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

2017AP2205-CRNM State of Wisconsin v. Arlis W. Gordon
(L.C. # 2015CF4575)

Before Brash, P.J., Dugan and Donald, 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).

Arlis W. Gordon appeals from a judgment of conviction for second-degree reckless homicide by use of a dangerous weapon and three counts of second-degree recklessly endangering safety, all as a party to the crime. His appellate counsel has filed a no-merit report pursuant to

WIS. STAT. RULE 809.32 (2017-18),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Gordon filed a response to the no-merit report, and counsel then filed a supplemental no-merit report.[2] *See* WIS. STAT. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, as mandated by ***Anders***, the judgment is summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The complaint recites that after a jury acquitted a man accused of killing Gordon's brother, an upset Gordon threatened to "do something" about the man who was acquitted. Gordon obtained a firearm from Divonte Forbes. Forbes told police that he loaned Gordon a semi-automatic handgun that had a unique green camouflage pattern on it. A few hours later, Gordon left a family gathering in a car with Forbes, Carl Barrett, and Paul Farr.[3] Farr was driving. At one point, Gordon told Farr to stop the car. Gordon and Barrett got out. They shot multiple rounds toward a house they believed was home to the acquitted man or the acquitted man's "baby mama." Gordon

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

[2] The no-merit report was filed January 8, 2018. Between February 1, 2018 and December 18, 2019, Gordon was granted thirteen extensions of time to file his response to the no-merit report. His response was finally filed on December 23, 2019. Appellate counsel's supplemental no-merit report was filed January 21, 2020.

On March 30, 2020, Gordon filed a "Response To Supplemental No Merit Report." On April 22, 2020, appellate counsel filed a "Second Supplemental No Merit Report." Because WIS. STAT. RULE 809.32 does not allow for these additional filings, we review them but need not directly address them. We observe that Gordon's response to the supplemental no-merit report complains about appellate counsel's performance. A no-merit report is an approved method by which appointed counsel discharges the duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). This court's decision accepting the no-merit report and discharging appointed counsel of any further duty of representation rests on the conclusion that counsel provided the level of representation constitutionally required.

[3] Carl Barrett and Paul Farr were named in the complaint as co-defendants.

bragged after the shooting that: "I emptied the whole clip. We lit the whole mother fucker up!" It turned out that the shooting occurred at the wrong house. Inside the house that Gordon and Barrett shot at was five-year-old Laylah Petersen, her grandparents, and her sister. Laylah was shot in the head and died.

Gordon was originally charged with being a party to the crime of first-degree intentional homicide by use of a dangerous weapon. An amended information subsequently charged Gordon with the four crimes of which he is convicted, and to which he entered guilty pleas. The plea agreement, recited at the end of the plea hearing and after the circuit court had accepted Gordon's pleas, was: "The recommendation from the [S]tate is prison up to the -[c]ourt. The family can recommend whatever they feel is appropriate up to the maximum. The defense is free to recommend whatever they feel is appropriate." As part of the agreement, a charge in a separate case was dismissed outright. Gordon was ultimately sentenced to consecutive terms, totaling thirty years of initial confinement and nineteen years of extended supervision.

The no-merit report addresses the potential issues of whether Gordon's pleas were knowingly, voluntarily, and intelligently entered and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further except as necessary to address Gordon's response.

In his response, Gordon suggests that the plea colloquy was entirely inadequate because the circuit court: did not confirm Gordon's understanding of the penalty for second-degree recklessly endangering safety until the end of the colloquy and after Gordon uttered his guilty pleas to those charges; did not inquire as to Gordon's understanding of the prosecution's agreement to

"remain silent" at sentencing; did not inform Gordon that at sentencing the court is not bound to follow the parties' sentencing recommendation; did not assure that Gordon had a correct understanding of the elements of the offenses, particularly party to the crime liability; did not ascertain that Gordon had a correct understanding of the factual basis for the convictions; and did not ask Gordon any questions requiring more than a yes or no answer. Gordon also claims that his pleas were not knowing and voluntary because he relied on inaccurate advice from trial counsel about the length of the sentences he would likely receive, the meaning of the plea agreement, the nature of the charges, the evidence against him, and the degree of risk he faced if he did not take the plea agreement. These claims in Gordon's response stand in sharp contrast to his affirmations during the plea colloquy that he had read the jury instructions outlining the elements of the offenses, that he had read the complaint or had it read to him, that he was satisfied with the representation of trial counsel, and his declaration that, "I understand everything."[4]

While the plea colloquy was not a model of organization, during the plea hearing the circuit court fulfilled each of the duties outlined in ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and WIS. STAT. § 971.08. No particular order or manner of questioning in addressing those obligations is required. To the contrary, a circuit court has considerable flexibility to conduct a plea colloquy in a manner that best suits the circumstances. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30, 32 & n.18, 317 Wis. 2d 161, 765 N.W.2d 794. Contrary to Gordon's assertions, the circuit court was not required to ascertain his understanding of the terms used to describe the plea

[4] In addressing Gordon's claims in his response to the no-merit report, appellate counsel's supplemental no-merit report explains that in conversations with Gordon, Gordon did not express any misunderstanding about the plea agreement, the elements of the charges, the potential penalties, or whether the sentencing judge had to follow the plea agreement.

agreement;[5] the court was not required to explain that the sentences could run consecutive to each other or add up and state Gordon's total sentencing exposure; and the court was not required to recite the entirety of the party to the crime liability jury instruction when Gordon acknowledged his understanding of party to the crime liability and signed the jury instruction.[6] Additionally, the circuit court was not required to lay out a factual basis for the crime so as satisfy Gordon that he committed the crimes charged. *See* ***State v. Black***, 2001 WI 31, ¶12, 242 Wis. 2d 126, 624 N.W.2d 363.

Although the circuit court failed to give an explicit advisement as required by ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, "that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court," there was no

[5] The plea questionnaire signed by Gordon stated the agreement to be: "WSP in an amount left to the discretion of the court[; defendant] free to argue." Gordon asserts that trial counsel told him the prosecution had agreed to "remain silent" at sentencing and that only the defense would be permitted to argue at sentencing. He describes the prosecutor's remarks at sentencing that he believes violated the plea agreement. Even if Gordon's characterization that the prosecutor had agreed to stand silent at sentencing is true, a prosecutor's comments on the facts of the case and the defendant's character is not a plea breach when the agreement is that the prosecutor will not recommend a specific sentence. ***State v. Richardson***, 2001 WI App 152, ¶12, 246 Wis.2d 711, 632 N.W.2d 84. Gordon's additional complaint that the prosecutor breached the plea agreement by presenting a community impact statement also lacks arguable merit. No plea agreement can operate to prevent the sentencing judge from hearing relevant information. *See* ***State v. Bokenyi***, 2014 WI 61, ¶44, 355 Wis. 2d 28, 848 N.W.2d 759. The law requires information from the victim to be made available to the sentencing court regardless of what the plea agreement may be. *See* ***id.*** at ¶¶62-64. The community impact statement submitted at Gordon's sentencing is likewise a victim's statement.

[6] Even if we accept Gordon's claim that in describing party to the crime liability the circuit court inappropriately dropped the language that the "person who commits the crime knows of the willingness to assist," the plea colloquy was not defective. In ***State v. Brown***, 2012 WI App 139, ¶1, 345 Wis. 2d 333, 824 N.W.2d 916, we held that a plea colloquy at which the circuit court fails to explain party-to-the-crime liability is not defective if the defendant admits to directly committing the act. Such an admission renders superfluous the explanation of party-to-the-crime liability. ***Id.*** Here, Gordon admitted to the author of the alternative presentence report filed by Gordon that the "the majority of the information contained in the criminal complaint is accurate." The complaint recites that Gordon was one of the shooters. Therefore, the circuit court's failure to give a complete explanation of party-to-the-crime liability did not render the plea colloquy defective.

agreement for the circuit court to approve or reject as the prosecutor agreed to leave the length of the prison sentence to the sentencing court. ***Hampton*** applies only when "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court." ***Id.***, ¶32. Gordon was not affected by that particular defect in the plea colloquy and any argument that Gordon should be permitted to seek plea withdrawal under Hampton lacks arguable merit. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (no manifest injustice justifying plea withdrawal exists where the court failed to advise defendant but followed the plea agreement).

Gordon's claims that he should be allowed to withdraw his plea because he relied on inaccurate assessments by trial counsel as to the likely sentence[7] or strength of the evidence against Gordon do not present arguably meritorious grounds for plea withdrawal. That counsel misjudged the likely sentence is not a basis for an ineffective assistance of counsel claim. ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272. "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." ***Brady v. United States***, 397 U.S. 742, 757 (1970). Further, as appellate counsel concludes in the supplemental no-merit report by a detailed examination of the evidence against Gordon, trial counsel's assessment that Gordon would likely be found guilty at a jury trial was not deficient performance. Although a significant portion of Gordon's response to the no-merit is

[7] The manifest injustice standard for plea withdrawal cannot be met by Gordon's "disappointment in the punishment [he] received;" the manifest injustice standard "serves as a deterrent to impede defendants from testing the waters for possible punishments." ***State v. Manke***, 230 Wis. 2d 421, 426, 602 N.W.2d 139 (Ct. App. 1999).

devoted to assailing the credibility of the potential witnesses against him, that exercise has no purpose when Gordon chose not to proceed to trial.

Gordon also appears to believe that his trial counsel was ineffective for not contacting certain witnesses as alibi witnesses. Gordon chose to enter his guilty pleas knowing whether or not he had an alibi. He waived his potential alibi defense when he pled guilty to the charges. It is well established that a plea of guilty, knowingly and understandingly made, waives nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 123, 332 N.W.2d 744 (1983). Gordon cannot claim that he was prejudiced by his trial counsel's failure to contact witnesses that would never have testified after Gordon chose to waive a possible alibi defense and test the strength of the evidence.

Gordon's final claim is that he is entitled to withdraw his pleas because of newly discovered evidence. Gordon attaches to his response an affidavit from the driver of the car, Paul Farr, dated September 4, 2018, in which Farr recants his statement that he saw Gordon in possession of the green camouflage gun which was said to have been used in the shooting. In his affidavit, Farr explains that all the information he told investigators about Gordon's possession of the gun was "hearsay information given to me by Divonte Forbes …" and that he "related the hearsay information under false pretenses in hopes of receiving favorable treatment at sentencing." Gordon suggests that Farr's affidavit demonstrates that Farr only told police what Forbes told him to say and that it reveals Forbes' scheme to blame Gordon for the little girl's death and deflect responsibility from Forbes.

For newly discovered evidence to constitute a manifest injustice and warrant the withdrawal of a plea the following criteria must be met. First, the defendant must prove, by clear

and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative. If the defendant proves these four criteria by clear and convincing evidence, the circuit court must determine whether a reasonable probability exists that a different result would be reached in a trial. Finally, when the newly discovered evidence is a witness's recantation, we have stated that the recantation must be corroborated by other newly discovered evidence. ***State v. McCallum***, 208 Wis. 2d 463, 473–74, 561 N.W.2d 707 (1997). The reasonable probability of a different outcome criteria is whether "there is a reasonable probability that a jury, looking at both the accusation and the recantation, would have a reasonable doubt as to the defendant's guilt." ***Id.*** at 474.

Gordon's potential claim for plea withdrawal based on newly discovered evidence lacks arguable merit because Gordon cannot establish a reasonable probability that a different result would be reached at trial.[8] Farr was not the only person to put Gordon in possession of a gun. Farr's recantation of personal knowledge of Gordon's possession of the camouflage gun does not erase other evidence of Gordon's involvement in the shooting supplied by Barrett and Forbes, as well as Gordon's own inculpatory statement to another individual.[9] Farr's recantation only takes away Farr's direct knowledge of the Gordon's possession of the camouflage gun and does not

[8] In addition, Gordon would not be able to establish that the newly discovered evidence is not merely cumulative. Farr's admission that he lied to the police about seeing Gordon with the gun impugns Farr's credibility. Farr first told police he knew nothing about the shooting, but cell phone evidence showed him in the vicinity of the shooting. The complaint recites that Farr also admitted in the presence of Leandrew Riley that he had driven Gordon to the site of the shooting, although he was unaware of what was going to happen. Thus, Farr's credibility was already subject to attack at trial before the recantation. That Farr's credibility was questionable was something known to Gordon at the time Gordon entered his plea. Newly discovered evidence is cumulative when it tends to address a fact established by existing evidence. ***State v. McAlister***, 2018 WI 34, ¶37, 380 Wis. 2d 684, 911 N.W.2d 77.

[9] The complaint recites that Gordon told Antonio Coleman that he had shot at the wrong house.

eliminate the possibility that Gordon was a shooter. Contrary to Gordon's assertion, Farr's recantation does not expose an elaborate scheme by Forbes to frame Gordon for the shooting.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Gordon further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. Rule 809.21.

IT IS FURTHER ORDERED that Attorney Sara H. Roemaat is relieved from further representing Arlis W. Gordon in this appeal. *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