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DISTRICT II

August 6, 2014

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

2014AP765-CRNM State of Wisconsin v. Brian G. Stoller (L.C. #2013CF263)
2014AP766-CRNM State of Wisconsin v. Brian G. Stoller (L.C. #2013CF284)

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

In these consolidated cases, Brian G. Stoller appeals from judgments convicting him of seventh-offense operating a vehicle while intoxicated (OWI) and four counts of felony bail jumping. Stoller's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Stoller was provided a copy of the report and informed of his right to file a response but he has not done so. Upon consideration of the no-merit report and our independent review of the record as mandated by

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

Anders and RULE 809.32, we conclude there are no issues which would have arguable merit for appeal. We summarily affirm the judgment, *see* WIS. STAT. RULE 809.21, accept the no-merit report, and relieve Attorney Luca L. Fagundes of further representing Stoller in this matter.

The no-merit report addresses a single issue: whether there would be arguable merit to a claim that the circuit court elicited a guilty plea from Stoller when he intended to plead no contest and did not explain the distinction between guilty and no-contest pleas. We agree with counsel that in this case there would not.

A no-contest plea is the functional equivalent of a guilty plea. ***State v. Higgs***, 230 Wis. 2d 1, 9, 601 N.W.2d 653 (Ct. App. 1999). While a no-contest plea "constitutes an implied confession of guilt for the purposes of the case to support a judgment of conviction," its "essential characteristic … is that it cannot be used collaterally as an admission" in a later civil action. ***Lee v. State Bd. of Dental Exam'rs***, 29 Wis. 2d 330, 334, 139 N.W.2d 61 (1966). "Collateral use of a no[-]contest plea occurs when the admission is used 'in another action' or 'in another case,' *i.e.*, in an action or case wholly independent of and separate from the action or case in which the no[-]contest plea takes place." ***State v. Rachwal***, 159 Wis. 2d 494, 513, 465 N.W.2d 490 (1991) (citation omitted).

Here, an intoxicated Stoller was found asleep in the driver's seat of his parked, running vehicle in a parking lot. After some dissembling, he admitted he had driven there. On these facts, Stoller likely would not be subject to any collateral effects, such as restitution, from his OWI and felony bail-jumping convictions. The court should have explained the difference between the two types of pleas, which might have prompted Stoller to correct himself, but we conclude that the failure to do so was harmless error. *See* ***State v. Dyess***, 124 Wis. 2d 525, 543,

370 N.W.2d 222 (1985) (the test with respect to harmless versus prejudicial error is whether there is a reasonable possibility that the error contributed to the conviction). No meritorious argument could be made that Stoller failed to understand that his plea, whether no contest or guilty, would result in a conviction.

The circuit court sentenced Stoller to forty-two months' initial confinement and forty-two months' extended supervision on the OWI. It also imposed eighteen months' probation, sentence withheld, on each of the four felony bail-jumping charges, and dismissed and read in three counts: operating with a prohibited alcohol content, obstructing an officer, and another felony bail jumping. We conclude that no issue of arguable appellate merit could be raised.[2]

Sentencing is left to the discretion of the circuit court and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The sentencing court must provide a "rational and explainable basis" for the sentence imposed to allow this court to ensure that discretion in fact was exercised. ***Id.***, ¶¶39, 76 (citation omitted). It must consider the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999), but the weight given to each factor is within the court's discretion, ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

No basis exists to disturb the sentence. Addressing the seriousness of the offense, Stoller's character, and the need to protect the public, the court found that Stoller flouted the

[2] A no-merit report must address whether the sentence imposed represents an erroneous exercise of discretion.

conditions of his bail by driving while intoxicated, thereby putting his life and the lives of others at risk, and that he then tried to cover it up by claiming he had used Nyquil, a claim incompatible with his 0.19 preliminary breath test. It concluded that incarceration was necessary to give Stoller the time and structure to address his alcoholism. As Stoller's exposure was ten years' imprisonment and a $25,000 fine, his sentence is not so excessive or unusual so as to shock public sentiment. *See* ***id.***; *see also* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. .

Our review of the record discloses no other potential issues for appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Luca L. Fagundes is relieved of further representing Stoller in this matter.

Diane M. Fremgen
Clerk of Court of Appeals