



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 III/II

April 9, 2014

To:

Hon. Eugene D. Harrington
Circuit Court Judge
P.O. Box 339
Shell Lake, WI 54871

Bruce R. Poquette
District Attorney
10610 Main Street, Ste. 105
Hayward, WI 54843

Anne Marie Swanson
Clerk of Circuit Court
Sawyer County Courthouse
10610 Main Street, Suite 74
Hayward, WI 54843

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

John C. Bachman
John Bachman Law Office
P.O. Box 477
Eau Claire, WI 54702-0477

Raymundo Gabriel Rodriguez
1203 W. Main St.
Cameron, WI 54822

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

2013AP1528-CRNM State of Wisconsin v. Raymundo Gabriel Rodriguez
(L.C. # 2012CF167)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Raymundo Rodriguez appeals from a judgment convicting him of operating while intoxicated (fifth offense) contrary to WIS. STAT. § 346.63(1)(a) (2011-12).¹ Rodriguez's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Rodriguez received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm

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

the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Rodriguez's no contest plea was knowingly, voluntarily, and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether there is a basis for sentence modification. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his no contest plea, Rodriguez answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Rodriguez's no contest plea was knowingly, voluntarily, and intelligently entered, *State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis, *State v. Harrington*, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Rodriguez signed is competent evidence of a knowing and voluntary plea. *State v. Moederndorfer*, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. *Hoppe*, 317 Wis. 2d 161, ¶¶30-32. During the plea colloquy, Rodriguez admitted that he had four prior operating while intoxicated convictions in Wisconsin. The admission established the prior convictions for sentencing purposes. *State v. Wideman*, 206 Wis. 2d 91, 105, 556 N.W.2d 737 (1996). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Rodriguez's no contest plea.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Rodriguez to a four-year term. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In fashioning the sentence, the court considered the seriousness of the offense and Rodriguez's character, history of other offenses, and previous failure on supervision. *Id.* The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence. We also agree with appellate counsel that the record does not reveal any basis for seeking sentence modification.

The no-merit report fails to address the warrantless blood draw in this case. Counsel was obligated to address possible appellate issues and state why the issues do not have arguable merit. Future no-merit reports may be rejected if they do not fulfill the purpose of WIS. STAT. RULE 809.32.

The warrantless blood draw, plea hearing, and sentencing all occurred prior to the decision in *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013).² Rodriguez did not move

² The blood draw occurred on November 11, 2012, the plea hearing was held on January 19, 2013, and the sentencing was on March 12, 2013. *Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552 (2013), was decided on April 17, 2013. In *McNeely*, the Court concluded that the natural metabolization of alcohol in the blood stream does not present a per se exigency that justifies an exception to the warrant requirement in all drunk driving cases. *Id.* at 1556.

the circuit court to suppress evidence gathered as a result of the warrantless blood draw. The record in this case does not suggest that the warrantless blood draw violated the requirements in effect at the time it occurred. *State v. Faust*, 2004 WI 99, ¶¶18-23, 274 Wis. 2d 183, 682 N.W.2d 371 (warrantless blood draw lawful if *Bohling*³ criteria satisfied); *State v. Reese*, 2014 WI App 27, ¶22, ___ Wis. 2d ___, ___ N.W.2d ___ (*State v. Dearborn*, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97, applies to warrantless blood draws and suppression not available due to good faith exception applicable to police who acted in objectively reasonable reliance upon clear and settled Wisconsin precedent later invalidated by the United States Supreme Court.). There would be no arguable merit to a challenge to the warrantless blood draw.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney John Bachman of further representation of Rodriguez in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

³ *State v. Bohling*, 173 Wis. 2d 529, 494 N.W.2d 399 (1993).

IT IS FURTHER ORDERED that Attorney John Bachman is relieved of further representation of Raymundo Rodriguez in this matter.

Diane M. Fremgen
Clerk of Court of Appeals