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DISTRICT II

October 15, 2014

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

2014AP978-CRNM State of Wisconsin v. Stephen P. Janoska (L.C. #2011CM2018)

Before Neubauer, P.J.[1]

Stephen P. Janoska appeals from a judgment of conviction for third offense driving while intoxicated (OWI). His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Janoska 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] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2011-12). 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.

Janoska shouted an obscenity at an officer who was completing a roadside traffic stop on another vehicle at approximately 1:30 a.m. on October 11, 2011. The officer observed Janoska speed away in excess of the posted speed limit. Janoska continued to speed as the officer pursued his vehicle. Janoska stopped in his own driveway. The officer observed that Janoska's eyes were bloodshot and glassy, his speech was slurred, and he emitted a strong odor of intoxicants. Janoska was charged with third offense OWI and operating with a prohibited alcohol concentration (BAC), both charges enhanced because his alcohol concentration was between .20 and .249. He was also charged with obstructing an officer. His motion to suppress all evidence because the stop was unconstitutional and to suppress a remark to the officer as procured without reading him his ***Miranda*** rights and involuntarily was denied. After entering treatment, Janoska entered a guilty plea to the enhanced OWI charge. The obstructing charge was dismissed as a read-in at sentencing. The BAC charge was dismissed. The State made the promised recommendation at sentencing. Janoska asked for and was given a sentence of 150 days' jail time and the minimum fine of $1,800.

The no-merit report addresses the potential issues of whether the suppression motion was properly denied,[2] whether Janoska's 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. In particular, the report correctly concludes that the circuit court's failure to advise Janoska that it was not bound by the plea agreement as required by ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, would be harmless error because the court followed the plea agreement and in fact gave a shorter sentence. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (no manifest injustice for plea withdrawal exists where court failed to advise defendant but followed the plea agreement; the error can be harmless).

[2] The no-merit report states that Janoska agreed to submit to an evidentiary blood test. Although the complaint recites that fact, at the suppression hearing the officer testified that after reading Janoska the informing the accused form, Janoska refused to submit to the blood test and a forced blood draw was taken. It is not necessary to resolve the inconsistency in the record regarding the blood draw.

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 on this ground 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 Janoska'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, 2011 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.

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 Janoska 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 Ellen J. Krahn is relieved from further representing Stephen P. Janoska in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals