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DISTRICT II

June 26, 2024

To:

Hon. Michael O. Bohren
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
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Christopher D. Sobiechowski
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Matthew R. Fett #513194
Drug Abuse Correctional Center
P.O. Box 190
Winnebago, WI 54985-0190

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

2024AP137-CRNM State of Wisconsin v. Matthew R. Fett (L.C. #2021CF969)

Before Neubauer, Grogan and Lazar, 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).

Matthew R. Fett appeals from a judgment, entered following his guilty plea, convicting him of operating while intoxicated as a sixth offense with the alcohol fine enhancer. He also appeals from an order denying his motion for sentence modification. Fett's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Fett was advised of his right to file a response, and he has not responded. After reviewing the record and counsel's report, we conclude that there are no issues with

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

arguable merit for appeal. Therefore, we summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

According to the amended criminal complaint, at approximately 12:30 a.m. on June 23, 2021, an officer heard a vehicle squealing its tires and then saw a pickup truck drive past him traveling over the speed limit. The officer stopped the truck and made contact with Fett, who was driving. When the officer arrived at Fett's window, Fett was looking at photos on his phone and showed the officer pictures of him drinking alcohol earlier in the night. Fett's speech was slurred, his eyes were red, bloodshot, and glassy, and he was unsteady on his feet. Ultimately, Fett was arrested for operating while intoxicated. His blood was drawn pursuant to a warrant and the results indicated he had a .194 blood alcohol concentration ("BAC"). The officer found THC and a pipe in Fett's vehicle.

Pursuant to a plea agreement, Fett plead guilty to operating while intoxicated as a sixth offense. The charge of operating with a prohibited BAC was dismissed pursuant to law, and the charges of possession of THC and possession of drug paraphernalia were dismissed and read in. During sentencing, the circuit court noted that for Fett's fifth offense, he received a prison sentence that included two years' initial confinement. Ultimately for the sixth offense, the court sentenced Fett to three years' initial confinement and three years' extended supervision.

Postconviction counsel hired an expert who opined Fett had a .152 BAC at the time of driving. Fett moved the circuit court to modify his sentence because his BAC was lower than the .194 BAC that the court relied on when it sentenced him. Fett asked the circuit court to reduce the amount of initial confinement. Over the State's objection, the circuit court determined the expert's opinion was a new factor. However, the circuit court determined that the new factor did

not justify a sentence modification. The court found that given “Fett’s history, the nature of the stop itself, and the need to ... ensure public protection,” the change in BAC does not “have a dramatic impact on the case.” The court denied the sentence modification motion. This no merit appeal follows.

We first agree with counsel’s analysis and conclusion that any challenge to the validity of Fett’s plea would lack arguable merit. See *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Our review of the record and of counsel’s analysis in the no-merit report satisfies us that the circuit court complied with its obligations for taking Fett’s plea. See WIS. STAT. § 971.08; *Bangert*, 131 Wis. 2d at 261-62; *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

With regard to the circuit court’s sentencing discretion, our review of the record confirms that the court appropriately considered the relevant sentencing objectives and factors. See *State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695; *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentence was 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). Therefore, there would be no arguable merit to a challenge to the court’s sentencing discretion.

The no-merit report also addresses Fett’s motion for sentence modification. “Deciding a motion for sentence modification based on a new factor is a two-step inquiry.” *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. The defendant has the burden of demonstrating the existence of a new factor. *Id.* If a new factor is present, the trial court determines, in its discretion, whether the new factor justifies modification of the sentence.

Id., ¶37. For purposes of this no-merit appeal, we first assume without deciding that the expert’s opinion that Fett had a .152 BAC at the time of driving amounted to a new sentencing factor. *See id.*, ¶36 (“Whether the fact ... put forth by the defendant constitutes a “new factor” is a question of law.”). We then agree with counsel that the circuit court appropriately exercised its discretion in determining that this new factor did not warrant sentence modification. The court reasoned that given “Fett’s history, the nature of the stop itself, and the need to ... ensure public protection,” the change in BAC from a .194 to a .152 did not “have a dramatic impact on the case.” There is no arguable merit to this issue.

Our independent review of the record discloses no other potential issues for appeal. This court accepts the no-merit report, affirms the judgment of conviction and order denying sentence modification, and discharges appellate counsel of the obligation to represent Fett further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Christopher D. Sobic is relieved of further representation of Matthew R. Fett in this appeal. *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