COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 96-3270-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH R. SCHEWE,

DEFENDANT-APPELLANT.

APPEAL from an amended judgment and an order of the circuit court for Eau Claire County: ERIC J. WAHL, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J. and Hoover, J.

PER CURIAM. Kenneth R. Schewe appeals from an amended judgment of conviction for first-degree intentional homicide and from those parts of a postconviction order denying his reconsideration motion for suppression and plea withdrawal. The state public defender appointed Attorney Michael P. Wagner as Schewe's appellate counsel. Attorney Wagner filed and served a no

merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32(1), STATS., to which Schewe responded. After an independent review of the record as mandated by ***Anders***, we conclude that further proceedings would lack arguable merit.

Schewe pleaded guilty to first-degree intentional homicide while armed with a dangerous weapon, as a habitual criminal, contrary to §§ 940.01(1), 939.63 and 939.62, STATS. Initially, the circuit court imposed a life sentence without parole eligibility, mistakenly pursuant to § 939.62(2m), STATS.[1] Schewe returned for resentencing, which resulted in parole eligibility in fifty years, pursuant to § 973.014(2), STATS. Schewe sought postconviction relief for: (1) reconsideration of the circuit court's denial of his suppression motion; (2) plea withdrawal for the claimed ineffective assistance of trial counsel; and (3) resentencing. The circuit court held an evidentiary hearing and amended the sentences to run concurrent, but denied the motion in all other respects.[2]

In the no merit report, counsel explains why it would lack arguable merit to challenge the circuit court's order denying Schewe's motions for suppression, plea withdrawal and resentencing. Schewe raises these same issues and the ineffective assistance of appellate counsel. Although we independently conclude that all of these issues lack arguable merit, we address them to respond to Schewe's filed response.

[1] Schewe's probation was revoked because of his conduct in this homicide. Consequently, the circuit court also imposed sentences incident to Schewe's probation revocation.

[2] The circuit court had previously imposed the life sentence to run consecutive to those sentences.

Preliminarily, a valid guilty plea waives all nonjurisdictional defects and defenses, including claimed violations of his constitutional rights.[3] *See* ***State v. Riekkoff***, 112 Wis.2d 119, 122-23, 332 N.W.2d 744, 746-47 (1983). Although we address the substance of these issues incident to our independent ***Anders*** review, they also lack arguable merit because Schewe waived them when he pleaded guilty. *See* ***Riekkoff***, 112 Wis.2d at 122-23, 332 N.W.2d at 746-47.

As a suspect in the murder investigation, Schewe was the target of an investigatory stop. *See* § 968.24, STATS.; ***State v. Guzy***, 139 Wis.2d 663, 679, 407 N.W.2d 548, 555 (1987). He had threatened to kill the victim several days before the murder, and thereafter, never inquired about the victim, despite their previous close friendship. Considering these circumstances, we independently conclude that it would lack arguable merit to challenge the investigatory stop.

Schewe challenges the seizure of the murder weapon, a shotgun, from the hatchback of his fiancee's car. At the time of the search, Schewe was a passenger in his fiancee's car. Both Schewe and his fiancee objected to the search. During the investigatory stop, Schewe's probation agent advised police to take Schewe into custody on a probation hold. Because custody pursuant to a probation hold is treated as a valid arrest, we independently conclude that it would lack arguable merit to challenge the warrantless search incident to a lawful arrest. *See* ***State v. Betterley***, 191 Wis.2d 406, 422-23, 529 N.W.2d 216, 222 (1995).

Schewe also contends that he had a reasonable expectation of privacy in his fiancee's car. The circuit court rejected that contention twice. Although the contention is inconsequential because the search was valid incident

[3] The exception is for ineffective assistance of counsel claims.

to Schewe's custody on a probation hold, Schewe's raising it prompts us to address it.

> There are several factors which are relevant in determining whether an accused has an expectation of privacy that society is willing to recognize as reasonable. These include whether one has a property interest in the premises, whether one was legitimately on the premises, whether one has complete dominion and control and the right to exclude others, whether one took precautions those seeking privacy take, whether one put the property to some private use, and whether the privacy claim is consistent with historical notions of privacy.

State v. West, 185 Wis.2d 68, 90, 517 N.W.2d 482, 490 (1994) (citations omitted). The circuit court considered the couple's living arrangements, their pooling of income, their joint acquisition of property, and their plans to marry. Both testified that they considered that car, and another, to be "both ours." However, it also considered that the car was titled only to the fiancee, and that she told police that only she drove that car. The circuit court was further dissuaded from Schewe's position because at the time of the investigatory stop he did not have a valid driver's license and when he drove, albeit illegally, his fiancee condoned his use of the other car, not the one which was the subject of this search. It also noted that Schewe did not have complete dominion or control over the car. To challenge the circuit court's ultimate conclusion, that Schewe lacked a reasonable expectation of privacy in the car searched, in light of the circuit court's findings would lack arguable merit.

Schewe also contends that the scope of the search was impermissibly broad because the shotgun was seized from the hatchback, rather than from the passenger part of the car. Before the circuit court, Schewe analogized the hatchback with a locked trunk. However, the circuit court distinguished the car's hatchback from a trunk because it was accessible to the passenger from inside the

car. In its decision denying suppression, the circuit court analogized this hatchback to an

> old-fashioned station wagon in that the cargo area of the car can be reached either from the passenger seats or through a separate door in the rear of the car. The search of this cargo area would be more akin to a search of the locked glove compartment in ***Fry***, than a separate, locked trunk area of a sedan.

See ***State v. Fry***, 131 Wis.2d 153, 174-80, 388 N.W.2d 565, 574-77 (1986). We independently conclude that a challenge to the scope of the search and seizure of the shotgun from the hatchback of the car owned by Schewe's fiancee, on this record, would lack arguable merit.

Schewe also moved to withdraw his guilty plea for the claimed ineffective assistance of trial counsel. At the ***Machner*** hearing, Schewe testified that his trial counsel failed to explain virtually anything to him, specifically the applicability of any lesser included offenses. *See* ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). Schewe's counsel contradicted Schewe. Counsel testified about his experience in criminal cases and the substance of his discussions with Schewe. Contrary to Schewe's testimony, his counsel recalled their discussions on how to approach Schewe's defense, and how Schewe's testimony about contemplating suicide in the murder victim's presence, may have vitiated the element of premeditation.[4] Much of Schewe's testimony was contradicted by the record and on cross-examination. Schewe admitted that had the circuit court imposed the jointly recommended lesser term of parole

[4] Schewe maintained that he had bungled his own suicide attempt. However, the prosecutor had evidence which supported premeditation. For example, Schewe, a convicted felon, had purchased a gun after the victim had insulted him. Schewe then severed the telephone lines at the victim's residence.

eligibility, he would not have claimed ineffective assistance. The circuit court also noted Schewe's experience with the court system and his familiarity with plea agreements. The circuit court was presented with two irreconcilable versions of counsel's representation of Schewe. The circuit court found counsel's version credible. The assessment of weight and credibility is uniquely a trial court function, not an appellate function. *See* ***In re Estate of Dejmal***, 95 Wis.2d 141, 151-52, 289 N.W.2d 813, 818 (1980). We independently conclude that it would lack arguable merit to challenge the circuit court's denial of Schewe's postconviction motion because it was predicated on its credibility determinations of Schewe and his trial counsel, the latter's version also corroborated substantially by the record.

Schewe challenges the circuit court's exercise of sentencing discretion. His principal criticism is that parole eligibility in fifty years is excessive punishment. He also raises several sentencing errors which were corrected by the circuit court.[5] Because the circuit court corrected these errors, Schewe is no longer aggrieved by them and to raise them would lack arguable merit. *Accord* ***Tierney v. Lacenski***, 114 Wis.2d 298, 302, 338 N.W.2d 522, 524 (Ct. App. 1983) (appellant must be aggrieved in some appreciable manner).

[5] Initially, the circuit court mistakenly relied on § 939.62(2m), STATS., and imposed a life sentence without the possibility of parole. Counsel recognized the mistake and moved for resentencing. *See* § 973.014, STATS.; ***State v. Setagord***, 187 Wis.2d 340, 342, 523 N.W.2d 124, 125 (Ct. App. 1994). The circuit court confirmed that its "rationale [when it imposed sentence initially] ha[d]n't changed," and corrected its mistake and resentenced Schewe to life imprisonment with parole eligibility in fifty years. It also imposed the life sentence to run consecutive to the other sentences, stating that, "I don't suppose it matters a great deal." However, at a postconviction hearing, the circuit court modified that ruling and imposed the sentences to run concurrent. Consequently, Schewe is no longer aggrieved insofar as the sentences are concurrent.

Our review of a sentence is limited to whether the circuit court erroneously exercised its discretion. *See* ***State v. Larsen***, 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary sentencing factors are the gravity of the offense, the character of the offender, and the need for public protection. ***Id.*** at 427, 415 N.W.2d at 541.

At sentencing, the circuit court referred to the gravity of the offense, that Schewe "killed another man … in cold blood. It wasn't an accident. It wasn't even a fight or something where hot blood intervened and caused a course of action." It commented on the premeditated nature of the homicide and how Schewe violated the law when he purchased the gun as a convicted felon. The circuit court discussed Schewe's character and was concerned about his failure to accept full responsibility by attempting to conceal his involvement.[6] It recognized the nature of Schewe's prior record and remarked that there was nothing in Schewe's background to explain his criminal behavior. The circuit court noted "millions of people that have the same problem [that Schewe has] that don't go out and commit crimes. They somehow overcome those problems . . . ." The circuit court was very concerned about public protection. In imposing a life sentence, the circuit court concluded "that unfortunately [Schewe] ha[s] forfeited [his] right to live in our society." It erroneously rejected the possibility of parole because it "c[ould] not in good conscience and without worrying about the safety of society do that." Although its overriding concern was public safety, once raised, the circuit court corrected its error and set a date for parole eligibility.

[6] After the homicide, Schewe went to the residence of one of the victim's relatives with a concocted alibi.

Schewe contends that the circuit court erroneously exercised its discretion because it did not follow §§ 304.06(1) and 973.014, STATS., to establish his parole eligibility date. However, §§ 304.06(1)(b) and 973.014(1)(b) address the "earliest possible parole eligibility date." *See* § 973.014(1)(b), STATS. The circuit court explained why it did not believe Schewe should be eligible for parole at the earliest possible date, despite the prosecutor's recommendation. Schewe was warned prior to his guilty plea that the circuit court was not bound by any sentencing recommendations. We independently conclude that challenging the circuit court's discretion to impose a fifty-year term to await parole eligibility would lack arguable merit, on this record of the premeditated, first-degree intentional homicide of a family friend.

Schewe also contends that appellate counsel was ineffective. We will not review an ineffective assistance of appellate counsel claim on direct appeal. *See* ***State v. Knight***, 168 Wis.2d 509, 512-13, 484 N.W.2d 540, 541 (1992). We consider that claim if pursued by a petition for a writ of *habeas corpus* in this court. *See* ***id.*** at 522, 484 N.W.2d at 545.

Upon our independent review of the record, as mandated by ***Anders***, we conclude that there are no other meritorious issues and that further proceedings would lack arguable merit. Accordingly, we affirm the amended judgment of conviction and postconviction order, and relieve Attorney Michael P. Wagner of further representation of Kenneth R. Schewe. *See* RULE 809.32(3), STATS.

By the Court.—Amended judgment and order affirmed.