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

August 28, 2019

To:

Hon. M. Joseph Donald
Circuit Court Judge
821 W. State St., Rm. 506
Milwaukee, WI 53233

Christopher D. Sobic
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4116

John Barrett
Clerk of Circuit Court
821 W. State Street, Rm. G-8
Milwaukee, WI 53233

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

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

Wynette Catrice McClelland 652816
Taycheedah Correctional 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:

2018AP711-CRNM State of Wisconsin v. Wynette Catrice McClelland
(L.C. # 2016CF1003)

Before Brash, P.J., Kessler 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).

Wynette Catrice McClelland appeals from a judgment, entered upon her guilty plea, convicting her on one count of second-degree reckless homicide as a party to a crime. Appellate counsel, Christopher D. Sobic, 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] McClelland was advised of her right to file a response, and she has responded. Appellate counsel also filed a supplemental no-merit report. Upon this court's independent review of the record, as mandated by ***Anders***, counsel's reports, and McClelland's response, we conclude that there are no arguably meritorious issues that could be pursued on appeal. We therefore summarily affirm the judgment.

McClelland and Breanna Eskridge witnessed Antonio Smith shoot and kill Eddie Powe on July 11, 2015. After the homicide, Smith repeatedly called McClelland because he was concerned that Eskridge would identify him to police. During the calls, Smith told McClelland that he intended to kill Eskridge.

On July 19, 2015, McClelland was driving her car with Eskridge, Eskridge's sister, and another person as passengers. McClelland received multiple calls from Smith and noticed he was following her in his car. Smith told McClelland, "As soon as you drop that bitch off, I'm going to kill her," and instructed McClelland to drop Eskridge wherever Eskridge wanted. McClelland told Smith where she was taking Eskridge, then dropped Eskridge and her sister off and drove away, without warning them about Smith. Smith killed Eskridge. When questioned by police, McClelland initially denied knowing anything about what happened to Eskridge.

McClelland was charged with one count of first-degree intentional homicide with use of a dangerous weapon as a party to a crime.[2] Eventually, the State agreed to amend the charge to one count of second-degree reckless homicide as a party to a crime in exchange for McClelland's

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

[2] The criminal complaint also charged Smith with the same offense.

guilty plea, a full statement, and her truthful testimony against Smith in this and two other cases. At the time of her plea hearing, McClelland had already given a statement, and the State indicated its intent to call her at Smith's jury trial scheduled thereafter. After a colloquy, the circuit court accepted McClelland's plea to the reduced charge. It later sentenced her to twelve years of initial confinement and eight years of extended supervision.

The first potential issue appellate counsel discusses is whether McClelland should be allowed to withdraw her plea as not knowing, intelligent, and voluntary. Our review of the record—including the plea questionnaire and waiver of rights form and addendum, attached jury instructions for second-degree reckless homicide and party to a crime liability, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

In her response to the no-merit report, McClelland asserts that a review of the plea colloquy "will clearly show that she did not understand the nature and elements of the reckless homicide charge." We disagree.

First, McClelland does not tell us specifically what she failed to understand. Though her argument need not be particularly sophisticated, she must still allege sufficient material facts warranting relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996); *see also* ***Bangert***, 131 Wis. 2d at 274-75 (defendant claiming defective plea colloquy must allege a prima facie violation of required procedures and that he or she did not understand information that should have been provided at the plea hearing).

Second, the plea hearing transcript belies any claim that McClelland did not understand the nature and elements of the reckless homicide charge. The transcript shows that McClelland reviewed and understood the criminal complaint, so she "[knew] what the charges [were] about," and that she had reviewed the jury instructions for party to a crime liability and second-degree reckless homicide with trial counsel. The circuit court then carefully reviewed the elements of both party to a crime liability and second-degree reckless homicide with McClelland, with her expressing her understanding of each element.

The circuit court next asked the State if the statement McClelland gave pursuant to the plea agreement corroborated her statement as recited in the complaint and whether the State's party to a crime theory was that she knew but did not warn Eskridge that Smith was following them and planned to kill her. The State so confirmed, expounding slightly on its party to a crime reasoning. The circuit court then confirmed that Eskridge understood the State's explanation and "[broke] it down" with her, including walking through the events from McClelland talking on the phone with Smith to McClelland dropping Eskridge off. McClelland acknowledged each factual point. The circuit court then inquired, "So do you understand how your intentionally aiding and abetting led to the homicide of Breanna Eskridge?" McClelland answered, "Yes, sir." Accordingly, we are satisfied that the record establishes no arguable merit to a claim that McClelland's plea was anything other than knowing, intelligent, and voluntary.

The other issue appellate counsel discusses is 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. 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 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. The twenty-year sentence imposed is well within the twenty-five year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is 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). There would be no arguable merit to a challenge to the court's sentencing discretion.

McClelland raises several other issues in her no-merit response. Appellate counsel responded to one of them—McClelland's claim that the only reason she pled guilty was that trial counsel told her she would only receive five to six years of initial confinement. Appellate counsel reports that he consulted with McClelland after reviewing her response and, according to her, trial counsel explained that he would ask the circuit court to sentence her "to either four to five or five to six years initial confinement, and that he would ask for more extended supervision time than initial confinement time as part of the total ten year sentence." McClelland also told appellate counsel that trial counsel did not specifically promise or guarantee five to six years of initial confinement, though her conversations with trial counsel made her feel like that time was guaranteed. However, McClelland also told appellate counsel that she understood that she could

receive the maximum sentence. The record reflects that trial counsel's sentencing recommendation was consistent with what McClelland told appellate counsel.

In light of the foregoing, it is apparent that McClelland was not promised, and did not believe, she would only receive five to six years of initial confinement. Further, an incorrect sentencing prediction by trial counsel does not provide grounds for relief. *See* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. Therefore, we conclude there is no arguable merit to a claim that McClelland was induced to enter a plea by a promise or prediction of no more than six years of initial confinement.

McClelland claims that she should be allowed to withdraw her plea because trial counsel was ineffective in four ways. After sentencing, a plea may be withdrawn if necessary to correct a manifest injustice. *See* ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 769 N.W.2d 110. The defendant has the burden to show a manifest injustice by clear and convincing evidence. *See* ***id.*** "Ineffective assistance of counsel can constitute a 'manifest injustice.'" *See* ***id.*** (citation omitted).

First, McClelland argues that trial counsel failed to shift culpability to Smith by failing to argue Smith acted alone. It was undisputed that Smith was the shooter and that he was the primary force behind Eskridge's death. However, the State charged McClelland as a party to the crime for aiding and abetting the homicide, and McClelland does not refute the facts of her assistance. Phone records showed that Smith and McClelland had been in contact no fewer than twenty-six times just prior to the homicide. Despite initially denying any knowledge of what happened to Eskridge, McClelland later admitted that she told Smith where she was taking Eskridge and her sister; McClelland also admitted that Smith told her he was going to kill

Eskridge. We discern no arguable merit to a claim that trial counsel was ineffective for failing to shift culpability.

Second, McClelland makes multiple arguments that boil down to the same point: because she was afraid of Smith, the charges should have been amended "to a lesser degree of 'Neglect' homicide" that would have limited her total exposure to ten years' imprisonment, and trial counsel was ineffective for not pursuing such a charge.

A felony with a maximum term of ten years' imprisonment is a Class G felony. *See* WIS. STAT. § 939.50(3)(g) (2015-16). The only class G homicides in WIS. STAT. ch. 940 (2015-16) ("crimes against life and bodily security") are *negligent* homicides, none of which are applicable here. *See* WIS. STAT. § 940.07 (2015-16) (negligent control of a vicious animal); § 940.08 (2015-16) (negligent handling of a dangerous weapon, explosives, or fire); § 940.10 (2015-16) (negligent operation of a vehicle). Thus, it is not apparent what "neglect homicide" McClelland believes trial counsel should have pursued.

To the extent that McClelland is actually arguing that she had a coercion defense under WIS. STAT. § 939.46(1) (2015-16),[3] we note that such a defense would have mitigated the original first-degree intentional homicide charge to second-degree intentional homicide. *See* ***id.*** Second-degree intentional homicide is a Class B felony. *See* WIS. STAT. § 940.05(1) (2015-16).

[3] Under WIS. STAT. § 939.46(1) (2015-16):

> [a] threat by a person other than the actor's coconspirator which causes the actor reasonably to believe that his or her act is the only means of preventing imminent death or great bodily harm to the actor or another and which causes him or her so to act is a defense to a prosecution for any crime based on that act[.]

Thus, entering a plea to secure a reduction in the charge to second-degree reckless homicide, which is a Class D felony, is an objectively better result for McClelland than invoking the coercion defense to first-degree intentional homicide. Additionally, McClelland's plea to second-degree reckless homicide waived the opportunity to invoke a defense to that charge. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

Based on the foregoing, there is no arguable merit to a claim that McClelland's offense should have been reduced to a "neglect homicide" or that trial counsel was ineffective for failing to seek such an amendment. There is also no arguable merit to a claim that trial counsel should have pursued a coercion defense to second-degree reckless homicide.

Third, McClelland makes several arguments that can be summarized as a claim that trial counsel was ineffective for not being prepared for trial, including failure to prepare an opening statement, failure to secure witnesses, and failure to seek a continuance. Aside from the fact that these complaints are wholly conclusory—McClelland does not indicate what witnesses should have been secured or why or what purpose a continuance would have served—there was no reason for trial counsel to prepare for trial once McClelland agreed to resolve the case through a plea. We discern no arguably meritorious claim.

Fourth, McClelland argues that trial counsel was ineffective for advising her to take a plea because there was "no plea bargain which were made in exchange for the plea to the second degree reckless homicide." This argument is nonsensical. The nature of the bargain is clear: in exchange for McClelland's plea, full statement, and cooperation in prosecuting Smith, the State reduced McClelland's charge from first-degree intentional homicide with a dangerous weapon to second-degree reckless homicide with no penalty enhancer. If nothing else, this reduced her

potential prison exposure from life without the possibility of extended supervision plus an additional five years for the penalty enhancer to a maximum of twenty-five years. There is no arguable merit to claiming trial counsel was ineffective for recommending the plea.

Finally, McClelland also argues there may be a basis on which to seek sentence modification based on a new factor—namely, her assistance to law enforcement and Smith's resulting homicide convictions. *See, e.g.*, ***State v. Doe***, 2005 WI App 68, ¶10, 280 Wis. 2d 731, 697 N.W.2d 101. A new factor is a fact or set of facts that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975); *see also* ***State v. Harbor***, 2011 WI 28, ¶¶40, 57, 333 Wis. 2d 53, 797 N.W.2d 828. McClelland claims "[t]he parties may have little knowledge that Ms. McClelland had cooperated with the Milwaukee County District Attorney Office, they did not know about the full extent and results of her [cooperation,] including her testifying at her Co-defendant, Mr. Smith['s] jury trial … after being sentence[d] herself by this Court."

Electronic docket entries[4] indicate that Smith faced consolidated trials charging him with three counts of first-degree intentional homicide, including Eskridge's, and ten other felonies. Trial in those cases began on February 13, 2017, in front of the same circuit court judge handling McClelland's case. The circuit court heard McClelland's testimony—a fact her trial attorney alluded to at her sentencing—and Smith's cases were ultimately resolved when he pled guilty to

[4] This court "may take judicial notice of any fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See* ***State v. Bullock***, 2014 WI App 29, ¶20 n.3, 353 Wis. 2d 202, 844 N.W.2d 429 (citations and quotation marks omitted).

the three homicide counts on February 22, 2017, approximately a week before McClelland's February 28, 2017 sentencing hearing. To suggest that McClelland's role in Smith's cases was unknown to the circuit court or the parties at the time of her sentencing is without merit. In fact, the State advised the court:

> Putting the homicide charge together for the Breanna Eskridge murder was a top priority for a long time. And we just weren't quite there until Ms. McClelland confessed and agreed to give us a statement under debrief and agreed to testify against Antonio Smith. I just, I'm not certain that case ever would have gotten charged and brought to conviction now if we hadn't had that missing piece.

There is no arguable merit to a claim for sentence modification based on McClelland's role in Smith's prosecutions as a "new factor."

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

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 Christopher D. Sobic is relieved of further representation of McClelland 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