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January 22, 2014

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

2013AP1192-CRNM State of Wisconsin v. Aleksander Mikhail Dobrinin
(L.C. # 2012CT716)

Before Brown, C.J.[1]

Aleksander Mikhail Dobrinin appeals from a judgment of conviction entered upon his guilty plea to one count of operating a motor vehicle while intoxicated (OWI), as a third offense, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)3. (2011-12). Dobrinin's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v.***

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

California, 386 U.S. 738 (1967). Dobrinin 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 no-merit 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 Dobrinin drove his vehicle into a median, hitting a park bench, slat bin, and two poles. A passenger-side decorative mirror from Dobrinin's car was found at the accident scene, and Dobrinin was located in a car with front-end damage that was stopped on the side of the road. A responding officer described Dobrinin as having a "strong odor of intoxicants coming from his person and glassy, bloodshot eyes." Dobrinin failed field sobriety tests and was arrested for and charged with third-offense OWI.

Dobrinin pled guilty to OWI as a third offense, and the parties stipulated that his blood alcohol concentration was 0.278, thereby quadrupling the $600 mandatory minimum fine to $2400. *See* WIS. STAT. § 346.65(2)(g)3. (enhancing the monetary penalties associated with WIS. STAT. § 346.63(1)(a) OWI convictions based on the driver's blood alcohol concentration). The State agreed to recommend nine months in jail without treatment or eight months in jail with treatment. The trial court imposed a ten-month jail sentence, a $2400 fine, a thirty-six-month driver's license revocation, and eighteen months of ignition interlock. The trial court also ordered restitution in the stipulated amount of $7756.

The no-merit report addresses the potential issues of whether Dobrinin's plea was freely, voluntarily, and knowingly entered, whether the sentence was the result of an erroneous exercise of discretion, and whether trial counsel was ineffective for failing to bring a suppression motion.

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. The trial court referred to the First Judicial District Guidelines for OWI offenses and ticked through the various mitigating and aggravating factors while noting that the court was not "bound by the sentencing guidelines." The court determined that probation would "unduly depreciate the severity of the offense" and that "a period of incarceration is warranted to have a punitive, rehabilitative and protection of the community component." The court gave Dobrinin "credit for coming forward and accepting responsibility and recognizing you have issues and have undergone treatment." In this case, the trial court identified proper objectives, considered relevant factors, explained its process, and reached a reasonable conclusion. ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695 (we will sustain a sentencing court's reasonable exercise of discretion even if this court or another judge might have reached a different conclusion). Further, it cannot reasonably be argued that Dobrinin'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, we agree with appellate counsel's conclusion that any challenge to the constitutionality of the warrantless blood draw in this case in light of ***Missouri v. McNeely***, 569 U.S. ___, 133 S. Ct. 1552 (2013), is without merit. 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. We agree with appointed counsel that because the issue was not raised in the trial court, Dobrinin would need to challenge the seizure under the rubric of ineffective assistance of counsel. *See* ***State v. Aniton***, 183 Wis. 2d 125, 129, 515 N.W.2d 302 (Ct. App. 1994) ("A guilty plea, made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea.") Dobrinin would need to establish that trial counsel's failure to challenge the warrantless blood draw was both deficient and prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Trial counsel's failure to challenge the search was, as a matter of law, not deficient, because at the time of the blood draw, no warrant was required under ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). *See* ***State v. McMahon***, 186 Wis. 2d 68, 84-85, 519 N.W.2d 621 (Ct. App. 1994) (an attorney is not ineffective for failing to pursue unsettled or novel issues of law). Further, there was no prejudice to Dobrinin because he was charged with OWI, and the facts in the complaint provide ample evidence supporting his plea and conviction without any reference to his blood alcohol concentration. Therefore, even assuming that Dobrinin'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]

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[2] Similarly, we conclude that the trial court properly applied the WIS. STAT. § 346.65(2)(g)3.
(continued)

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Kaitlin A. Lamb is relieved from further representing Aleksander Mikhail Dobrinin in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

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penalty enhancer, which quadrupled Dobrinin's mandatory minimum fine. The enhancer applies to convictions for OWI 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).