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DISTRICT I

April 8, 2019

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

2018AP1556-CRNM State of Wisconsin v. Antonio L. Beck (L.C. # 2016CF1734)

Before Kessler, P.J., 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).

Antonio L. Beck appeals from a judgment, entered upon his guilty pleas, convicting him on one count of operating a motor vehicle without the owner's consent and one count of hit and run causing great bodily harm. Appellate counsel, Carly Cusack, has filed a no-merit report,

pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[1] Beck has filed a response. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Beck's response, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On April 12, 2016, A.G. reported her Toyota RAV4 stolen. On April 13, 2016, around 6:00 p.m., Milwaukee police responded to an armed robbery call. Taxi cab driver W.S. reported that he was getting ready to turn over his taxi cab to the next driver at the end of his shift, so he had started his personal vehicle, a Chevrolet Impala, which was parked nearby. Then, a black RAV4 pulled up near the Impala and a young black male jumped out of the RAV4, got into the Impala, and drove off with it.

At 11:15 p.m., Milwaukee police responded to a traffic accident involving a RAV4 and a Lincoln Navigator. The occupants of the Navigator, A.J. and S.J., had been injured, with A.J. suffering a broken rib and a lacerated liver, and S.J. suffering a broken nose. The only occupant of the RAV4 on the scene was fifteen-year-old S.H., who was also injured. S.H. told police that her friend, Taquita Thomas, was the front seat passenger in the RAV4, which was being driven by someone S.H. knew only as "Tone." S.H. reported that Thomas and Tone had run from the scene after the collision, which occurred when the Navigator turned in front of them.

On April 14, 2016, police spoke with Thomas. She told police that she knows Beck and that she was driving around with him in the RAV4, which she knew was stolen, on April 13, 2016. At some point, police tried to stop them, and Beck took off at a high rate of speed; the

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

accident occurred while Beck was fleeing from police. Police also spoke with Tyron Richardson, who had also been driving around with Beck in the RAV4 on April 13. Richardson admitted he told Beck to stop the RAV4 so that he (Richardson) could steal the Impala. Richardson further indicated that he was driving around in the Impala when he "came upon" the scene of the collision between the Navigator and the RAV4. He said that Beck and Thomas ran up and got into the Impala, and he drove them away from the scene.

On April 15, 2016, police arrested Beck when he pulled into a laundromat parking lot driving a silver minivan that had been reported stolen by its owner, J.M., on April 14, 2016. Beck said he had gotten the RAV4 from a friend, but suspected it was stolen. He admitted driving it at the time Richardson stole the Impala and when it was involved in the collision with the Navigator. He also admitted that he did not stay at the scene of the accident to help anyone or exchange information. He also said that he obtained the minivan from a friend, but noticed that the steering column was peeled, so he believed it was stolen.

Beck was charged with two counts of operating a motor vehicle without the owner's consent, contrary to WIS. STAT. § 943.23(3) (2015-16), for driving A.G.'s RAV4 and J.M.'s minivan. He was also charged with two counts of hit and run causing great bodily harm,[2] contrary to WIS. STAT. §§ 346.67(1) (2015-16) and 346.74(5)(c) (2015-16), based on the injuries sustained by A.J. and S.J. in the collision and on Beck's leaving the scene.

[2] "Hit and run" is the colloquial description of the offense. WISCONSIN STAT. § 346.67(1) (2015-16) prescribes a "[d]uty upon striking person or attended or occupied vehicle," including providing personally identifying information and rendering aid to injured people. WISCONSIN STAT. § 346.74(5) (2015-16) describes various penalties for failing to fulfill that duty.

In exchange for Beck's guilty pleas to one count of each offense, the State agreed to dismiss and read in the other two offenses, recommend a global sentence of four years' initial confinement and four years' extended supervision, and take no position on whether the sentence structure should be concurrent or consecutive. There would also be four additional, uncharged offenses used as read-ins. The circuit court accepted Beck's pleas and ultimately imposed concurrent sentences totaling seven years of initial confinement and three years of extended supervision with eligibility for the challenge incarceration program.[3] Beck appeals.

Appellate counsel first discusses whether Beck could seek to withdraw his pleas by asserting they were not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Our review of the record—including the plea questionnaire and waiver of rights form, attached jury instructions for both offenses and plea hearing transcript—confirms that the circuit court conducted an appropriate plea colloquy and adequately complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***Bangert***, 131 Wis. 2d at 261-62, and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The circuit court also informed Beck of the effects of read-in offenses, including the possibility of being ordered to pay restitution on those offenses, as recommended by ***State v. Straszkowski***, 2008 WI 65, ¶97, 310 Wis. 2d 259, 750 N.W.2d 835.

Beck had agreed to plead guilty to the hit-and-run charge involving victim S.J., and appellate counsel notes that during the plea colloquy, Beck appeared to have some hesitation over whether S.J.'s broken nose constituted "great bodily harm." The circuit court asked

[3] The circuit court also ordered Beck to pay restitution to A.G. and S.J. for damage to their vehicles; Beck stipulated to the amounts.

whether the parties would like to return on the jury trial date, but the State noted that if they returned on the trial date, it would seek to go ahead with the trial. Trial counsel explained that Beck "is unsure, from what I can gather, as to whether or not a broken nose during a car accident would constitute great bodily harm under the hit-and-run section. I certainly believe it does." Beck acknowledged that was "the only thing I'm worried about. Other than that, I'm willing to go forward."[4] The circuit court and the State left the courtroom briefly so that trial counsel and Beck could confer. When they returned, trial counsel indicated that he believed he had answered all of Beck's questions and the pleas could proceed. Beck confirmed this was true and entered his guilty pleas.

There are generally three types of bodily harm for purposes of criminal statutes; in order of increasing severity, they are bodily harm, substantial bodily harm, and great bodily harm. *See* ***State v. Davis***, 2016 WI App 73, ¶15, 371 Wis. 2d 737, 885 N.W.2d 807. "'Great bodily harm' means bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury." WIS. STAT. § 939.22(14) (2015-16). The definition of "substantial bodily harm" expressly includes "a broken nose." *See* WIS. STAT. § 939.22(38) (2015-16).

We note that there is no offense of hit and run causing substantial bodily harm. There may be a hit and run without injury, a hit and run causing injury but not great bodily harm, a hit

[4] Beck later filed a *pro se* postconviction motion, purportedly challenging sufficiency of the evidence, in which he complained that his hit-and-run offense "define[s] substantial bodily harm but I was charged with great bodily harm." The circuit court denied the motion because the issues therein were undeveloped.

and run causing great bodily harm, or a hit and run causing death. *See* WIS. STAT. § 346.74(5)(a)-(d) (2015-16). Thus, the definition of substantial bodily harm does not come into play on the facts of this case. *See* ***Davis***, 371 Wis. 2d 737, ¶16 (definition of substantial bodily harm irrelevant to case because charging statute penalized only causing bodily harm or great bodily harm and did not reference substantial bodily harm).

In any event, "it is not out of the question to expect some overlap between the definitions of 'great bodily harm' and 'substantial bodily harm.'" *See* ***id.***, ¶21. "Just because all fractures meet the definition of substantial bodily harm, that does not imply that a particular fracture … cannot be serious enough to qualify as an 'other serious bodily injury' for purposes of being great bodily harm." ***Id.*** Distinguishing among the various levels of harm will often "'fall into a twilight zone' that the jury must resolve." *See* ***id.*** (citation omitted).

Though Beck initially expressed some concern about whether S.J.'s injury constituted great bodily harm, he was given the opportunity to review the matter with his attorney and make a decision on how to proceed. He indicated a desire to proceed with the guilty plea. By entering a guilty plea to hit and run causing great bodily harm, Beck conceded that the injury sufficed as great bodily harm, gave up the opportunity to challenge the sufficiency of the evidence, and waived his right to make the State prove the elements of the offense beyond a reasonable doubt. *See* ***State v. Kelty***, 2006 WI 101, ¶¶18, 30, 41, 294 Wis. 2d 62, 716 N.W.2d 886. Therefore, based on the foregoing, we conclude there is no arguable merit to a claim that Beck's pleas were anything other than knowing, intelligent, and voluntary.

Appellate counsel also discusses 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,

and whether the sentence was harsh or excessive. 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, *see* ***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 circuit court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider a variety of 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* ***id.*** Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors.

For the hit-and-run conviction, the circuit court imposed seven years of initial confinement and three years of extended supervision out of a maximum possible fifteen years' imprisonment. For the conviction for operating a motor vehicle without the owner's consent, the circuit court imposed a concurrent maximum sentence of one and one-half years of imprisonment and two years of extended supervision.[5] The concurrent sentences imposed, which total ten years' imprisonment, are well within the possible maximum of eighteen and one-half-years' imprisonment, *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

[5] The circuit court originally imposed two years of initial confinement and two years of extended supervision on the conviction for operating a motor vehicle without the owner's consent. However, this exceeded the statutory maximum. Recognizing its error, the circuit court reconvened the parties later in the day and commuted the sentence to the maximum of three and one-half years' imprisonment. *See* WIS. STAT. § 973.13.

Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to a challenge to the circuit court's sentencing discretion.[6]

In his reply to the no-merit report, Beck notes that he was charged with a violation of WIS. STAT. § 346.67 (2015-16) and asserts that the statute's number "means it was an accident on the highway. I was never on the highway in an accident. The accident never happened on the highway." He requests that we change the statute number because he says it is affecting his eligibility for the "early release program" and it is false.

One of the elements the State must prove in order to show a violation of WIS. STAT. § 346.67 (2015-16) is that "[t]he defendant operated a vehicle involved in an accident on a highway." *See* WIS JI—CRIMINAL 2670. We suspect that Beck raises this issue because the collision with the Navigator occurred on North Avenue and not on a road specifically containing "highway" in its name. But the applicable definition of "highway" includes "all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel." *See* WIS. STAT. § 340.01(22) (2015-16). In other words, for purposes of § 346.67 (2015-16), a "highway" includes any public road, and Beck was indisputably on a public road, so there is no arguable merit to a challenge to the charging statute.

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

[6] In his *pro se* postconviction motion, Beck also complained that he felt "oversentenced" because the plea agreement had called for four years of initial confinement and four years of extended supervision. The State made the recommendation as agreed. During the plea colloquy, though, the circuit court asked Beck, "Do you understand what the lawyers say to me about sentencing is a recommendation, and I don't have to follow it?" Beck answered affirmatively.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Carly Cusack is relieved of further representation of Beck 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