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DISTRICT IV

October 2, 2014

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

2013AP155-CRNM State of Wisconsin v. Nicholas C. Lavore (L.C. # 2009CM90)

Before Kloppenburg, J.[1]

Nicholas Lavore appeals a judgment convicting him, after entry of a no contest plea, of operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood, contrary to WIS. STAT. § 346.63(1)(am). Attorney Donald Lang has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

addresses the court's ruling on a pretrial motion to suppress, whether Lavore's plea was knowingly and voluntarily entered, and whether the circuit court erroneously exercised its sentencing discretion. Lavore was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, any challenge to the circuit court's denial of Lavore's suppression motion would lack arguable merit. Lavore filed a motion to suppress, arguing that the police officer who arrested him did not have probable cause and, therefore, the evidence obtained incident to his arrest should be suppressed. "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe … that the defendant was operating a motor vehicle while under the influence of an intoxicant." ***State v. Nordness***, 128 Wis. 2d 15, 35, 381 N.W.2d 300 (1986).

At the suppression motion hearing, state patrol trooper Thomas Rahmer testified that around 8:00 a.m. on April 12, 2009, he came upon two vehicles stopped on the shoulder of Highway 39. The driver of one of the vehicles reported, and Lavore confirmed, that Lavore's vehicle had crashed into the rear of her vehicle. Rahmer testified that during the course of his discussion with Lavore at the accident scene, Rahmer observed that Lavore's "actions seemed somewhat slow, and while he spoke he seemed dry mouthed." A short time later, when Lavore removed the sunglasses he had been wearing, Rahmer observed that Lavore's eyes were red and bloodshot. Rahmer also observed the odor of intoxicants coming from Lavore's vehicle. When asked if he'd been drinking, Lavore responded that the prior night he drank four vodka and cranberry juice drinks from nine p.m. to midnight. Rahmer then asked Lavore to step out of his vehicle for field sobriety testing. Rahmer testified that he observed signs of possible impairment

during the testing. After the testing, he also observed the odor of intoxicants coming from Lavore's person.

Based on his observations, Rahmer requested that Lavore perform a preliminary breath test. The result of the test was .03. After the field sobriety tests and preliminary breath test, Rahmer placed Lavore under arrest for driving under the influence. Rahmer testified that, based on his observations and Lavore's performance on the tests, he suspected that Lavore was impaired and that his impairment was possibly related to a drug other than alcohol. Under the "totality of the circumstances," we are satisfied that Rahmer had probable cause to arrest Lavore, and any challenge to the denial of the suppression motion on those grounds would lack arguable merit. *See* ***Nordness***, 128 Wis. 2d at 35.

Next, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Lavore entered into a negotiated plea agreement that was presented in open court. In exchange for Lavore's plea of guilty or no contest to operating with a detectable amount of a restricted controlled substance in his blood, the State agreed to dismiss a second count and propose to the court a joint sentencing recommendation of twenty days in jail to be served concurrently with another sentence Lavore was serving.

The circuit court conducted a standard plea colloquy, inquiring into Lavore's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Lavore understood that it would not be bound by any sentencing recommendations. In addition, Lavore provided the court with a signed plea questionnaire. Lavore indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts in the amended complaint—namely, that Lavore operated a motor vehicle with a detectable amount of cocaine in his blood—provided a sufficient basis for the plea. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Lavore has not alleged any other facts that would give rise to a manifest injustice. Therefore, his plea was valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Lavore's sentence would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). There is no such basis here. The court sentenced Lavore to twenty days in jail, to be served concurrently, and imposed a fine and costs totaling $904. The fine and sentence imposed were in accordance with the joint sentencing recommendation, and were well within the

applicable penalty ranges faced. *See* WIS. STAT. § 346.65(2)(am) (providing maximum fine of $1,100 and maximum jail term of six months). A defendant may not challenge on appeal a sentence that he affirmatively approved. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989). In addition, there is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here was not "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted). Therefore, we agree with counsel that there would be no arguable merit to challenging Lavore's sentence on appeal.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Donald Lang is relieved of any further representation of Nicholas Lavore in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals