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August 31, 2016

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

2016AP67-CRNM State of Wisconsin v. Donovan M. Robinson (L.C. # 2013CF2675)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

Donovan M. Robinson pled guilty to second-degree reckless homicide, as party to a crime (PTAC). He appeals from the judgment of conviction and from the order denying his postconviction motion seeking resentencing. His postconviction and appellate lawyer, Matt Last, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Robinson responded. Upon consideration of the no-merit report, response, and our independent review of the record as mandated by ***Anders*** and

RULE 809.32, we conclude there are no issues of arguable merit that could be raised on appeal. We summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

Robinson and three others entered a man's home with a plan to rob him. Robinson, one of his co-actors, and the intended victim were all armed. The intended victim was killed.

Robinson was charged with one count first-degree reckless homicide, use of a dangerous weapon, and one count attempted robbery, armed (use of force), both as PTAC. After his motion to suppress his confession was denied, Robinson pled guilty to PTAC second-degree reckless homicide. He was sentenced to twelve years' initial confinement and eight years' extended supervision. Postconviction, he sought resentencing on the basis that the court did not fully consider relevant sentencing factors and imposed a harsh and excessive sentence. The motion was denied. This no-merit appeal followed.

The no-merit report addresses the potential issues of whether (1) Robinson received ineffective assistance of counsel at sentencing; (2) the trial court erroneously exercised its discretion in denying the motion to suppress his statement to police; (3) Robinson should be allowed to withdraw his plea because it was not freely, voluntarily, and knowingly entered; (4) the sentence was the result of an erroneous exercise of discretion and/or was harsh and excessive; and (5) the trial court erroneously exercised its discretion in denying Robinson's postconviction motion for resentencing. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit and will not discuss them further.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

As noted, Robinson filed a response to counsel's no-merit report. Robinson complains that, in addition to the postconviction challenge to his sentence, he wanted counsel to address the denial of his motion to suppress. Robinson contends his statement was coerced by the methods employed by the detective who questioned him and notes that the detective later was terminated for official misconduct, including planting evidence and apparently beating a restrained suspect during interrogation.[2]

In most instances, a defendant who pleads guilty waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). WISCONSIN STAT. § 971.31(10) makes an exception to this rule, however, and allows appellate review of an order denying a motion to suppress evidence. ***Smith***, 122 Wis. 2d at 434-35. When this court reviews a trial court's ruling on a motion to suppress, we uphold that court's factual findings unless they are clearly erroneous. ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347.

The detective misrepresented that Robinson's girlfriend undermined his initial alibi and that blood found at the scene of the murder was tested twice for DNA and both times positively identified Robinson. He also used profanity in his questioning, repeatedly told Robinson "you're done," that it was his goal to put Robinson in prison for life, and, when Robinson said he was afraid for the lives of his family if he divulged the names of his co-actors, the detective told him, "You already dead, you already dead."

[2] Robinson's complaint about the detective's subsequent misdeeds would have come into play only if the matter had gone to trial because the defense planned to call the detective as a witness and the charges against him would have impeached his credibility.

The trial court found that police can mislead, even lie, to a suspect and that these misrepresentations are but one factor to consider in the totality of the circumstances in assessing if a confession is involuntary. *See* ***State v. Triggs***, 2003 WI App 91, ¶17, 264 Wis. 2d 861, 663 N.W.2d 396. It also found that this was not Robinson's "first time at the dance," having had juvenile adjudications and previous convictions; that he was in street clothes and was not restrained; that, while the detective profanely "berated" him and at one point "sort of lean[ed] into Robinson, he did not stand over Robinson or touch him; that Robinson, too, used "colorful language" and did not appear intimidated; that Robinson was left alone after admitting he was one of the shooters and only then became upset and cried; and that the detective returned with a cigarette for Robinson and patted him on the shoulder in a "consoling" or "friendly" fashion.

In light of these findings, a postconviction challenge to the denial of the suppression motion would have been denied. Accordingly, postconviction counsel was not ineffective for failing to raise the issue. *See* ***State v. Simpson***, 185 Wis. 2d 772, 784, 519 N.W.2d 662 (Ct. App. 1994). There also would be no arguable merit on appeal to asserting that the trial court erred by denying Robinson's motion to suppress. Our independent review reveals no other meritorious issues. Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Matt Last is relieved of any further representation of Robinson on this appeal.

Diane M. Fremgen
Clerk of Court of Appeals