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August 13, 2014

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

2013AP984-CRNM State of Wisconsin v. John M. Weller (L.C. #2011CF361)

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

John M. Weller appeals from a judgment of conviction entered upon his guilty plea to one count of homicide by intoxicated use of a vehicle, as a repeater, contrary to WIS. STAT. §§ 940.09(1)(a) and 939.62(1)(c) (2011-12).[1] Weller's appellate counsel has filed a no-merit

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

report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Weller received a copy of the report and filed a response. Upon consideration of the no-merit report, Weller's response, and our 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.

According to the criminal complaint, in 2011, officers were dispatched to a two-vehicle crash. Officers arrived to find a truck flipped onto its roof. Its driver, Kelly Agnes, was seatbelted behind the steering wheel and "was deceased from apparent injuries suffered in [the] motor vehicle crash." Weller was the sole occupant of the other vehicle. He admitted having consumed intoxicants and a portable breath test (PBT) administered at the scene showed a blood alcohol concentration (BAC) of 0.178 grams per one hundred milliliters. Deputy Jon Albrecht, a trained accident reconstructionist, reported that based on the evidence at the scene, it appeared that Weller failed to stop at a marked sign and ran into Agnes' truck. Weller was taken to the hospital and provided two blood samples. At Weller's preliminary hearing, the blood test results were admitted and established that his BAC was 0.202 at 11:06 p.m. and 0.169 one hour later. Weller's blood samples also contained benzodiazepines and cannabinoids. The trial court found probable cause sufficient to bind Weller over for trial and the State filed an information charging four counts: (1) homicide by intoxicated use of a vehicle, as a repeater; (2) homicide by use of a vehicle while driving with a prohibited alcohol concentration, as a repeater; (3) homicide by use of a vehicle while driving with a detectable amount of a restricted controlled substance, as a repeater; and (4) knowingly operating a motor vehicle with a suspended license, causing death. Pursuant to a plea agreement, Weller pled guilty to count one as a repeater, and the remaining

counts were dismissed.[2] At sentencing, the trial court imposed a bifurcated sentence of twenty-five years, with eighteen years of initial confinement and seven years of extended supervision.

The no-merit report addresses whether there is any basis for a challenge to the validity of Weller's guilty plea and whether the trial court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

The record demonstrates that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a) and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The trial court specifically ascertained Weller's understanding of the nature of and factual basis for the charge, the constitutional rights waived by his guilty plea, the parties' plea agreement, and the maximum penalty as enhanced by Weller's repeater status. Though the trial court did not directly ask Weller if he understood that the court was not bound by the parties' plea agreement, on the facts of this case, the court's omission does not give rise to an arguably meritorious plea-withdrawal claim. ***State v. Johnson***, 2012 WI App 21, ¶¶10, 12, 339 Wis. 2d 421, 811 N.W.2d 441 (where defendant received the benefit of his plea bargain, the court's failure to warn the defendant that the court was not bound by the parties' agreement was an insubstantial defect and did not constitute a manifest injustice as a matter of law). The trial court accepted the plea agreement

[2] The plea agreement did not include any sentencing concessions. At the plea hearing, trial counsel stated that he had explained to Weller that because he could only be sentenced in connection with one of the first three counts, any reduction in his exposure at sentencing derived from the dismissal of count four.

and dismissed the remaining three charges. There was no agreement as to Weller's sentence, and the trial court correctly informed Weller of his potential maximum sentence.

We also conclude that no arguably meritorious issue arises from the trial court's failure to directly ask Weller whether his plea was induced by any threats or promises other than the plea agreement. As part of the plea colloquy, the trial court drew Weller's attention to the signed plea questionnaire/waiver of rights form and ascertained that he had reviewed, understood, and signed the document. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (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 the plea is taken). In signing the form, Weller acknowledged and represented that his plea was voluntary as the product of his "own free will" and that no promises or threats induced the entry of his guilty plea. The trial court further ascertained trial counsel's opinion that Weller's guilty plea was knowing and voluntary. This comports with ***Hoppe***. *See* ***id.***, ¶42 (use of the plea form at the plea hearing lessens the extent and degree of the requisite colloquy).[3]

Appointed counsel next addresses whether 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 (sentencing is committed to the trial court's discretion, and our review is limited to determining

[3] Additionally, counsel's no-merit brief certifies that he discussed with Weller his appellate options and asserts that Weller is unable to allege facts sufficient to establish a prima facie ***Bangert*** violation. *See* ***State v. Brown***, 2006 WI 100, ¶¶36-37, 293 Wis. 2d 594, 716 N.W.2d 906 (in order to establish a prima facie case sufficient to trigger an evidentiary hearing, a defendant must allege that he did not understand the information that should have been provided by the trial court). Weller's response does not rebut counsel's representation.

whether the court erroneously exercised that discretion). Here, in fashioning its sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court considered the crime to be aggravated by Weller's high BAC and cannabis consumption, his excessive driving speed and failure to stop at the marked stop sign, and the impact of the offense on the victims (Agnes' immediate family, including his five children). With respect to Weller's character, the trial court considered mitigating attributes, including Weller's acceptance of responsibility, demeanor, demonstrations of remorse, and history of caring for his disabled girlfriend. The court also considered aggravating factors such as Weller's prior record and history of drug and alcohol use. The trial court determined that in light of the above factors and considering the defendant's rehabilitative needs, a long period of incarceration was necessary to protect the public.

In his response to the no-merit report, Weller challenges only the length of his sentence. He asks this court to "take into consideration" that at the time of the offense, he had only three prior convictions, was working five days per week, and was taking care of his sick girlfriend as they prepared for their first child. Pointing out that he was only twenty-one years old, Weller asserts that he "was just a kid who made a mistake that took another man's life." On review, we afford the sentencing court a strong presumption of reasonability, and if discretion was properly exercised, we follow "a consistent and strong policy against interference" with the court's sentencing determination." ***Gallion***, 270 Wis. 2d 535, ¶18 (citation omitted). Here, the trial court considered the facts of record, including those identified in Weller's response, explained its process, and reached a reasonable conclusion. The trial court acknowledged mitigating circumstances related to Weller's character, but in the end, permissibly focused on the

aggravated nature of the offense. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23 (the weight to be given to each factor is committed to the trial court's discretion). There is no meritorious challenge to the trial court's exercise of sentencing discretion.[4]

Further, we cannot conclude that the sentence imposed was unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id.***, ¶¶31-32 (citation omitted). Here, the twenty-five year sentence was below the thirty-one year maximum authorized by statute, and is not so excessive or unusual as to shock the public's sentiment. *See* ***id***.

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 Weller further in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Steven D. Grunder is relieved from further representing John M. Weller in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] Appointed counsel correctly states that Weller received 289 days of sentence credit and asserts that he "is not aware of any additional creditable time in custody." Weller's response does not contradict counsel's representation and our review of the record does not provide any reason to doubt the propriety of the trial court's sentence credit award.