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**DISTRICT III**

October 21, 2014

To:

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

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2013AP2334-CRNM      State of Wisconsin v. Theodore L. Neubauer (L .C. # 2011CF39)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Theodore Neubauer has filed a no-merit report concluding there is no arguable basis for Neubauer to withdraw his no contest plea or challenge the sentence imposed for seventh-offense driving while intoxicated. Neubauer was advised of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

The complaint charged Neubauer with seventh-offense driving while intoxicated and seventh offense driving with a prohibited blood alcohol concentration. Sheriff deputies were

dispatched to the accident scene in which Neubauer's van struck a parked vehicle and a mailbox. Witnesses identified Neubauer as the driver. They said he drove over a snowbank onto a front lawn and did two u-turns before his van stopped. A citizen then turned off the vehicle and took the keys. The first deputy on the scene found Neubauer staggering, with glassy bloodshot eyes, slurred speech and a strong odor of intoxicants. Neubauer failed field sobriety tests and registered .20% on the portable breath testing device. A subsequent blood test established his blood alcohol concentration at .244%.

Neubauer's initial jury trial resulted in a mistrial after a deputy testified that on his way to the scene, he heard that the first deputy had already arrested Neubauer for "OWI 7th." The State had previously agreed not to introduce Neubauer's prior convictions unless he testified. After considering the possibility of instructing the jury to disregard the prior convictions, the court granted Neubauer's motion for a mistrial.

Neubauer subsequently waived the retrial and pled no contest to seventh-offense driving while intoxicated. The PAC count was merged and the State agreed to dismiss the second count as well as other traffic offenses, and to jointly recommend the minimum sentence of three years' initial confinement and three years' extended supervision. The defense would be free to ask for the sentence to run concurrent with other sentences Neubauer was then serving. The court accepted the plea and imposed the recommended sentence, consecutive to Neubauer's other sentences.

Although the no-merit report does not address the issue, we consider whether the second trial might have been barred by the double jeopardy clause. When a mistrial results from the State's misconduct, retrial is prohibited if the misconduct was intended to provoke the defendant

into moving for a mistrial. *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982). Here, the mistrial did not result from State misconduct and there is no basis for believing the State intended to goad Neubauer into requesting a mistrial, or that the State sought an opportunity to start over with a new jury.

The record discloses no arguable manifest injustice upon which Neubauer could withdraw his no contest plea. See *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, supplemented by a plea questionnaire and waiver of rights form, informed Neubauer of the constitutional rights he waived by pleading no contest, the elements of the offense, and the potential penalties, including the mandatory minimum sentence. As required by *State v. Hampton*, 2004 WI 117, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14, the court informed Neubauer it was not bound by the parties' sentence recommendations. The court followed the procedures for accepting a no contest plea set forth in WIS. STAT. § 971.08<sup>1</sup> and *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

Neubauer's plea agreement and the court's sentencing were based on the presumption that the law required a three-year minimum initial confinement. In *State v. Williams*, 2014 WI 64, ¶6, 355 Wis. 2d 581, 852 N.W.2d 467, the court construed WIS. STAT. §§ 346.65(2)(am)6. and 973.01 to require three years' initial confinement for this offense. Therefore, Neubauer was correctly informed about the potential penalties, and the court correctly construed the statutes when it determined the sentence.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The record discloses no arguable basis for challenging the sentence. The court could have imposed a sentence of ten years' imprisonment and a \$25,000 fine. The court imposed the jointly-recommended sentence to run consecutive to Neubauer's other sentences based on the seriousness of the offenses, the degree of Neubauer's intoxication, his character, his failure to have benefitted from past therapy and the need to protect the public. The court considered no improper factors and the six-year sentence is not arguably so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney William Schmaal is relieved of his obligation to further represent Neubauer in this matter. WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*