



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](http://www.wicourts.gov)

**DISTRICT IV**

October 8, 2020

To:

Hon. Robert J. Shannon  
Circuit Court Judge  
1516 Church St.  
Stevens Point, WI 54481

Michael E. Covey  
Covey Law Office  
P.O. Box 1771  
Madison, WI 53701-1771

Lisa M. Roth  
Clerk of Circuit Court  
Portage Co. Courthouse  
1516 Church Street  
Stevens Point, WI 54481-3598

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

Cass Cousins  
Assistant District Attorney  
1516 Church St.  
Stevens Point, WI 54481-3501

Billy Jo E. McSherry 514207  
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:

---

2019AP545-CRNM      State of Wisconsin v. Billy Jo E. McSherry (L.C. # 2017CF374)

Before Fitzpatrick, P.J., Blanchard, and Nashold, 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).**

Attorney Michael Covey, appointed counsel for Billy Jo McSherry, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2017-18)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). McSherry was sent a copy of the report and has

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

filed a response, and Attorney Covey has filed a supplemental no-merit report. Upon consideration of the report, the response, the supplemental report, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

McSherry was charged with a number of crimes arising out of an intoxicated driving incident in which McSherry struck a motorcycle, killing the motorcycle's driver and seriously injuring its passenger. McSherry's daughter was a passenger in her vehicle and, according to the complaint, McSherry's daughter was also injured.

The parties entered into a plea agreement under which McSherry agreed to plead guilty or no contest to (1) homicide by intoxicated use of a vehicle while having a prior intoxicant-related conviction; (2) injury by intoxicated use of a vehicle; and (3) operating while intoxicated and causing injury as a second or subsequent offense, with a minor child in the vehicle. The State agreed that three other charges would be dismissed and read in, and that three additional charges would be dismissed outright. The State further agreed to cap its sentencing recommendation at 20 years of initial confinement on the homicide charge, and to recommend shorter concurrent sentences on the other two charges to which McSherry would plead.

The circuit court accepted guilty pleas from McSherry on the three counts specified in the plea agreement, and the court dismissed the remaining charges in accordance with the plea agreement. The court imposed concurrent sentences as follows: on the homicide charge, a total of 25 years, consisting of 15 years of initial confinement and 10 years of extended supervision; on the injury by intoxicated use of a vehicle charge, a total of 12-1/2 years, consisting of 7-1/2 years of initial confinement and five years of extended supervision; and on the operating while

intoxicated and causing injury charge, a total of five years, consisting of three years of initial confinement and two years of extended supervision.<sup>2</sup>

The no-merit report addresses whether McSherry's pleas were knowing, intelligent, and voluntary. We agree with counsel that there is no arguable merit to this issue. The plea colloquy that the circuit court conducted, including references to McSherry's plea questionnaire and waiver of rights form, complied with the requirements of WIS. STAT. § 971.08 and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The record shows no other arguable ground for plea withdrawal.

The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. We agree with counsel that there is no arguable merit to this issue. The circuit court discussed the required sentencing factors along with other relevant factors, and the court did not rely on any inappropriate factors. See *State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. We see no other arguable basis for McSherry to challenge her sentence.<sup>3</sup>

In her response to the no-merit report, McSherry asserts that there were a number of factual inaccuracies in the presentence investigation report and the defense sentencing packet.

---

<sup>2</sup> On the injury by intoxicated use of a vehicle charge, the circuit court initially imposed a 13-year sentence, but the court revised the sentence to 12-1/2 years when the prosecutor noted that this was the maximum.

<sup>3</sup> McSherry was ordered to pay \$100,000 in restitution after a hearing before a court commissioner that resulted in findings adopted by the circuit court. In an order dated September 14, 2020, this court noted that the record does not include a transcript of the hearing, and we requested further input from no-merit counsel. In his response filed September 21, 2020, counsel informed this court that McSherry's potential restitution exposure was reduced from \$196,800 to \$100,000, and that McSherry does not wish to pursue any claim relating to restitution.

These alleged inaccuracies are for the most part minor.<sup>4</sup> More importantly, though, we agree with no-merit counsel that there is nothing to show that the circuit court relied on any information that McSherry asserts was inaccurate. Because such reliance would be necessary to seek resentencing, there is no arguable merit to pursuing further proceedings relating to the asserted inaccuracies. *See State v. Travis*, 2013 WI 38, ¶22, 347 Wis. 2d 142, 832 N.W.2d 491 (“Once a defendant shows that the information is inaccurate, he or she must establish by clear and convincing evidence that the circuit court actually relied on the inaccurate information.”).

McSherry makes other assertions in her response that are most reasonably summarized as an argument that the circuit court should have given more weight to some of her difficult life circumstances when the court imposed sentence. There is no arguable merit to this issue. The circuit court considered McSherry’s circumstances, including mental health issues and past domestic abuse, and the court determined that some of these circumstances were mitigating factors. The court’s overall sentencing decision makes clear that the court concluded that other factors nonetheless warranted the sentence imposed. An appellate court’s role is not to re-weigh the circuit court’s balancing of factors at sentencing. *See Cunningham v. State*, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977) (“Giving consideration to various relevant factors does involve a weighing and balancing operation, but the weight to be given a particular factor in a particular case is for the trial court.”).

We see no further assertions in McSherry’s response showing any other potential issue for appeal, and our review of the record discloses no other potential issues.

---

<sup>4</sup> For example, McSherry asserts that, contrary to information in the defense packet, she was not using heroin while working as a dancer and that instead she had tried heroin only three times in 2007.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Michael Covey is relieved of any further representation of Billy Jo McSherry 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*