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October 1, 2014

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

2014AP909-CRNM State of Wisconsin v. David J. Crockett, II (L.C. #2013CF79)

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

David J. Crockett, II, appeals from a judgment of conviction for injury by intoxicated use of a vehicle. 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). Crockett received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, we conclude that the

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

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.

Crockett was originally charged with three counts: injury by intoxicated use of a vehicle contrary to WIS. STAT. § 940.25(1)(a), injury by use of vehicle with a prohibited alcohol concentration contrary to § 940.25(1)(b), and injury by intoxicated use of a vehicle by using a controlled substance contrary to § 940.25(1)(am). The charges stem from a one-car accident which occurred while Crockett was driving. The passenger in his car was severely injured. Crockett entered a guilty plea to the intoxicated use charge and the other charges and a related traffic ticket were dismissed as read-ins at sentencing. Crockett was sentenced to eighteen months' initial confinement and five years' extended supervision.

The no-merit report addresses the potential issues of whether Crockett's plea was voluntarily and knowingly entered and whether the sentence was the result of an erroneous exercise of discretion. The report's conclusion that the plea was valid relies primarily on the fact that the circuit court asked Crockett about his execution and understanding of the plea questionnaire. However, ***State v. Hoppe***, 2009 WI 41, ¶31, 317 Wis. 2d 161, 765 N.W.2d 794, explains that the circuit court may not rely entirely on a plea questionnaire as a substitute for a substantive in-court plea colloquy. "The plea colloquy cannot … be reduced to determining whether the defendant has read and filled out the Form," and "the Form cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant." ***Id.***, ¶32. Other than questioning Crockett about his understanding of the maximum penalty and his rights to counsel, to a unanimous jury verdict based on the beyond a reasonable doubt standard, to confront and cross examine witnesses, and to remain silent, the circuit court did not specifically address any other topic covered by the plea questionnaire before concluding that the

plea was freely and voluntarily entered.[2] The no-merit report fails to address whether the circuit court achieved the right blend of a substantive colloquy and reliance on the information in the plea questionnaire.

We conclude on this record there is no arguable merit to a claim that the plea taking was defective. What first stands out as perhaps lacking in the plea colloquy is the absence of an on-the-record discussion of the elements of the offense. *See* ***State v. Bangert***, 131 Wis. 2d 246, 269, 389 N.W.2d 12 (1986) (establishing a mandatory obligation on the circuit court to first inform the defendant of the charge's nature or to ascertain that the defendant possess such information and to do so in a manner that is just more than a perfunctory procedure); *see also* WIS. STAT. § 971.08(1)(a). ***State v. Brown***, 2006 WI 100, ¶¶46-48, 293 Wis. 2d 594, 716 N.W.2d 906, reiterates that a circuit court may fulfill its duty under § 971.08(1)(a), to address the defendant personally to determine that the plea is made with understanding of the nature of the charge by summarizing the elements of the crime by reading from the appropriate jury instructions or statute; asking defendant's counsel whether he explained the nature of the charge to the defendant and requesting him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing; or expressly referring to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea. Although the elements of the offense were attached to the plea questionnaire, the circuit court did not ask Crockett specifically about the elements portion of the questionnaire. However, after the circuit court found that Crockett's plea was freely and voluntarily entered, the circuit court considered

[2] The Honorable David G. Reddy sentenced Crockett and is listed as the responsible court official in this case. However, Crockett's guilty plea was accepted by the Honorable John R. Race.

the factual basis for the plea. During that inquiry, the circuit court addressed Crockett about each fact that satisfied the elements of the offense. Crockett acknowledged that he understood the facts necessary to establish the crime. Discussion of the elements of the crime in the context of the facts was sufficient to satisfy the circuit court's duty under § 971.08(1)(a) and ***Bangert***. *See* ***Brown***, 293 Wis. 2d 594, ¶49 ("There may be other ways to show a defendant's understanding of the charges.").

During the plea colloquy the circuit court also failed to advise Crockett as required by ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, "that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court." ***Hampton*** requires that when a circuit court discovers that "the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court." ***Id.***, ¶32 (citation omitted). In ***Hampton***, the defendant and the State agreed to a particular sentence. ***Id.***, ¶16. Here the plea agreement required the dismissal of charges and left both sides free to argue for an appropriate sentence. The court accepted the agreement as to the dismissal of the charges. As to sentencing recommendations, there was no agreement for the circuit court to approve or reject. Crockett was not affected by the defect in the plea colloquy. Any argument that Crockett should be permitted to seek plea withdrawal under ***Hampton*** lacks arguable merit. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 411 (no manifest injustice justifying plea withdrawal exists where the court failed to advise defendant but followed the plea agreement).

The circuit court did not address Crockett during the plea colloquy regarding the impact of the read-in offenses at sentencing. *See* ***State v. Straszkowski***, 2008 WI 65, ¶¶5, 97, 310

Wis. 2d 259, 750 N.W.2d 835 (the circuit court "should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge."). Here the read-in charges involved the same victim. The circuit court made no mention of the read-in charges at sentencing and no restitution was imposed. If the circuit court was required to make advisements about the read-ins charges,[3] Crockett was not affected. *See* ***Johnson***, 339 Wis. 2d 421, ¶12.

Finally, the deportation warning required by WIS. STAT. § 971.08(1)(c), was not given. The presentence investigation report lists Crockett's birthplace as Illinois. The failure to give the warning is not grounds for relief because there is no suggestion that Crockett could 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.

We turn to consider whether there is arguable merit to a claim that the sentence was an erroneous exercise of discretion or unduly harsh. We are satisfied that the no-merit report properly analyzes and concludes that any challenge to the sentence lacks merit. We also observe that the circuit court required Crockett to pay the DNA surcharge because of his ability to pay

[3] It appears unsettled whether the advisements outlined in ***State v. Straszkowski***, 2008 WI 65, ¶¶5, 97, 310 Wis. 2d 259, 750 N.W.2d 835, are part of the circuit court's duties during a plea colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶19, 23, 317 Wis. 2d 161, 765 N.W.2d 794 (claim that the circuit court failed to notify the defendant that the read-in offenses could be considered at sentencing targeted the court's mandatory plea colloquy duties); ***State v. Lackershire***, 2007 WI 74, ¶28 n.8, 301 Wis. 2d 418, 734 N.W.2d 23 (the supreme court declined to adopt the court of appeals' characterization of read-ins as "collateral consequences" and expressly declined to address a circuit court's obligation to explain the nature of read-in offenses).

the associated cost of collecting his DNA for this conviction. It was an appropriate exercise of discretion to imposing the surcharge. *See* ***State v. Long***, 2011 WI App 146, ¶8, 337 Wis. 2d 648, 807 N.W.2d 12 (permissible to impose surcharge because the surcharge relates to costs of the DNA sample taken as a result of the conviction). The 6.5-year sentence imposed is well within the 12.5-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.").

Any other possible appellate issues are waived because Crockett's guilty plea forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights.[4] ***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. Our review of

[4] It appears that a blood sample was taken from Crockett without a warrant; it is unclear whether or not Crockett 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 Crockett's blood draw was nonconsensual, there is no arguable merit to a claim that trial counsel was ineffective for not challenging it. The October 11, 2012 blood draw predated the ***McNeely*** decision. 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). 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 a 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 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 Crockett 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 Thomas J. Erickson is relieved from further representing David J. Crockett, II, in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals