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

June 25, 2024

To:

Hon. David L. Borowski
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Jill Marie Skwor
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Alicia A. Ojeda 647637
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:

2022AP2172-CRNM State of Wisconsin v. Alicia A. Ojeda (L.C. # 2020CF3734)

Before White, C.J., Geenen and Colón, 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).

Alicia A. Ojeda appeals from a judgment, entered on her guilty pleas, convicting her of two counts of second-degree reckless homicide. Appellate counsel, Jill Marie Skwor, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Ojeda has filed a response. Upon this court's independent review of the record, as mandated by ***Anders***, counsel's report, and Ojeda's response, we conclude there

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Around 8:30 p.m. on October 17, 2020, Ojeda was driving northbound on South 27th Street and collided with a southbound car making a left turn at an intersection. Ojeda was traveling over seventy-five miles per hour in a forty-mile-per-hour zone.[2] The husband and wife occupants of the southbound vehicle were pronounced dead at the scene. A witness who attempted to aid the occupants of both vehicles described Ojeda to police as "high as a kite" and "out of it."[3] Ojeda, who was seriously injured, told a paramedic her phone had fallen to the car floor and slipped under the pedals, and she crashed when she reached down to retrieve the phone.

Ojeda was charged with two counts of second-degree reckless homicide and two counts of knowingly operating a motor vehicle with a suspended license, causing death. She agreed to resolve the case through a plea agreement. In exchange for guilty pleas to the reckless homicide charges, the State would move to dismiss and read in the suspended license offenses and would recommend a total sentence of twenty-five years' imprisonment. The defense would be free to argue. The circuit court accepted Ojeda's pleas and subsequently sentenced her to fifteen years of initial confinement and ten years of extended supervision for each homicide, to be served concurrently. Ojeda appeals.

[2] Ojeda's speed was obtained from an airbag control module, which records five seconds of pre-collision data. The module indicated that Ojeda was traveling at 75.8 miles per hour for the entire five seconds. However, 75.8 miles per hour is the maximum speed the module can report; any higher speeds are also reported as 75.8 miles per hour.

[3] A toxicology report later revealed that Ojeda tested positive for benzodiazepines, opiates, cocaine metabolites, and ketamine.

Appellate counsel discusses two potential issues in the no-merit report; the first is whether Ojeda should be allowed to withdraw her pleas either because they were not knowing, intelligent, and voluntary or because they were not supported by a factual basis.

To be valid, a guilty plea must be knowing, intelligent, and voluntary. ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). To that end, a number of requirements have been established for circuit courts accepting guilty pleas as a way to help ensure such pleas are properly entered by the defendant. *See, e.g.*, ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (listing circuit court duties); WIS. STAT. § 971.08. Our review of the record—including the plea questionnaire and waiver of rights form and addendum, the attached jury instructions for second-degree reckless homicide, and the plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas.

In her no-merit response, Ojeda writes, "Please reject the no-merit report, as I now understand that I have a constitutional right (14th Amendment) to a trial by jury." We construe this as a claim that Ojeda was not fully aware of the constitutional rights she was giving up with her pleas, making her plea involuntary and invalid.

A defendant who seeks to withdraw a plea after sentencing must prove that the withdrawal is necessary to correct a manifest injustice. ***State v. Villegas***, 2018 WI App 9, ¶18, 380 Wis. 2d 246, 908 N.W.2d 198. A plea that is not entered knowingly, intelligently, and voluntarily constitutes a manifest injustice. ***State v. Sulla***, 2016 WI 46, ¶24, 369 Wis. 2d 225, 880 N.W.2d 659. There are two routes available for a plea withdrawal motion. ***Villegas***, 380 Wis. 2d 246, ¶18. One is to show a plea was not knowing, intelligently, and voluntarily entered because of a defect in the plea colloquy. ***Id.***, ¶20; ***Bangert***, 131 Wis. 2d at 274. The other is to

show that the plea was infirm based on a factor outside of the plea colloquy. ***State v. Howell***, 2007 WI 75, ¶74, 301 Wis. 2d 350, 734 N.W.2d 48; ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996).

Here, there is no arguable merit to a ***Bangert*** plea withdrawal motion because, as noted, the record reflects that the circuit court properly complied with the mandatory procedures for accepting guilty pleas. Moreover, Ojeda signed the plea questionnaire, thereby acknowledging that she was "giv[ing] up my right to a jury trial, where all 12 jurors would have to agree that I am either guilty or not guilty." The circuit court also directly asked Ojeda not once but twice whether she understood she was giving up the right to a jury trial, and she answered affirmatively both times. There is also no arguable merit to a ***Bentley*** plea withdrawal motion. The record does not reveal any factors outside of the colloquy that would interfere with Ojeda's understanding of her constitutional rights, and Ojeda does not identify any factors outside the record that might have prevented her understanding. In short, there is no arguable merit to a claim that Ojeda's pleas were anything other than knowing, intelligent, and voluntary.

Likewise, there is no arguable merit to a claim that the pleas were unsupported by a factual basis. The parties stipulated to using the complaint as a factual basis, and the complaint more than adequately supports the charges to which Ojeda pled.

The other issue appellate counsel discusses in the no-merit report is whether the circuit court may have erroneously exercised its sentencing discretion. ***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, ***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 other factors. ***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. ***Id.***

Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The twenty-five-year sentence imposed is well within the fifty-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 is no arguable merit to a challenge to the court's sentencing discretion.

In her response, Ojeda also asserts that she "[did] not wish this report to be filed … [Counsel] did not explain to me that I had a right to disagree. I (the defendant) did express the desire to appeal my case; yet my [counsel] was quick to disagree." She asked that we reject the no-merit report.

It is the duty of appellate counsel to determine what issues have merit for appeal; a defendant has no right to insist that certain issues be raised. *See* ***State v. Evans***, 2004 WI 84, ¶30, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900. Sometimes, an attorney will determine that no issues have merit for appeal, and counsel may not advance frivolous arguments to the court. While Ojeda correctly recognizes that a defendant has the right to disagree with

counsel's conclusion of no merit, it is precisely that disagreement which compels counsel to file a no-merit report. *See* WIS. STAT. RULE 809.32(1)(a); ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 610, 516 N.W.2d 362 (1994). The no-merit appeal procedure exists as a way to "reconcile a defendant's right to appeal and right to effective assistance of counsel, with an attorney's duty to avoid making frivolous arguments." ***State ex rel. Office of the State Public Defender v. Court of Appeals***, 2013 WI 31, ¶29 n.8, 346 Wis. 2d 735, 828 N.W.2d 847. There is no basis on which to strike counsel's no-merit report, and no arguably meritorious issue related to the use of the no-merit process.

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 Jill Marie Skwor is relieved of further representation of Ojeda in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals