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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:

2013AP2488-CRNM State of Wisconsin v. John J. Miller (L.C. #2011CF915)

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

John J. Miller appeals from a judgment of conviction for operating while under the influence of an intoxicant (OWI) as a seventh offense. His 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). Miller filed a response to the no-merit report and counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Miller then submitted three additional "responses." Upon

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

consideration of these submissions 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.

At 6:00 a.m. on a Sunday morning, Miller was clocked going ninety-one miles per hour on the interstate highway. A traffic stop was initiated which eventually resulted in Miller's arrest for OWI. Miller refused to consent to the blood draw but it was completed while officers restrained Miller. Having six prior OWI convictions, Miller was charged with OWI as a seventh offense, operating with a prohibited blood alcohol concentration as a seventh offense, and operating after revocation. Miller entered a guilty plea to the OWI charge with the others dismissed as read-ins.[2] He was sentenced to four years' initial confinement and five years' extended supervision to be served consecutive to prior sentences.

The no-merit report discusses two potential issues: whether ***Missouri v. McNeely***, 569 U.S.___, 133 S. Ct. 1552 (2013), decided after Miller's plea and sentencing, provides a basis for plea withdrawal, and whether the sentence was unduly harsh. The no-merit report does not discuss the plea taking and whether Miller's plea was freely, voluntarily, and knowingly entered. ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, summarizes the judge's duties during the plea colloquy. During the plea hearing the circuit court fulfilled each of those

[2] The speeding and refusal charges filed in separate cases were also dismissed as read-ins as part of the plea agreement.

duties.[3] Miller admitted he operated a motor vehicle while intoxicated and that he had six prior convictions for the same conduct. No issue of merit exists from the plea taking.[4]

The no-merit reports sets forth the holding of ***McNeely*** that but for a finding of exigency in a specific case, the natural dissipation of alcohol in the blood does not categorically permit an involuntary blood draw without a warrant. ***McNeely***, 133 S. Ct. at 1563. Counsel concludes in the report that a potential claim that Miller should be allowed to withdraw his guilty plea because the blood draw was without a warrant lacks merit because Miller was convicted of operating while under the influence and not operating with a prohibited blood alcohol content and consequently, the test result was not needed for the conviction. We do not accept counsel's reasoning because it does not account for the possibility that the plea was influenced by the addition of the charge of operating with a prohibited blood alcohol concentration after the test result was reported. Also, the conviction carried a higher potential fine because of the test result.

Here no motion to suppress the test result was filed and the potential challenge was forfeited. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. Thus, Miller could only claim that his trial counsel was ineffective for not filing the motion to suppress

[3] The circuit court properly advised Miller that there was a three-year minimum period of initial confinement for his seventh OWI offense. *See* ***State v. Williams***, 2014 WI 64, ¶6, ___, Wis. 2d ___, ___ N.W.2d ___.

[4] At the hearing at which Miller waived his right to a preliminary hearing, the prosecution appeared by a "District Attorney Law Intern" without the presence of a supervising attorney. It appears the intern's appearance was authorized by SCR § 50.06(2)(b) which permits a law student intern to appear without "[d]irect and immediate supervision" "when very routine actions take place." Even if the appearance was improper, by his guilty plea, Miller forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

the test result. However, ***McNeely*** was decided after Miller's plea and sentencing. Prior to ***McNeely*** the law in Wisconsin was that the natural dissipation of blood-alcohol evidence alone constituted a *per se* exigency. *See* ***State v. Bohling***, 173 Wis. 2d 529, 494 N.W.2d 399 (1993). Additionally, in ***State v. Reese***, 2014 WI App 27, ¶22, 353 Wis. 2d 266, 844 N.W.2d 396, the court held that the blood test result should not be suppressed because officers reasonably relied on clear and settled Wisconsin Supreme Court precedent in obtaining the warrantless blood draw. A suppression motion asserting that the warrantless blood draw was unlawful would have been unsuccessful. "Trial counsel's failure to bring a meritless motion does not constitute deficient performance." ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441. The ***McNeely*** decision does not provide a basis to pursue plea withdrawal.[5]

In sentencing Miller the court settled on the need to protect the public as the objective to be served. The sentence was a demonstrably proper exercise of discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. We accept the discussion and conclusion in the no-merit report that the sentence was not unduly harsh.

[5] Miller's second response to the no-merit report claims the blood draw was illegally obtained. He also claims his trial, postconviction, and appellate attorneys were deficient for not pursuing the unlawful search, seizure, and suppression issues. His final salvo is that he was given false and misleading advice by trial counsel as to how the test result evidence could be used and therefore, his plea was not knowing, intelligent, or voluntary. Our discussion demonstrates why there is no merit to these claims.

In his first response to the no-merit report Miller contends that his first OWI conviction, a forfeiture offense, could not be counted in the total number of prior convictions and that he stands only convicted of his sixth offense, which has lower maximum penalties. The supplemental no-merit report correctly points out that the statute which sets forth the prior convictions to be counted, WIS. STAT. § 343.307, is not limited to criminal OWI convictions. *See* ***State v. Novak***, 107 Wis. 2d 31, 42-43, 318 N.W.2d 364 (1982). There was no counting error in determining that the present conviction is Miller's seventh.

Miller claims there was no basis to arrest him since the officer only stopped him for speeding and had no information on how many beers Miller had consumed or the length of time since Miller's last drink.

> Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime. There must be more than a possibility or suspicion that the defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.

State v. Secrist, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999) (citations omitted). The criminal complaint sets forth the circumstances of the stop which included some erratic driving, the strong odor of intoxicants coming from the vehicle, and Miller's poor performance on field sobriety tests. There is no basis to question the validity of the stop and subsequent arrest.

Our review of the record discloses no other potential issues for appeal.[6] Accordingly, this court accepts appointed counsel's no-merit conclusion, affirms the conviction, and discharges appellate counsel of the obligation to represent Miller further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Kathleen M. Quinn is relieved from further representing John J. Miller in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[6] Miller's third and fourth submissions in response to the no-merit report repeat the same claims about the forced blood draw and probable cause for arrest.