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August 16, 2022

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

2021AP897-CRNM State of Wisconsin v. Herbert Martinez Pirtle (L.C. # 2019CF1714)

Before Brash, C.J., Dugan and White, 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).

Herbert Martinez Pirtle appeals a judgment of conviction entered upon his guilty pleas to second-degree recklessly endangering safety and possession of cocaine as a second or subsequent offense. His appellate counsel, Attorney Katie Babe, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] In the no-merit report, appellate counsel examined Pirtle's pleas and sentences. In a supplemental no-

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

merit report filed at our request, appellate counsel addressed sentence credit. Pirtle then filed a response. Upon consideration of the no-merit report, the supplemental no-merit report, and Pirtle's response, and upon an independent review of the record as mandated by RULE 809.32 and ***Anders***, we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, two Milwaukee police officers in a marked squad car saw a Ford Escape without registration plates travelling on a Milwaukee city street at approximately 6:44 p.m. on April 18, 2019. The officers attempted to conduct a traffic stop, but the Ford accelerated and fled. The officers pursued the Ford through the city for nearly two miles. During the pursuit, the Ford reached speeds of over seventy miles per hour, and the driver disregarded red stop lights at eight intersections. At an intersection at 400 West Virginia Street, the Ford ignored a stop sign and collided with a Honda Civic. Squad camera video recorded the Ford rolling over several times, striking a tree, and coming to rest on its side while a male, subsequently identified as Pirtle, was ejected from the driver's seat. When police approached the Ford, they found a front seat passenger trapped inside.

Paramedics treating Pirtle at the scene of the collision were required to cut off his pants to assist him, and police observed a baggie containing a white chunky substance inside of the pants. During a later search of Pirtle's pants pockets, police found a baggie containing a powdery substance. Field tests determined that the baggies contained 4.7 grams of cocaine and .40 grams of fentanyl respectively. Further investigation revealed that Pirtle had a prior conviction for possession of a controlled substance and that the conviction remained of record and unreversed.

The State charged Pirtle with four felonies: second-degree recklessly endangering safety, possession of cocaine as a second or subsequent offense, attempting to flee or elude an officer, and possession of narcotic drugs. Pursuant to a plea agreement, Pirtle pled guilty to second-degree recklessly endangering safety and to possession of cocaine as a second or subsequent offense. The State agreed to recommend "substantial prison" as a disposition, to move to dismiss the fleeing charge outright, and to move to dismiss and read in the charge of possessing narcotic drugs. The circuit court accepted Pirtle's guilty pleas and granted the State's dismissal motions.

At sentencing, Pirtle faced maximum penalties of a $25,000 fine and ten years of imprisonment for second-degree recklessly endangering safety, and he faced maximum penalties of a $10,000 fine and three years and six months of imprisonment for possession of cocaine as a second or subsequent offense. *See* WIS. STAT. §§ 941.30(2), 961.41(3g)(c), 939.50(3)(g), (i). The circuit court imposed a nine-year term of imprisonment for second-degree recklessly endangering safety, bifurcated as five years of initial confinement and four years of extended supervision. The circuit court also imposed a consecutive, evenly bifurcated two-year term of imprisonment for possession of cocaine as a second or subsequent offense, and the circuit court ordered Pirtle to serve the two sentences consecutive to the revocation sentence that he was already serving for an earlier offense. The circuit court found Pirtle eligible for both the challenge incarceration program and the Wisconsin substance abuse program after serving three years of initial confinement, and the circuit court ordered him to pay $10,808.62 in restitution.

We first consider whether Pirtle could pursue an arguably meritorious claim for plea withdrawal on the ground that his guilty pleas were not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). We agree with appellate

counsel that Pirtle could not do so. At the outset of the plea hearing, after placing Pirtle under oath, the circuit court established that Pirtle was twenty-five years old and that he had a high school education. The circuit court also established that Pirtle had signed a guilty plea questionnaire and waiver of rights form and addendum, and that he had reviewed them with his trial counsel and understood their contents. *See* ***State v. Pegeese***, 2019 WI 60, ¶¶36-37, 387 Wis. 2d 119, 928 N.W.2d 590. The circuit court then conducted a colloquy with Pirtle as required when accepting a plea other than not guilty. *See* ***id.***, ¶23; *see also* WIS. STAT. § 971.08.

In the no-merit report, appellate counsel examines whether Pirtle could pursue an arguably meritorious claim that the plea colloquy was inadequate because the circuit court failed to advise him that it was not bound by the terms of any plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶¶32, 38, 274 Wis. 2d 379, 683 N.W.2d 14. We agree with appellate counsel's conclusion that he could not do so. ***Hampton*** requires that when "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court." ***Id.***, ¶32 (citation and emphasis omitted). Here, however, the State did not make any sentence concessions requiring court approval—the State requested a substantial prison sentence for the two convictions—and the circuit court approved the charge concessions by granting the State's motions to dismiss one of the remaining charges outright and to dismiss and read in the other. Accordingly, the omission of a warning during the plea colloquy that the circuit court was not bound by the parties' plea agreement was an insubstantial defect that does not warrant plea withdrawal. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441.

No other aspect of the plea colloquy requires further discussion. We are satisfied that appellate counsel properly analyzed the sufficiency of the plea proceedings and that the record—including the plea questionnaire and waiver of rights form and addendum, the attached jury instructions that Pirtle signed, and the plea hearing transcript—demonstrates that Pirtle entered his guilty pleas knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08; *see also* ***Bangert***, 131 Wis. 2d at 266-72. Accordingly, we agree with appellate counsel that the record does not reflect any basis for an arguably meritorious challenge to the validity of the pleas.

We also agree with appellate counsel that Pirtle could not pursue an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The circuit court indicated that deterrence and Pirtle's rehabilitation were the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The circuit court's discussion included the mandatory sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentences imposed were within the maximums allowed by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and were not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In response to the no-merit reports, Pirtle asserts that his sentences should be concurrent "because it's not a violent case." Pursuant to WIS. STAT. § 973.15(2)(a), however, a sentencing court has discretion to determine whether sentences should be served "concurrent with or consecutive to any other sentence imposed at the same time or previously." Here, the circuit court implicitly rejected any suggestion that Pirtle's actions were nonviolent, equating his

reckless driving with firing a loaded gun into a crowd. The circuit court then determined that Pirtle's sentences should all be consecutive because he was on supervision for an earlier offense when he committed the crimes in this case and nonetheless took unacceptable risks that he knew that he should not take. Although the circuit court assessed the case differently from the way that Pirtle would have preferred, that does not demonstrate an erroneous exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206 (reflecting that our inquiry is whether discretion was exercised, not whether it could have been exercised differently). There is no merit to further pursuit of this issue.

At the close of the sentencing proceeding, the circuit court questioned whether Pirtle might be entitled to some credit against his sentences for his days in custody prior to sentencing. In the supplemental no-merit report, appellate counsel considered that inquiry and concluded that a claim for sentence credit would lack arguable merit. We agree with that conclusion. The record reflects that Pirtle was serving a term of community supervision for an earlier conviction when he was arrested on April 18, 2019, for offenses in this case. As a result of the arrest, the Department of Corrections (DOC) imposed a violation of supervision hold. Ultimately, the DOC revoked his extended supervision for the earlier conviction, and Pirtle thereafter remained imprisoned serving his revocation sentence throughout the pendency of the instant case. Materials submitted with the supplemental no-merit report reflect that the DOC awarded Pirtle credit against his revocation sentence for his days in custody from April 18, 2019, until he returned to prison to serve that revocation sentence. Because Pirtle's sentences in the instant case are consecutive to his revocation sentence, any claim for credit against his sentences in this case for his time in custody while serving the revocation sentence would lack arguable merit. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) ("Credit is to be given on a

day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively.").

Appellate counsel did not address the sentencing court's order that Pirtle pay $10,808.62 as restitution. Our independent review of the record satisfies us that any challenge to that order would lack arguable merit. Well in advance of sentencing, the State submitted both a victim impact statement from B.D., the driver of the Honda Civic involved in the April 18, 2019 collision, and a restitution request from B.D.'s insurance carrier. Those submissions described the financial losses that B.D. incurred as a result of the collision and requested $10,808.62 as restitution to his insurer. Pirtle did not object to the restitution request during the sentencing proceedings, and he did not contest the order for restitution after it was pronounced. Pirtle thus stipulated to the restitution requested. *See* ***State v. Szarkowitz***, 157 Wis. 2d 740, 748-49, 460 N.W.2d 819 (Ct. App. 1990) (holding that a defendant who receives a restitution summary in advance of sentencing and does not object to the restitution request constructively stipulates to the amount claimed).

Last, Pirtle asserts in his response to the no-merit reports that he pled guilty only because his trial counsel "told [him] that the judge go [sic] run [his] sentence concurrent." We observe that during the plea colloquy, Pirtle told the circuit court under oath that no one, including his attorney, had promised him anything to induce him to plead guilty. Pirtle's allegation now thus appears to be a claim that his trial counsel was ineffective for incorrectly predicting the sentence structure that the circuit court would impose. We assess claims of ineffective assistance of counsel using a familiar two-prong test: the defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d

272, however, we held that trial counsel is not ineffective if counsel recommends accepting a plea agreement that results in a more severe sentence than that predicted by counsel. "Counsel's incorrect prediction concerning defendant's sentence is not enough to support a claim of ineffective assistance of counsel." ***Id.*** (citation and ellipsis omitted). Accordingly, a claim for relief in this case based on alleged ineffective assistance of counsel would lack arguable merit.

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Katie Babe is relieved of any further representation of Herbert Martinez Pirtle. *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