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**DISTRICT I**

November 19, 2024

*To*:

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Reserve Judge
Electronic Notice

Anna Hodges
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James M. Bohringer 387511
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P.O. Box 700
Waupun, WI 53963-0700

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

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2023AP426-CRNM State of Wisconsin v. James M. Bohringer (L.C. # 2020CF3099)

Before White, C.J., Donald, P.J., and Colón, J.

**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).**

James M. Bohringer appeals a judgment of conviction entered upon his guilty pleas to two felonies. Bohringer's appellate counsel, Attorney Jill Marie Skwor, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Bohringer filed a response. Upon consideration of the no-merit report, the response, and an independent review of the record as mandated by ***Anders***, we conclude that no arguably

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

meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State alleged in a criminal complaint that on August 30, 2020, a Ford Fusion travelling at a high rate of speed hit a parked car and then struck R.S.W., who was sitting in a chair on his lawn in the 400 block of South 86th Street in Milwaukee. The Ford next crashed into R.S.W.'s house, then backed into the street and stalled. A woman approached the Ford, and witnesses saw its driver and the woman walking away from the vehicle. Police and emergency personnel subsequently arrived and pronounced R.S.W. dead at the scene. A witness told police that she had recognized the Ford's driver as the boyfriend of a neighborhood resident, and the witness then picked Bohringer from a photographic array and identified him as the driver. Several hours after the crash, police went to the home of Bohringer's aunt. When they arrived, Bohringer leapt out of a window and attempted to flee on foot. Police caught and arrested him. The State charged Bohringer with second-degree reckless homicide, hit and run resulting in death,[2] and operating a vehicle while his operating privileges were revoked, causing the death of another person.

Bohringer elected to resolve the case with a plea agreement that involved charge concessions from the State but no sentencing concessions. Pursuant to the terms of the agreement, the State moved to dismiss the charge of second-degree reckless homicide. The circuit court granted the motion, and Bohringer pled guilty to the remaining two charges.

[2] "Hit and run" is the colloquial description of the statutory offense. WISCONSIN STAT. § 346.67(1) prescribes a "[d]uty upon striking person or attended or occupied vehicle," when the operator of the striking vehicle "knows or has reason to know that the accident resulted in injury or death of a person or in damage to a vehicle[.]" Section 346.74(5) describes various penalties for failing to fulfill that duty.

At sentencing, Bohringer faced a twenty-five-year term of imprisonment and a $100,000 fine for hit and run resulting in death. *See* WIS. STAT. §§ 346.67(1), 346.74(5)(d), 939.50(3)(d) (2019-20). The circuit court imposed a maximum term of imprisonment, bifurcated as fifteen years of initial confinement and ten years of extended supervision. Bohringer faced six years of imprisonment and a $10,000 fine for operating a motor vehicle while his operating privileges were revoked, causing the death of another person. *See* WIS. STAT. §§ 343.44(1)(b), (2)(ar)4., 939.50(3)(h) (2019-20). The circuit court imposed a maximum, evenly bifurcated term of imprisonment. The circuit court ordered Bohringer to serve his sentences concurrently with each other and concurrently with a six-year revocation sentence that he was serving for an armed robbery. The circuit court found Bohringer eligible for the challenge incarceration program and the Wisconsin substance abuse program after completing seventy-five percent of his initial confinement, ordered him to pay $6,642.50 in restitution,[3] and granted him sentence credit for his time in custody from August 30, 2020, until the day of sentencing.[4]

In the no-merit report, appellate counsel examines whether Bohringer could pursue an arguably meritorious claim that he did not enter his guilty pleas knowingly, intelligently, and voluntarily. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). We agree with appellate counsel's analysis and with appellate counsel's conclusion that Bohringer could not

[3] Bohringer stipulated to the amount of restitution ordered. Therefore, he cannot pursue an arguably meritorious challenge to the order. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

[4] At sentencing on July 28, 2021, the circuit court granted Bohringer the 333 days of credit that he requested for his time in presentence custody. Following an inquiry from the Department of Corrections, the circuit court modified the award to 332 days because the original award included credit for the day of sentencing. A defendant is not entitled to presentence credit for the day of sentencing. ***State v. Kontny***, 2020 WI App 30, ¶¶9, 12, 392 Wis. 2d 311, 943 N.W.2d 923. Accordingly, Bohringer cannot mount an arguably meritorious challenge to the modification. *See* ***id.***

mount such a claim. However, we will address several matters that appellate counsel did not discuss.

First, Bohringer was not physically in the courtroom for the April 7, 2021 plea hearing, although he had the right to be present pursuant to WIS. STAT. § 971.04(1)(g). The circuit court noted at the beginning of the hearing that various restrictions were in place due to public health orders necessitated by the COVID-19 pandemic. Bohringer, who was in custody, appeared at the hearing via Zoom, acknowledged that he had the right to attend the hearing in person, and waived that right. The waiver satisfied the requirements of ***State v. Soto***, 2012 WI 93, ¶50, 343 Wis. 2d 43, 817 N.W.2d 848. Accordingly, any challenge to the guilty pleas based on Bohringer's appearance via Zoom would be frivolous within the meaning of ***Anders***.

Second, Bohringer did not sign the plea questionnaire and waiver of rights form that his trial counsel filed in advance of the plea hearing. His trial counsel explained to the circuit court that she had reviewed the form with Bohringer by telephone and that she had also provided him with a copy of the form to review. Bohringer personally confirmed during the plea hearing that he had reviewed the questionnaire with his trial counsel and that he understood it. Moreover, a plea questionnaire is not an essential component of the plea procedure. Rather, the questionnaire is a tool that the circuit court may use in conducting a plea colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794. In this case, our review of the record confirms appellate counsel's assessment that the plea colloquy satisfied the circuit court's common law and statutory obligations when accepting a guilty plea. *See* ***id.***, ¶18; WIS. STAT. § 971.08(1). There is no arguable merit to a claim that the circuit court failed to ensure that Bohringer's pleas were knowing, intelligent, and voluntary.

Turning to the sentencing proceeding, we observe that appellate counsel again does not discuss Bohringer's physical absence from the courtroom when he had a right to be present pursuant to WIS. STAT. § 971.04(1)(g). As with the plea hearing, however, the record of the sentencing shows that Bohringer appeared via Zoom from a correctional institution and waived his right to appear in person, in accordance with ***Soto***, 343 Wis. 2d 43, ¶50. A challenge to the sentences on the ground that he did not appear in person at the hearing would be frivolous within the meaning of ***Anders***.

Appellate counsel does discuss the substance of the sentencing hearing, and we agree with appellate counsel's conclusion that Bohringer could not mount an arguably meritorious claim that 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 (explaining that a circuit court exercises its discretion at sentencing and appellate "review is limited to determining [whether] discretion was erroneously exercised"). The circuit court indicated that the primary sentencing goal was protection of the public, and the circuit court discussed the factors that it viewed as relevant to achieving that goal. *See* ***id.***, ¶¶41-43. The circuit court's discussion included consideration of the mandatory sentencing factors, namely, "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76.

The record further shows that the sentences selected were not unduly harsh. A sentence is unduly harsh "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). However, "[a]

sentence well within the limits of the maximum sentence is unlikely to be unduly harsh[.]" ***Id.*** (citation omitted). Here, the circuit court imposed maximum terms of imprisonment, but it ordered Bohringer to serve those sentences concurrently with each other and concurrently with the sentence that he was already serving. Further, the circuit court did not impose any of the $110,000 in fines that Bohringer faced. The aggregate sentence imposed was thus far less than the maximum aggregate sentence that the law allowed and cannot be considered unduly harsh or excessive. *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. We conclude that Bohringer could not mount an arguably meritorious challenge to the circuit court's exercise of sentencing discretion.

Bohringer disagrees. In his response to the no-merit report, he asserts that the circuit court should have imposed a more lenient sentence. As grounds, he points to the low scores that he received on the "criminal personality" and "criminal opportunity" scales of his COMPAS evaluation,[5] which was included with the presentence investigation report (PSI) in this case. Our supreme court holds, however, that a sentencing court may not use a COMPAS risk assessment to determine the severity of a sentence. ***State v. Loomis***, 2016 WI 68, ¶98, 371 Wis. 2d 235, 881 N.W.2d 749. In this case, the circuit court relied on proper factors to fashion an individualized aggregate sentence for crimes that ended with the death of an innocent bystander. Although the circuit court did not assess the sentencing factors as Bohringer would have preferred, that is not

[5] COMPAS stands for "Correctional Offender Management Profiling for Alternative Sanctions." ***State v. Loomis***, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749. It is a "risk-need assessment tool" and is intended "to provide decisional support for the Department of Corrections when making placement decisions, managing offenders, and planning treatment." ***Id.***, ¶13.

an erroneous exercise of discretion. *See* ***State v. Prineas***, 2009 WI App 28, ¶34, 316 Wis. 2d 414, 766 N.W.2d 206.

Bohringer also contends that the circuit court sentenced him on the basis of inaccurate information. *See* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 (providing that a defendant has a due process right to be sentenced on accurate information). Specifically, he points out that the circuit court said that his prior record was "aggravated" and put him outside the normal sentencing parameters. He characterizes these statements as mistakes of fact. The circuit court, however, reached its conclusions in light of information in the PSI, which the circuit court reviewed in detail on the record during the sentencing hearing. Bohringer did not suggest at sentencing that the information in the PSI was wrong, nor does he make such an allegation now. Rather, he contends that the circuit court should not have viewed his prior record as aggravated because much of it stems from non-criminal offenses.

We have reviewed the PSI. It reflects that Bohringer had prior criminal convictions for an armed robbery and for operating a motor vehicle while intoxicated as a second offense and with a minor passenger in the vehicle. He also had a host of prior convictions for violations of civil law—carrying a concealed weapon; possessing a controlled substance; multiple retail thefts; multiple incidents of disorderly conduct; hindering; operating a motor vehicle while intoxicated as first offense—along with nine juvenile adjudications. Almost all of his adult misconduct occurred while he was serving terms of extended supervision following his release from prison. Further, his extended supervision was revoked four times, and he had been in absconder status for eight months when he committed the crimes in this case. The circuit court assessed this history and observed: "of all the people that [the court] sentence[s] for this kind of an offense, yours is among the most aggravated of prior records that I can say I've seen."

Judges are not expected or encouraged to view each exercise of sentencing discretion in a vacuum. ***State v. Counihan***, 2020 WI 12, ¶48, 390 Wis. 2d 172, 938 N.W.2d 530. To the contrary, a judge may consider his or her criminal sentencing experience when imposing sentence on a defendant. ***State v. Ogden***, 199 Wis. 2d 566, 573, 544 N.W.2d 574 (1996). The sentencing remarks here reflect that the circuit court fashioned an individualized sentence for Bohringer based on information about his background and history and in light of the circuit court's experience on the bench. The record does not support a claim that Bohringer was sentenced based on inaccurate information.

Bohringer also asks us to conclude that he has an arguably meritorious claim for plea withdrawal based on alleged ineffective assistance of his trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel performed deficiently and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

Bohringer alleges here that his trial counsel performed deficiently by inducing his guilty pleas with assurances "that his prior record ... would be viewed favorably and mitigate against a longer sentence." Bohringer thus faults his trial counsel for incorrectly predicting the outcome of his sentencing hearing. However, in ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272, we held that trial counsel is not ineffective for recommending a plea agreement that leads to 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).

Relatedly, Bohringer alleges that his trial counsel performed deficiently by failing to investigate his prior record in order to provide "the details necessary to more accurately depict and explain the record." However, nothing in Bohringer's submission explains why an investigation would have provided any details about his record that he was unable to disclose himself. Accordingly, further pursuit of this claim would be frivolous within the meaning of ***Anders***. *See* ***State v. Jones***, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390 (holding that a defendant's claim that counsel was ineffective for failing to investigate something that the defendant could have revealed is "wholly without 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 Jill Marie Skwor is relieved of any further representation of James M. Bohringer. *See* WIS. STAT. RULE 809.32(3).

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

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*Samuel A. Christensen*
*Clerk of Court of Appeals*