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 II/I

November 13, 2013

To:

Hon. Mark D. Gundrum
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188-0527

Kathleen A. Madden, Clerk
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188-0527

Jeffrey J. Guerard
Ahmad & Guerard, LLP
4915 S. Howell Avenue, Suite, #300
Milwaukee, WI 53207

Brad Schimel
District Attorney
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188-0527

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

Walter C. Shawlin #333650
900 S. Madison Street
John Burke Corr. Center
Waupun, WI 53963

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

2012AP2159-CRNM State of Wisconsin v. Walter C. Shawlin
(L.C. #2010CF366)

Before Fine, Kessler and Brennan, JJ.

Walter Shawlin appeals from a judgment of conviction for one count of operating after revocation, contrary to WIS. STAT. § 343.44(1)(b) (2009-10),[1] which was entered on his guilty plea, and one count of operating while intoxicated (7th, 8th, or 9th offense), contrary to WIS.

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

STAT. § 346.63(1)(a) (2009-10), which was entered after a jury trial.[2] Shawlin's postconviction/appellate counsel, Jeffrey J. Guerard, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Although this court granted numerous extensions of time for Shawlin to file a response to the no-merit report, he ultimately elected not to file a response. We have independently reviewed the record and the no-merit report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

According to the trial testimony of Officer Kyle Bucher of the Village of Menomonee Falls Police Department, he responded to a report of a disabled vehicle. When Bucher arrived, he saw a van stopped in a lane of traffic and a man later identified as Shawlin sitting in the driver's seat. Shawlin's chin was lowered to his chest and he appeared to be asleep. The transmission gear was in the "drive" position and Shawlin's foot was on the brake. After trying to get Shawlin's attention by knocking on the window, Bucher opened the driver's door, put the transmission gear in park, and turned off the ignition.

[2] Shawlin's notice of appeal states that he is appealing from the judgment of conviction dated October 19, 2011. We note, however, that the portion of the judgment of conviction relating to the operating-after-revocation conviction was amended on December 21, 2011, to give Shawlin sentence credit against that conviction. We consider Shawlin to be appealing from the judgment as amended.

We also note that the jury found Shawlin guilty of one count of operating with a prohibited alcohol concentration (7th, 8th, or 9th offense). Pursuant to WIS. STAT. § 346.63(2)(am), when a person is found guilty of both operating while intoxicated and operating with a prohibited alcohol concentration, as was the case here, "there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under [WIS. STAT. §§] 343.30 (1q) and 343.305." In this case, Shawlin was convicted of operating while intoxicated.

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

After trying unsuccessfully to wake Shawlin, Bucher summoned an ambulance. Another officer, Scott Henning, assisted the responding medical personnel by holding Shawlin's head for about fifteen minutes to "allow for easier breathing." Henning testified that as he held Shawlin, he "detected a strong odor of intoxicants on his breath."

Shawlin was transported to the hospital. Shawlin did not regain consciousness while Bucher was at the hospital, but Bucher completed an implied consent form and Shawlin's blood was drawn for a blood alcohol test. The test revealed that Shawlin's blood alcohol level was .132. Shawlin spent four days in the hospital, including time in a coma.

The amended criminal complaint charged Shawlin with operating while intoxicated (7th, 8th, or 9th offense), operating with a prohibited alcohol concentration (7th, 8th, or 9th offense), and operating after revocation. Shawlin pled guilty to operating after revocation and went to trial on the other charges. Shawlin's defense at trial was that he did not remember anything after drinking beer at a bar, but he believed that he had been drugged, that someone had taken money from his wallet, and that someone drove his van to the side of the road and put Shawlin in the driver's seat. The jury found Shawlin guilty of both charges.

The trial court sentenced Shawlin to the maximum sentence for operating while intoxicated (7th, 8th, or 9th offense): five years of initial confinement and five years of extended supervision, consecutive to a sentence Shawlin was already serving.[3] The trial court said

[3] The Honorable Mark D. Gundrum accepted Shawlin's plea, presided over the jury trial, and sentenced him.

Shawlin did not have to pay a DNA surcharge. The trial court imposed a thirty-day concurrent sentence for the operating-after-revocation conviction.

The judgment of conviction indicated that Shawlin was entitled to ninety-nine days of sentence credit against his operating-while-intoxicated sentence, but zero days of sentence credit against the operating-after-revocation sentence. In response to an inquiry from the Department of Corrections, the trial court amended the judgment so that Shawlin received ninety-nine days of sentence credit against both sentences.[4]

Subsequently, the Department of Corrections again contacted the trial court to inquire whether sentence credit was appropriate for either sentence because Shawlin received sentence credit against an older case. The trial court conducted a hearing at which the State and postconviction/appellate counsel agreed that the ninety-nine days of sentence credit was correctly awarded.[5] The trial court ordered that Shawlin was entitled to the ninety-nine days of credit and, therefore, the trial court made no changes to the amended judgment of conviction.

The no-merit report addresses two issues: (1) whether trial counsel provided ineffective assistance by failing to call one of Shawlin's doctors as a witness and by failing to "'ask the right questions' of the witnesses"; and (2) whether the trial court properly counted Shawlin's prior convictions. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In addition to agreeing with appellate counsel's description and

[4] The Honorable James R. Kieffer entered the amended judgment of conviction.

[5] This information is taken from online court records because the appellate record does not contain a transcript from the hearing, which was conducted by the Honorable Jennifer R. Dorow.

analysis, we will briefly discuss those issues, plus three additional issues: whether there would be any basis to challenge Shawlin's guilty plea, the sufficiency of the evidence at trial, or the trial court's exercise of sentencing discretion.

We begin with Shawlin's guilty plea to operating after revocation. There is no arguable basis to allege that Shawlin's plea was not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), and the trial court conducted a thorough plea colloquy addressing Shawlin's understanding of the plea agreement and the charge to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his plea, *see* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72. The trial court went through the elements and penalties of the crime with Shawlin. It also told Shawlin that it was not bound by the parties' recommendations, and it confirmed that Shawlin had not been coerced into pleading guilty. The trial court also found that there was a factual basis for the plea after trial counsel discussed the facts and stipulated that there was an adequate factual basis because Shawlin admitted that he drove to the bar. The plea questionnaire, waiver of rights form, and the trial court's colloquy appropriately advised Shawlin of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. There would be no basis to challenge Shawlin's guilty plea.

Next, we consider the jury trial. We begin with Shawlin's concern that he was denied the effective assistance of trial counsel. "[A] convicted defendant must show two elements to

establish that his counsel's assistance was constitutionally ineffective: First, that counsel's performance was deficient; second, that the deficient performance resulted in prejudice to the defense." ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62.

According to the no-merit report, Shawlin told postconviction/appellate counsel that he "believes his trial counsel was ineffective because the doctor who treated Mr. Shawlin at the hospital was not called as a defense witness." The no-merit report explains that Shawlin "believes that if the doctor was called at the trial the doctor would have testified that the defendant was drugged and was not voluntarily intoxicated." In the no-merit report, postconviction/appellate counsel Guerard states that he contacted trial counsel and also reviewed the medical reports of Shawlin's hospitalization. Guerard states that the medical reports do not indicate that the doctor believed that Shawlin was drugged. Instead, Guerard states, "[t]he only mention in the [medical] report about the defendant being drugged was that it was the *defendant's* complaint that he might have been drugged." Guerard explains that trial counsel told him that when he contacted the doctor, trial counsel was told that the doctor "would not testify that the defendant was drugged" and that trial counsel therefore "determined that the [doctor's] testimony would not be relevant to the defense." Guerard also notes that the one nurse Shawlin called at trial testified that a drug screen had been performed, but no drugs were found

in Shawlin's system.[6] Guerard's investigation of this issue is consistent with comments trial counsel made just prior to sentencing, when Shawlin said he wanted a different lawyer and complained that not all of his witnesses had been called. Trial counsel told the trial court that the three witnesses he subpoenaed but did not call at trial "would not have provided the information that Mr. Shawlin was hoping."

Based on Guerard's representations to this court, which are consistent with trial counsel's statement at sentencing, we agree that there would be no merit to asserting that trial counsel's performance was constitutionally deficient because he did not present the testimony of Shawlin's doctor, because there is no evidence that the doctor would have testified that he believed Shawlin was drugged.[7] Not only do the medical records reportedly not indicate that he was drugged, the nurse that testified said she had not made any notations in the records indicating that she believed that Shawlin was drugged.

Guerard explains that Shawlin's second complaint about his trial counsel is that he "did not 'ask the right questions' of the witnesses," but Shawlin did not identify any specific questions that he believed should have been asked. Guerard said that he "has been unable to find any of [trial counsel's] questions that seemed improper or constitutionally ineffective." Our independent review has not identified any issues of potential merit with respect to trial counsel's performance.

[6] The nurse also testified that it is not common for someone with a blood alcohol content of .132 to become comatose. In addition, she acknowledged that the drug screen does not include "every drug that's out there."

[7] The other two individuals on Shawlin's witness list were nurses. There is nothing in the record to indicate that they would have testified that they believed Shawlin was drugged.

We have also considered whether there was sufficient evidence to support the jury's verdict that Shawlin operated while intoxicated and operated with a prohibited alcohol concentration. The jury heard evidence that Shawlin was found in the driver's seat of a running vehicle, with the transmission gear in the drive position. The jury also heard that Shawlin had a blood alcohol content of .132 shortly after he was found in the vehicle. These facts support the elements of both operating while intoxicated and operating with a prohibited alcohol concentration. *See* WIS JI—CRIMINAL 2663 and WIS JI—CRIMINAL 2660C. The jury, which is the sole judge of credibility, was entitled to accept that evidence over Shawlin's theory that he was drugged and/or did not drive the van. *See* ***State v. Burgess***, 2002 WI App 264, ¶23, 258 Wis. 2d 548, 654 N.W.2d 81 ("[T]he jury is sole judge of credibility; it weighs the evidence and resolves any conflicts.").

Next, we turn to the sentencing. Trial counsel told the trial court that Shawlin believed this should count as his eighth conviction, not his ninth, because one of the prior incidents that the State alleged should count was a refusal to submit to chemical testing.[8] The trial court went through Shawlin's driver's record from the Department of Transportation in open court and found that this was Shawlin's ninth offense. There would be no merit to a challenge of this determination. WISCONSIN STAT. § 346.65(2)(am)6. states that prior countable offenses include those referenced in WIS. STAT. § 343.307(1), which include prior convictions for operating while

[8] Shawlin's exposure was the same whether it was his seventh, eighth, or ninth violation, *see* WIS. STAT. § 346.65(2)(am)6., but the number of prior convictions can influence the sentence a trial court chooses to impose.

intoxicated and revocations for refusals to submit to chemical testing.[9] *See* § 343.307(1)(a) & (f). Here, Shawlin had seven prior operating-while-intoxicated violations, plus one refusal based on an incident that did not also result in a conviction for operating while intoxicated. The trial court properly found this to be Shawlin's ninth offense.

With respect to the sentencing itself, we conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial

[9] WISCONSIN STAT. § 346.65(2)(am)6. also provides that "suspensions, revocations, or convictions arising out of the same incident or occurrence shall be counted as one."

court noted that Shawlin has "a long record of driving while intoxicated," which "endangers the lives of other innocent people on the road." It recognized that Shawlin's blood alcohol concentration was .132, which presented "a significant danger to the public." Looking at Shawlin's character, the trial court told Shawlin that when he is free in the community, he does not stop drinking and "even more concerning to the Court … you won't stop driving when you drink." Based on the fact that this was Shawlin's ninth offense, the trial court told Shawlin that it could not assume that he would "exercise smart or good judgment in the future to keep the public safe if you are unable to control your alcohol issues." The trial court said that personal and public deterrence was important, so that Shawlin would exercise better judgment when he is released from prison and so that the public knows that ninth-offense drunk drivers do not "end up with a slap on the wrist."

Not only would there be no merit to challenge the trial court's compliance with ***Gallion***, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The trial court said that probation was "not an option here" because it would "significantly undermine the seriousness of the offense in this case." It said it would order the maximum sentence for the operating-while-intoxicated charge, which the State recommended, "because of the grave danger imposed here and the message that needs to be sent to [Shawlin] and to the community." The trial court also noted that the operating-after-revocation charge had aggravated the operating-while-intoxicated charge and expressed concern that Shawlin did not recognize that he is not "supposed to be driving at all." Nonetheless, the trial court imposed only thirty days in jail for that conviction—far less than the one-year maximum—and it also made the sentence concurrent with the operating-while-intoxicated sentence.

Although the trial court imposed the maximum sentence for the operating-while-intoxicated conviction, the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***id.*** At the time of his offenses, Shawlin was still on probation for another operating-while-intoxicated offense, and he had many prior offenses for drinking and driving. He did not have a valid driver's license, and yet he chose to drive. Finally, Shawlin received the benefit of having a concurrent thirty-day sentence imposed for the operating-after-revocation conviction. There would be no merit to challenging the trial court's exercise of sentencing discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Jeffrey J. Guerard is relieved of further representation of Shawlin in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals