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DISTRICT I

January 17, 2014

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

2013AP2313-CRNM State of Wisconsin v. John Charles Duncan (L.C. #2011CT2723)

Before Curley, P.J.[1]

John Charles Duncan appeals from a judgment of conviction, entered upon his guilty plea, to one count of operating a motor vehicle while intoxicated as a third offense. Appellate counsel, Dustin C. Haskell, has filed a no-merit report, pursuant to ***Anders v. California***, 386

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

U.S. 738 (1967), and WIS. STAT. RULE 809.32. Duncan was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, which was filed in December 2011, a police officer was dispatched to an accident on September 12, 2009.[2] The officer spoke to the victim, who said his vehicle had been struck by a 1991 Jeep. The officer then spoke to Duncan, the Jeep's driver, who admitted he had been drinking earlier in the evening but was on his way to buy cigarettes at the time of the accident. The officer noted that Duncan had bloodshot eyes, slurred speech, and a moderate odor of alcohol on his breath. Duncan was too intoxicated for field sobriety tests, but a preliminary breath test registered a reading of .19. Duncan was charged with one count of operating while intoxicated as a third offense, one count of operating with a prohibited alcohol concentration as a third offense, and one count of operating after revocation.

Duncan ultimately agreed to resolve the case with a plea. In exchange for his guilty plea to operating while intoxicated, the State would make a particular sentence recommendation and dismiss the other two charges. Duncan entered his plea and the State made the agreed-upon recommendation. The circuit court ultimately thought both sides' recommendations were

[2] Later proceedings indicate that the reason for the charging delay was that the district attorney's office temporarily lost track of the relevant file.

inadequate and imposed a sentence of ten months in the House of Correction with release privileges, a $600 fine, twelve months with an ignition interlock device, and thirty-six months' revocation of operating privileges.

Counsel identifies two potential issues: whether there is any basis for a challenge to the validity of Duncan's guilty pleas and whether the circuit court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

There is no arguable basis for challenging whether Duncan's plea was knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Duncan 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), in which he acknowledged that his attorney had explained the elements of the offenses. These elements were also attached to the plea questionnaire, and Duncan had placed his initials next to them. The form correctly acknowledged the maximum penalties Duncan faced[3] and the form, along with an addendum, also specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court conducted a plea colloquy, and our review of the record satisfies us that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT.

[3] Originally, the questionnaire indicated a mandatory minimum $300 fine, which was not accurate. This error was noted at the outset of the plea hearing, pointed out to Duncan, and changed on the form. Duncan then acknowledged the correct mandatory minimum fine of $600.

§ 971.08, ***Bangert***, 131 Wis. 2d at 261-62, and subsequent cases, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. We note that, with regard to establishing a factual basis for the plea, Duncan disputed whether he was responsible for causing the accident. The circuit court noted this factual dispute, but appropriately observed that fault for the accident ultimately had no bearing on the factual basis for the operating-while-intoxicated charge.

The plea questionnaire and waiver of rights form and addendum, the supplemental document counsel discussed with Duncan, and the court's colloquy appropriately advised him of the elements of his offenses and the potential penalties he faced, and otherwise complied with the requirements for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the plea's validity.

The other issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a 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 determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the 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 may consider several subfactors. *See* ***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 circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court considered multiple factors, both mitigating and aggravating. It noted that Duncan had a good employment history; at the time of his offense, he had a lot going on with a critically ill parent; he had gone into treatment; and he was taking responsibility by entering a plea. However, the treatment was offset by the fact that Duncan had acquired an additional operating-while-intoxicated charge while the present matter was pending, and the circuit court explained that treatment would continue as part of Duncan's sentence so that he would hopefully come to understand that alcohol was a depressant that does not solve problems. The circuit court noted that operating while intoxicated is inherently dangerous and, in any event, Duncan should not have been driving with a revoked license. While Duncan was on a signature bond in this case, he was placed in a pretrial supervision program for intoxicated drivers. However, he missed multiple appointments, which led the circuit court to conclude that supervision was not going to be successful, and making confinement necessary. The circuit court also thought that confinement would be necessary for punishment, rehabilitation, and community-protection goals.

The maximum possible sentence Duncan could have received was a year in jail, a $2000 fine, twelve months with an ignition interlock device, and thirty-six months' revocation of operating privileges. Duncan's sentence is within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is 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). There would be no arguable merit to a challenge to the sentencing court's 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 Dustin C. Haskell is relieved of further representation of Duncan in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals