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September 3, 2014

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

2013AP1109-CRNM State of Wisconsin v. Jesse J. Delebreau (L.C. #2012CT1015)
2013AP1110-CRNM State of Wisconsin v. Jesse J. Delebreau (L.C. #2012CF711)

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

In these consolidated appeals, Jesse J. Delebreau appeals from judgments of conviction entered upon his no contest pleas to operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood as a third offense and felony bail jumping as a repeater. Delebreau's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967), as well as four supplemental

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

no-merit reports.[2] Delebreau has filed three responses. Upon consideration of the no-merit reports, Delebreau's responses, and our independent review of the record, we conclude that the judgments 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.

In June 2012, police received a report from a named informant that a gray Cadillac with a maroon top was "crossing the center line, all over the road, and had almost hit a car head [on]." The complainant provided the car's license plate number and described the driver as a young white male with a "possibly shaved head, smoking something and laid back in the driver seat." Deputy Jason Stuckart located the Cadillac and saw it swerve in its lane, make at least one sudden turn, and nearly strike a curb. Stuckart stopped the car and made contact with Delebreau, the driver. He noticed that Delebreau's eyes were red, glassy, and droopy and his pupils were very constricted. Stuckart described Delebreau's speech as slow and thick and stated that he was shaky on his feet and swayed when standing still. Delebreau failed the field sobriety tests. Deputy McAuly, a trained drug recognition expert, observed numerous indicia of drug intoxication as well as scabbed track marks on Delebreau's arm. Delebreau was charged with operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood (OWI) as a third offense and bail jumping as a repeater.[3] Pursuant to a plea agreement, Delebreau pled no contest to both charges, and the trial court imposed the following sentences:

[2] Two of the supplemental no-merit reports were filed in reply to Delebreau's written responses. The third and fourth supplemental reports were filed at the direction of this court pursuant to orders entered February 11 and April 25, 2014. Delebreau filed a response to the third but not the fourth supplemental report. The fourth supplemental report was filed on June 27, 2014.

[3] The factual basis for the bail jumping charge is Delebreau's commission of the OWI while released on bail in a separate felony case.

(1) on the felony bail jumping, a four-year bifurcated sentence with two years of initial confinement and two years of extended supervision, to run concurrent with a longer sentence previously ordered in a separate case; and (2) on the OWI, sixty days in jail, consecutive to the bail jumping sentence.

The traffic stop

Delebreau contends that his traffic stop was illegal because police began following his car based on the tip of a citizen who "used bad judgment, and is not in State Law known as a credible witness." This claim lacks arguable merit. An officer may lawfully perform a traffic stop where, based on specific and articulable facts, he or she reasonably suspects that criminal activity is afoot. ***Terry v. Ohio***, 392 U.S. 1, 21, 30 (1968). Reasonable suspicion need not derive from an officer's firsthand observation of suspicious or criminal activity, but may be based on a tip exhibiting reasonable indicia of reliability. ***State v. Rutzinski***, 2001 WI 22, ¶¶18, 31, 38, 241 Wis. 2d 729, 623 N.W.2d 516. A tip from an identified citizen informant is subject to a relaxed test of reliability which focuses on "observational reliability" as evaluated "from the nature of [the] report, [the] opportunity to hear and see the matters reported, and the extent to which it can be verified by independent police investigation." *See* ***State v. Kolk***, 2006 WI App 261, ¶¶12-13, 15, 298 Wis. 2d 99, 726 N.W.2d 337 (citation omitted). Deputy Stuckart had reasonable suspicion to believe that Delebreau was operating while intoxicated based solely on the tip of a named citizen who reported contemporaneous observations of Delebreau's driving and provided a detailed description of the car and its approximate location, which Stuckart was then able to verify. *See* ***Rutzinski***, 241 Wis. 2d 729, ¶¶31, 38. Additionally, Stuckart observed Delebreau's erratic driving firsthand. Stuckart had ample reasonable suspicion to stop Delebreau's car and any argument to the contrary would be frivolous.

Delebreau's no contest pleas

In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective and the defendant did not understand information that should have been provided, ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986), or demonstrate that under the analysis of ***State v. Bentley***, 201 Wis. 2d 303, 313-14, 548 N.W.2d 50 (1996), factors extrinsic to the plea colloquy rendered his or her plea infirm. *See* ***State v. Hoppe***, 2009 WI 41, ¶3, 317 Wis. 2d 161, 765 N.W.2d 794.

We conclude that there is no arguably meritorious challenge under ***Bangert*** to the trial court's plea-taking procedures. *See* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 266-72; *see also* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The trial court drew Delebreau's attention to the completed plea form and verified that Delebreau reviewed, understood, and signed the document. *See* ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32, 42 (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). The trial court ascertained that Delebreau understood the plea agreement, the constitutional rights waived by entry of a plea, and that the court was not bound by the parties' agreement or recommendations.

In our April 25, 2014 order, we observed that the trial court failed to explicitly inform Delebreau of the ten-year maximum enhanced penalty on the bail jumping charge and the plea questionnaire stated only the unenhanced six-year maximum. Distinguishing ***State v. Taylor***, 2013 WI 34, 347 Wis. 2d 30, 829 N.W.2d 482, we stated that we were unable to determine from

the record whether Delebreau was aware he faced a ten-year sentence.[4] Appellate counsel's fourth supplemental no-merit report alleges that by letter dated June 28, 2012, trial counsel informed Delebreau of the ten-year enhanced maximum and that Delebreau acknowledged receipt of the letter. A copy of trial counsel's letter to Delebreau is attached to the fourth supplemental no-merit report. Delebreau has not responded. We deem appellate counsel's unrebutted assertions to be admitted and determine that they establish Delebreau's understanding of the enhanced bail jumping penalty. *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 under ***Bangert***, a defendant must allege he did not understand the information that should have been provided by the trial court).

Further, Delebreau's responses do not give rise to a claim under ***Bentley*** that factors extrinsic to the colloquy rendered his plea infirm. Delebreau was convicted under WIS. STAT. § 346.63(1)(am), which criminalizes the operation of a vehicle by a driver with a "restricted controlled substance" in his or her blood.[5] Delebreau's July 31, 2013 response to the original no-

[4] In ***State v. Taylor***, 2013 WI 34, ¶54, 347 Wis. 2d 30, 829 N.W.2d 482, though the trial court did not specify the enhanced maximum penalty in the plea colloquy, the Wisconsin Supreme Court ultimately concluded that:

> it was not manifestly unjust to deny Taylor's motion to withdraw his no contest plea where (1) the circuit court informed Taylor at the plea colloquy that he could receive [the unenhanced maximum of] a six-year term of imprisonment; (2) Taylor actually received a six-year term of imprisonment; and (3) the record is abundantly clear that Taylor was nonetheless aware of the two-year penalty enhancer from the alleged repeater.

As in ***Taylor***, Delebreau received a sentence that did not exceed the unenhanced maximum penalty.

[5] A "restricted controlled substance" is defined in WIS. STAT. § 340.01(50m) as:

> (a) A controlled substance included in schedule I under [WIS. STAT.] ch. 961 other than a tetrahydrocannabinol.
> (b) A controlled substance analog, as defined in [WIS. STAT. §] 961.01(4m) of a controlled substance described in par. (a).

(continued)

merit report asserted that his blood test results revealed only the presence of schedule II narcotics and that no "restricted controlled substances" were detected.[6] Delebreau suggested that due to trial counsel's performance, he may have entered his OWI plea without an accurate understanding of the charge or in the absence of a sufficient factual basis. *See* ***Bentley***, 201 Wis. 2d at 311. These circumstances led to our February 11, 2014 order for a third supplemental no-merit report.

Counsel's third supplemental no-merit report addresses our concerns and maintains there is no arguably meritorious challenge to Delebreau's OWI plea. We agree. Attached to the report is appellate counsel's affidavit outlining his conversations with both trial counsel and Delebreau. According to the affidavit, trial counsel stated that the test results were received and mailed to Delebreau in advance of the plea hearing. Trial counsel stated that he contacted the state laboratory and was informed that: (1) the blood tests detected codeine and morphine, (2) the tests were not specific enough to determine if the codeine and morphine derived from a schedule I or a schedule II drug, (3) the presence of codeine and morphine may have been the result of heroin consumption, and (4) the presence of codeine or morphine could not have been the result of the hydrocodone prescribed to Delebreau.[7] The affidavit avers that appellate counsel spoke with Delebreau on March 10, 2014, at which time Delebreau agreed that he (1) received the blood test

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(c) Cocaine or any of its metabolites.
(d) Methamphetamine.
(e) Delta-9-tetrahydrocannabinol.

[6] It is unclear from the record what the results of Delebreau's blood tests revealed and whether he received the results prior to entering his plea.

[7] According to his affidavit, appellate counsel also contacted the state lab and was provided the same information.

results prior to the plea hearing, (2) discussed the test results with trial counsel prior to entering his plea, (3) understood that the codeine and morphine in his blood could have been either schedule I or schedule II variants of those drugs, and (4) was aware of the above information when he elected to settle this case by entering a plea. Delebreau's response to the third supplemental no-merit report does not dispute any of its relevant assertions,[8] and we deem them admitted.

Sentencing

Finally, we conclude that there is no arguably meritorious challenge to the trial court's exercise of sentencing discretion. In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. *See* ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court considered but rejected probation, stating that "ordering simply a straight probation case in this file, in light of the nature of the offense and in light of the history of the—the priors, would be unduly depreciating the seriousness of what's going on here in this case." The court considered mitigating factors, such as Delebreau's family relationships, educational background, and employment history. Concerned about Delebreau's serious and longstanding substance abuse issues, the trial court found him eligible for the challenge incarceration and earned release programs. The trial court identified proper objectives, considered relevant factors, explained its process, and reached a reasonable conclusion. ***State v. Odom***, 2006 WI App 145, ¶8, 294

[8] Instead, Delebreau states that appellate counsel failed to properly investigate his case because rather than having the blood retested, he "only asked the State testing labs tech which is ridiculous because of [their] bias and that is [absolutely] not fair at all of [course they're] going to say well probably not from hydrocodone."

Wis. 2d 844, 720 N.W.2d 695 (we will sustain a sentencing court's reasonable exercise of discretion even if this court or another judge might have reached a different conclusion). Further, it cannot reasonably be argued that Delebreau's sentence, which is less than the statutory maximum, is so harsh or excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgments, and discharges appellate counsel of the obligation to represent Delebreau further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Daniel R. Goggin II, is relieved from further representing Jesse J. Delebreau in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals