued on despite striking the police vehicle. *See* ***State v. Haase***, 2006 WI App 86, ¶16, 293 Wis. 2d 322, 716 N.W.2d 526 (noting that in ***State v. Dillon***, 637 P.2d 602 (Or. 1981), wherein defendant was ordered to pay restitution to repair patrol car he had intentionally rammed with his vehicle, the government agency was a direct victim of defendant's conduct).

The damage to the wagon was not a collateral expense, like overtime for police officers or the cost of fighting a fire resulting from an accident caused by a defendant. *See* ***State v. Ortiz***, 2001 WI App 215, ¶23, 247 Wis. 2d 836, 634 N.W.2d 860 (overtime); ***State v. Schmaling***, 198 Wis. 2d 756, 760-61, 543 N.W.2d 555 (Ct. App. 1995) (fire-fighting). Nor was the cost incurred in the ordinary course of law enforcement, like when police use stop sticks in a pursuit or expend money in a drug investigation. *See* ***Storlie***, 256 Wis. 2d 500, ¶5 (stop sticks); ***State v. Evans***, 181 Wis. 2d 978, 982-84, 512 N.W.2d 259 (Ct. App. 1994) ("buy money"). There is no arguable merit to claiming the Milwaukee Police Department was not a direct victim in this case, and there is no arguable merit to claiming the restitution award was improper.[4]

Appellate counsel next addresses whether Stewart received ineffective assistance from trial counsel. Appellate counsel concludes that "the record does not disclose any deficient

[4] Regarding the reconsideration motion, appellate counsel notes in the no-merit report that she has been unable to locate any evidence to suggest the police department has made a double recovery on the cost of the damaged vehicle, so she cannot make any further meritorious argument in that regard.

actions or omissions of counsel which arguably … prejudiced" Stewart. We agree that the record does not support any arguably meritorious claim of ineffective assistance of trial counsel.

Finally, appellate counsel addresses whether any "other non-harmless legal error(s) have marred" Stewart's prosecution. In this section, appellate counsel discusses the motion for resentencing because of Stewart's ineligibility for the challenge incarceration program and an amendment to the award of sentence credit.

In ruling on the postconviction motion, the circuit court explained that Stewart's sentence had been based "solely" on the nature of the offenses, the fact that he was on supervision at the time, and the need to protect the public, but not on any eligibility for early release programs.[5] Accordingly, there is no arguable merit to claiming that Stewart was entitled to sentence modification because of a new factor or resentencing because of inaccurate information relating to his statutory ineligibility for the challenge incarceration program.

Additionally, Stewart was originally awarded sentence credit in this case, which the circuit court vacated when it learned the same amount of credit was also awarded on Stewart's revocation sentence. "A convicted person should be given sentence credit for presentence incarceration for time spent in custody in connection with the course of conduct for which sentence was imposed." ***State v. Amos***, 153 Wis. 2d 257, 280, 450 N.W.2d 503 (Ct. App. 1989). However, "[t]he total time in custody should be credited on a day-for-day basis against the total days imposed in the consecutive sentences." *See* ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423

[5] The circuit court additionally explained that because Stewart had not yet been revoked at the time of sentencing in this case, the court did not consider "some unknown period of time he might serve after revocation" when setting the sentence length in this case.

N.W.2d 533 (1988). Accordingly, because the sentences in this case are consecutive to the revocation sentence, there is no arguable merit to challenging the amended judgment removing credit in this case.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and orders are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Urszula Tempska is relieved of further representation of Stewart in this matter. *See* 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