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

2012AP1119-CRNM State of Wisconsin v. Antonio Lamar Tatum (L.C. #2010CF573)

Before Curley, P.J., Fine and Kessler, JJ.

Antonio Lamar Tatum appeals from a judgment of conviction, entered upon his guilty plea, on one count of felony murder. Appellate counsel, Jeremy C. Perri, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Tatum was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Tatum's

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On January 30, 2010, Tatum gave Keith Bohannon the idea to rob Jordan Larson. Tatum and Bohannon discussed the setup, which involved Larson purchasing a car from Tatum for $1800.[2] According to Bohannon, the plan did not go entirely as expected. Tatum was supposed to simply rob Larson of the cash meant for the car but, after Bohannon dropped Larson off in the alley behind Larson's home, Tatum robbed Larson and shot him in the head and back.

Larson did not die immediately. He told witnesses and the police that Bohannon had set him up, but that it was not Bohannon who had shot him. Bohannon identified Tatum as his co-actor and the shooter. Tatum was originally charged with one count of first-degree intentional homicide as party to a crime while armed with a dangerous weapon, and one count of armed robbery as party to a crime.[3]

Tatum insisted he had not shot Larson, but admitted his involvement by claiming he was simply the getaway driver. Pursuant to a plea bargain, the State agreed that, in exchange for Tatum's guilty plea, it would amend the homicide charge to felony murder with armed robbery as the predicate offense, dismiss the separate armed robbery charge, and recommend prison time. Both sides would be free to argue the length of the sentence. The circuit court accepted the plea and later sentenced Tatum to twenty-five years' initial confinement and ten years' extended supervision.

[2] Prior to the robbery, Larson had withdrawn $2000 cash in anticipation of the transaction.

[3] The same complaint charged Bohannon with one count of armed robbery.

The first issue counsel raises is whether there is any arguable merit to a challenge to Tatum's guilty plea. In his response, Tatum raises multiple concerns about his plea's validity.

There is no arguable basis for challenging whether Tatum's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Tatum completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The form correctly acknowledged the maximum penalties Tatum faced and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262. The circuit court also conducted a plea colloquy, and our review of the record satisfies us that the colloquy complied with WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

Prior to accepting a plea, the circuit court must "determine the extent of the defendant's education and general comprehension[.]" ***Bangert***, 131 Wis. 2d at 261. Tatum complains that the circuit court did not properly ascertain his educational level. If it had, Tatum claims, it would have done more to ensure his understanding of the pleadings, given that twenty-seven-year-old Tatum had completed only the eighth grade.

The plea questionnaire form listed Tatum's education level and the circuit court inquired whether Tatum's answers on the form were correct. Tatum said they were. The circuit court also asked Tatum multiple questions to determine whether he understood the charges, whether he was confused, whether he understood everything, and whether he had any questions of the circuit court. Tatum's answers suggested no comprehension difficulties. Further, defense counsel told

the circuit court that although Tatum did not have a lot of education, he was capable of carrying on a discussion, retaining information, and asking intelligent questions. Thus, the record reveals no arguable merit to a claim that the circuit court violated ***Bangert*** by failing to determine the extent of Tatum's education and general comprehension.[4]

Tatum additionally complains that he misunderstood parts of the plea. Specifically, he claims that he thought the armed robbery charge would be dismissed and that, if it was dismissed, it could not be the basis for anything, including felony murder. He further claims that he would not have pled guilty if he had known that the armed robbery was not going to be dismissed and omitted from his record.

Though armed robbery is the predicate offense for the felony murder count, *see* WIS. STAT. §§ 940.03 & 943.32(2), felony murder is a stand-alone charge, *see* ***State v. Mason***, 2004 WI App 176, ¶21, 276 Wis. 2d 434, 687 N.W.2d 526. A defendant cannot be convicted of both felony murder and the predicate felony, because the predicate offense is always a lesser-included charge of the felony murder. *See* ***State v. Krawczyk***, 2003 WI App 6, ¶¶26-27, 259 Wis. 2d 843, 657 N.W.2d 77. Thus, the armed robbery charge *was* dismissed.[5]

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[4] To the extent that Tatum might be claiming the circuit court was required to directly and personally ask Tatum for his level of education, ***Bangert*** only requires the circuit court to "determine" the defendant's level of education and comprehension. *See* ***State v. Bangert***, 131 Wis. 2d 246, 261, 389 N.W.2d 12 (1986). Such determination can be made in ways other than with a direct question to the defendant.

[5] The judgment of conviction describes Tatum's offense as "Felony Murder-Armed Robbery" and includes a reference to the felony murder statute. The inclusion of the phrase "armed robbery" on the judgment merely specifies which of thirteen possible predicate felonies occurred. It does not represent a conviction for armed robbery.

In addition, the record belies Tatum's claims of misunderstanding. The circuit court took great care to explain the nature of the felony murder charge to Tatum. It explained how the State had originally charged two offenses and that the lawyers were offering to make it just one crime with armed robbery as the underlying felony. The circuit court further explained that by charging felony murder, the State was saying that Tatum had committed armed robbery as party to a crime, which Tatum never disputed, and that a death resulted. Tatum acknowledged his understanding of these points.[6] Ultimately, our review of the record satisfies us that there is no arguable merit to a challenge to the plea's validity.

Tatum also complains that the State violated the plea agreement. He claims that a "major inducement" for him to plead guilty was "that he would not be accused as being the actual shooter" but merely as a participant.

"A criminal defendant has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Howard***, 2001 WI App 137, ¶13, 246 Wis. 2d 475, 630 N.W.2d 244. But "[n]ot all breaches of a plea agreement require a remedy." ***Id.*** at ¶15. A defendant is not entitled to relief if the breach is technical rather than material and substantial. ***Id.*** A material and substantial breach is one that deprives the defendant "of a material and substantial benefit for which he or she bargained." ***Id.*** However, because there was no contemporaneous objection to

[6] We note that Tatum does not tell us why, had he "known" the armed robbery would not be dismissed, he would have refused to plead guilty to felony murder and instead would have wanted a trial on first-degree intentional homicide and armed robbery, which would have exposed him to a possible sentence of life imprisonment plus an additional forty years, rather than fifty-five years for felony murder. *See* ***State v. Allen***, 2004 WI 106, ¶¶21-23, 274 Wis. 2d 568, 682 N.W.2d 433.

any alleged breach, we must review this complaint under the ineffective-assistance-of-counsel framework. *See* ***State v. Liukonen***, 2004 WI App 157, ¶6, 276 Wis. 2d 64, 686 N.W.2d 689.

There is nothing in the record to support Tatum's claim that the plea was premised on the State not accusing him of being the shooter.[7] At the start of the plea hearing, defense counsel pointed out that the parties disputed the factual basis for the plea, with Tatum insisting he was not the shooter and the State maintaining to the contrary. Defense counsel also told the circuit court that, at sentencing, both parties would each argue their respective positions. There is no reason for defense counsel to have given the circuit court this warning if the plea was premised on an agreement on the facts. It is true that, for purposes of the plea, the State agreed that the circuit court could rely on Tatum's position, but this temporary acquiescence is not the same thing as offering the factual concession in exchange for the plea. Indeed, based on defense counsel's comments, it appears that the parties knew before the plea hearing that they would each be maintaining their respective positions on Tatum's role in Larson's death.

Moreover, nothing suggests that, even if the plea were premised on the State conceding Tatum was not the shooter, Tatum received any "material and substantial benefit" that he was deprived of by the alleged breach. For example, it does not appear that any charge or sentencing concessions were linked to either version of the facts. As such, even if there were a breach as Tatum describes, it appears to be merely technical, and no remedy is warranted.

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[7] The record citation Tatum offers in support of his contention is merely defense counsel's recitation of Tatum's own position that he was not the shooter. It is not evidence that the plea was premised on this supposition.

If there was no actionable breach of the agreement, there was no basis for counsel to object. Counsel is not ineffective for failing to pursue a meritless objection. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996). Accordingly, we discern no arguable merit to a claim that the State breached the plea agreement and no arguable merit to a challenge to counsel's performance.

The other issue counsel raises 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 circuit 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 circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *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* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court considered both sides' arguments on the identity of the shooter and ultimately declined to conclude Tatum was the shooter. It was, however, convinced that Tatum was more than just the getaway driver. The circuit court appears to have focused on deterrence as an objective, explaining that the community demands that senseless robberies and killings had to stop, and "that's the message that I'm getting out." It described the crime as deplorable—even if Tatum were not the shooter, by his own admission he still helped plan a robbery and facilitated the escape. Tatum had a juvenile record and had not done well on probationary sentences; he

also had an adult record for drug-dealing. The circuit court considered mitigating factors, like the fact that Tatum had lived a "tough life" and had dropped out of school. It also noted, though, that while Tatum claimed he was planning to get his GED, Tatum had evidently been "planning" to do so for the last thirteen years without taking any action to further that goal.

The maximum possible sentence Tatum could have received was fifty-five years' imprisonment. The sentence totaling thirty-five years' imprisonment is well within the 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).

The circuit court also ordered Tatum to pay approximately $23,700, joint and several, for restitution. This amount represented uncovered funeral expenses and the value of cash and jewelry stolen from Larson during the robbery. The original restitution claim was over $90,000, but the circuit court was able to ascertain that only $21,000 was unreimbursed expenses. The circuit court also ordered $2735 be paid to Larson's mother for the stolen items. Because Larson is deceased, his mother qualifies as a victim for restitution purpose. *See* ***State v. Gribble***, 2001 WI App 227, ¶71, 248 Wis. 2d 409, 636 N.W.2d 488 (adopting definition of "victim" found in WIS. STAT. § 950.02(4)(a)); *see also* WIS. STAT. § 950.02(4)(a)4.a.

The fact of the missing cash, withdrawn for the car purchase, had been established, and Larson's mother testified about a watch, necklace, and earrings that he always wore, including how he obtained them, and noted that they were missing following the robbery. The circuit court determined there was a causal nexus between that loss and Tatum's actions. *See* ***State v. Madlock***, 230 Wis. 2d 324, 333, 602 N.W.2d 104 (Ct. App. 1999) (For purposes of restitution,

"crime" encompasses "all facts and reasonable inferences concerning the defendant's activity related to the 'crime' for which the defendant was convicted, not just those facts necessary to support the elements of the specific charge of which the defendant was convicted." (Emphasis omitted.)). The circuit court also expressly found Tatum had the ability to pay the award, explaining he was likely to live at least another forty years, which amounted to an annual obligation of less than $600, even if Tatum had to pay the entire amount himself. *See* ***State v. Fernandez***, 2009 WI 29, ¶64, 316 Wis. 2d 598, 764 N.W.2d 509 (amount of restitution award not constrained by sentence length). There would be no arguable merit to a challenge to the sentencing court's discretion.

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 Jeremy C. Perri is relieved of further representation of Tatum in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals