OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I/II

August 14, 2013

To:

Hon. David A. Hansher
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State St.
Milwaukee, WI 53233

Scott D. Connors
Law Office of Scott D Connors
10125 W. North Ave.
Wauwatosa, WI 53226

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Lionel A. Brown 586196
Prairie Du Chien Corr. Inst.
P.O. Box 9900
Prairie du Chien, WI 53821

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

2012AP2640-CRNM State of Wisconsin v. Lionel A. Brown (L.C. #2012CF905)

Before Brown, C.J., Reilly and Gundrum, JJ.

Lionel A. Brown appeals from a judgment of conviction for operating while intoxicated (OWI) as a fifth offense, a Class H felony, contrary to WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)5., and 939.50(3)(h) (2011-12).[1] Upon Brown's guilty plea, the trial court ordered a bifurcated sentence of five years and six months, with two years and six months of initial confinement, and three years of extended supervision. Pursuant to § 346.65(2)(am)5. and

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

(2)(g)3., the trial court imposed a $2400 fine. Brown's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Brown received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The criminal complaint alleges that on February 26, 2012, an officer witnessed Brown drive through a flashing red light without coming to a complete stop. Brown failed to yield and the officer had to apply his brakes in order to avoid a collision. The officer performed a traffic stop and detected signs of intoxication, including the odor of alcohol, slurred speech, and unsteady coordination. Brown "became disorderly" and refused to perform field sobriety tests. After his arrest, Brown waived his preliminary hearing and pled to the OWI offense pursuant to an agreement requiring the state to move to dismiss all related traffic citations and to recommend prison, leaving the length up to the trial court.

The no-merit report addresses the potential issues of whether Brown's plea was freely, voluntarily, and knowingly entered and whether the sentence was the result of an erroneous exercise of discretion. Our review of the record—including the plea questionnaire, its addendum, the attached jury instructions, and the plea hearing transcript—confirms that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Based on our independent review, we agree with appellate counsel that no meritorious issue arises from the plea taking.

We also conclude that there is no arguable merit to a claim that the trial court improperly exercised its sentencing discretion. In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In terms of severity, the trial court considered this offense to be aggravated by Brown's dangerous driving, including his near collision with police, his disorderly behavior at arrest, and his "extremely high" blood alcohol concentration of .306 per 100 milliliters. As to Brown's character, the trial court considered as a mitigating factor that Brown disposed of this case quickly and took responsibility for his actions, but also noted his lengthy traffic record and history of driving without a valid license in violation of court-ordered revocations. The trial court explained that incarceration was necessary to protect the community because Brown committed the present offense after already having served over 300 days in jail in connection with a prior OWI conviction and because Brown's history demonstrated an inability to control his drinking while in the community. In addition to community protection and deterrence, the trial court stated that punishment was a primary sentencing objective. Based on our independent review, we agree with appellate counsel's conclusion that there is no arguable merit to the trial court's exercise of sentencing discretion. Further, it cannot reasonably be argued that Brown's sentence, which is less than the statutory maximum, is so harsh or excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Finally, though not discussed in counsel's no-merit report, we have reviewed Brown's case in light of ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), a United States Supreme Court decision released on April 17, 2013, after the no-merit report was already filed. In ***McNeely***, the Supreme Court declared that the natural dissipation of alcohol in a suspect's blood stream does

not always constitute an exigent circumstance justifying a warrantless blood draw. ***Id.*** at 1568. Here, Brown was only charged with OWI, and the facts in the complaint provide ample evidence supporting his plea and conviction without any reference to Brown's blood alcohol concentration. Therefore, even assuming that Brown's blood was drawn without consent or a warrant, and aside from any forfeiture or retroactivity concerns, no arguably meritorious issue arises under ***McNeely*** on the facts of this case.[2]

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Brown further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Scott D. Connors is relieved from further representing Lionel A. Brown in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[2] Similarly, we conclude that the trial court properly applied the WIS. STAT. § 346.65(2)(g)3. penalty enhancer which quadrupled Brown's mandatory minimum fine. The enhancer applies to convictions for operating while intoxicated under WIS. STAT. § 346.63(1)(a). Even if the blood draw had been found unlawful for suppression purposes, the trial court is permitted to consider excluded evidence at sentencing. *See* ***State v. Rush***, 147 Wis. 2d 225, 230-31, 432 N.W.2d 688 (Ct. App. 1988) (sentencing court permitted to consider suppressed evidence; court is encouraged to consider all relevant information in exercising its broad sentencing discretion, and applying the exclusionary rule at sentencing would not deter illegal searches).