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 II

September 10, 2014

To:

Hon. Mary Kay Wagner
Circuit Court Judge
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

Colleen Marion
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

Robert D. Zapf
District Attorney
Molinaro Bldg.
912 56th Street
Kenosha, WI 53140-3747

Monroe J. Esters 432749
Drug Abuse Corr. Cntr.
P.O. Box 190
Winnebago, WI 54985-0190

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

2014AP910-CRNM State of Wisconsin v. Monroe J. Esters (L.C. #2013CF134)

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

Monroe Esters appeals from a judgment of conviction for operating while intoxicated (OWI) causing injury as a second or subsequent 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). Esters has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, we conclude that

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

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.

Esters was involved in a two-car motor vehicle accident and the driver of the other car injured her wrist as a result of the accident. Esters was combative with the police officer at the scene of the accident and his conduct prevented the officer from conducting field sobriety tests. A sample of Esters' blood was taken at a hospital. Esters was charged with OWI causing injury, resisting an officer, and OWI as a third offense. He entered a no-contest plea to the OWI causing injury charge and the other charges were dismissed.[2] The prosecution agreed to make no specific recommendation at sentencing, and it did not. Esters was sentenced to two years' initial confinement and three years' extended supervision. The sentence was made consecutive to a sentence Esters was serving after the revocation of extended supervision.

[2] A separate refusal charge was also dismissed. It appears that a blood sample was taken from Esters without a warrant; it is unclear whether or not Esters consented. ***Missouri v. McNeely***, 569 U.S. __, 133 S. Ct. 1552, 1563 (2013), holds 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. No motion to suppress the blood test result was filed and a potential challenge under ***McNeely*** was forfeited. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. Where a potential issue is forfeited, it may be reviewed within the rubric of the ineffective assistance of trial counsel. ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. Even if Esters' blood draw was nonconsensual, there is no arguable merit to a claim that trial counsel was ineffective for not challenging it. The January 29, 2013 blood draw predated the ***McNeely*** decision which was entered April 17, 2013. 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), *abrogated by* ***McNeely***, 133 S. Ct. at 1557-58 & n.2. 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 no-merit report addresses the potential issues of whether Esters' plea was freely, voluntarily, and knowingly entered and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.[3]

In his response Esters claims that his appellate counsel fails to consider and discuss whether his trial counsel was ineffective for not timely preserving evidence from the accident. Specifically Esters complains that his trial attorney did not acquire the victim's cell phone records around the time of the accident to show whether the victim was distracted while driving, the on-board computer from the victim's car which would show the vehicle's speed, time of air-bag deployment, and whether the brakes were applied before impact, and the surveillance video from a nearby building that may have captured the accident. At his first meeting with counsel, Esters asked his trial counsel to get those items. He entered his no-contest plea knowing that his trial counsel did not or was unable to get those items. By his no-contest plea Esters forfeited the right to raise defenses and complaints he may have about trial counsel's failure to get the items. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (a no-contest plea forfeits the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights). Additionally, during the plea colloquy Esters was asked if he was satisfied

[3] The no-merit report notes that during the plea colloquy the circuit court failed to give the required deportation warning. *See* WIS. STAT. § 971.08(2). The presentence investigation report lists Esters' ethnicity as African-American. Thus, as the no-merit report concludes, the circuit court's failure to give the warning provides no grounds for relief because Esters could not show that his plea is likely to result in deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1.

with his trial counsel's performance and he indicated he was even though he knew counsel had not obtained the requested items.[4]

Further, at sentencing, the circuit court asked Esters about a letter he wrote to the court about trial counsel's failure or inability to get the requested items. Esters stated that he was not claiming that his trial counsel was ineffective and that he was not asking his attorney to do something else. During sentencing, Esters' trial counsel acknowledged that Esters had asked for those items but explained that Esters was not trying to deflect blame onto the victim. Thus, Esters used to his advantage at sentencing that he was willing to proceed despite not having those items as reflecting his acceptance of responsibility and desire not to unnecessarily drag out the proceeding. He cannot now complain that the unfilled request for those items provides grounds for relief. *See* ***State v. Petty***, 201 Wis. 2d 337, 347, 548 N.W.2d 817 (1996) ("[t]he equitable doctrine of judicial estoppel … is intended to 'protect against a "litigant playing fast and loose with the courts" by asserting inconsistent positions'" (citations omitted)).

Esters also contends that his sentence is unduly harsh because the victim only had a minor injury. Esters also suggests the sentence is harsh because it was made consecutive to an eighteen-month term of confinement on a previous conviction. We have already concluded that there is no arguable merit to a claim that the sentence was an erroneous exercise of discretion.

[4] In his response Esters states that because he is a layman he did not realize until after doing further research the seriousness of his trial counsel's inaction with respect to the items. Even if Esters' explicit approval of trial counsel's performance is excused, there is no issue of arguable merit. There is no suggestion that the items could have been retrieved and that they would have presented a defense to the charge.

The five-year sentence is within the six-year maximum and cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances."). The consecutive nature of the sentence is supported by Esters' criminal history and past failure on supervision.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Esters 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 Colleen Marion is relieved from further representing Monroe Esters in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals