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

2014AP1278-CRNM State of Wisconsin v. Philip C. Shierk (L.C. # 2012CF428)
2014AP1279-CRNM State of Wisconsin v. Philip C. Shierk (L.C. # 2013CF193)

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

Philip C. Shierk appeals from judgments of conviction for sixth- and seventh-offense operating while under the influence of an intoxicant (OWI). 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). Shierk 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 judgments 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.

Shierk was stopped for speeding on November 17, 2012, and after field sobriety tests, transportation to a hospital, and a blood draw, he was charged with sixth-offense OWI (OWI six) with an alcohol fine enhancer and operating with a prohibited blood alcohol content. On May 7, 2013, Shierk was stopped for an inoperative tail light and subsequently charged with seventh-offense OWI (OWI seven), operating with a prohibited blood alcohol content, and two counts of bail jumping. Shierk was appointed counsel by the circuit court and he was ordered to reimburse the county for the cost. He entered guilty pleas to the OWI charges and all other charges, including a separate bail jumping case, were dismissed as read-ins. Shierk was sentenced to concurrent terms consisting of the maximum on the OWI six conviction of three years' initial confinement and three years' extended supervision, and four and one-half years' initial confinement and five years' extended supervision on the OWI seven conviction. As a condition of probation on the OWI six conviction, Shierk was also ordered to give a DNA sample and pay the $250 surcharge. Bond money was applied to the attorney fee balance, court costs, and fines.

The no-merit report addresses the potential issues of whether Shierk'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, and except as discussed below, this court will not discuss the potential issues further.

As the no-merit report observes, during the plea colloquy the elements of the offense were not fully recited. However, the circuit court referenced the elements of the offense in the

context of the facts of the case and consequently ascertained that Shierk understood the elements. This was sufficient.[2] *See* ***State v. Brown***, 2006 WI 100, ¶56, 293 Wis. 2d 594, 716 N.W.2d 906 (circuit courts are encouraged to "translate legal generalities into factual specifics when necessary to ensure the defendant's understanding of the charges").

During the plea colloquy the deportation warning required by WIS. STAT. § 971.08(1)(c) was not given. The presentence investigation report lists Shierk's birthplace as Wisconsin. The failure to give the warning is not grounds for relief because there is no suggestion that Shierk 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.

Other than to say the court would consider the dismissed charges at sentencing, the circuit court did not address Shierk during the plea colloquy regarding the impact of the read-in offenses. *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"). The circuit court made no mention of the read-in charges at sentencing and no restitution was imposed on them. If the circuit court

[2] The elements of the offense were attached to the plea questionnaire. The circuit court solicited Shierk's confirmation that he had reviewed and understood all material covered by the plea questionnaire.

was required to make advisements about the read-ins charges,[3] Shierk was not affected. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (plea withdrawal is not justified unless the fundamental integrity of the plea is seriously flawed).

Any other possible appellate issues in the proceedings before sentencing are forfeited because a defendant's guilty plea forfeits the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. An exception to this general rule permits review of circuit court orders denying motions to suppress evidence or determining that statements of the defendant are admissible into evidence. *See* WIS. STAT. § 971.31(10). No motions to suppress were filed in these cases. The record reflects the stops were justified. It is unclear in the OWI six case whether Shierk consented to the blood draw.[4] ***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. Because no motion to suppress the blood test result was filed, 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

[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).

[4] With respect to the OWI seven case, the record shows Shierk consented to the blood draw after an initial refusal and as the officer was working on obtaining a warrant.

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 Shierk's blood draw was nonconsensual, there is no arguable merit to a claim that trial counsel was ineffective for not challenging it. The November 17, 2012 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.

Under WIS. STAT. § 973.046(1g), the circuit court had discretion to impose a DNA surcharge on Shierk's felony convictions. In cases where the decision to impose the surcharge is discretionary, we have held that the circuit court must explain its decision. ***State v. Cherry***, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 ("[I]n exercising discretion, the trial court must do something more than stating it is imposing the DNA surcharge simply because it can."). We have explained that the circuit court "should consider any and all factors pertinent to the case before it, and … should set forth in the record the factors it considered and the rationale underlying its decision for imposing the DNA surcharge." ***Id.***, ¶9. Here the court did not state

any rationale for imposing the surcharge on the OWI six conviction and a potential issue for appeal may exist.[5]

Although the circuit court erroneously exercises discretion when it fails to delineate the factors that influenced its determination, "[r]egardless of the extent of the trial court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the trial court's decision had it fully exercised its discretion." ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (quoting ***State v. Shillcutt***, 116 Wis. 2d 227, 238, 341 N.W.2d 716 (Ct. App. 1983), *aff'd*, 119 Wis. 2d 788, 350 N.W.2d 686 (1984)). Indeed, this court has rejected the notion that the circuit court must explicitly describe its reasons for imposing a DNA surcharge or otherwise use "magic words." ***State v. Ziller***, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241. The court's entire sentencing rationale may be examined to determine if imposition of the DNA surcharge is a proper exercise of discretion. *See* ***id.***, ¶¶11-13. Moreover, to have a meritorious claim, Shierk would have to establish that imposition of the surcharge is unreasonable. ***Id.***, ¶12.

At the start of its sentencing remarks, the court noted that Shierk has a strong work ethic and had demonstrated over many years the ability to earn a good living and support his family. It also recounted that Shierk had been able to post two cash bonds and that money was applied to attorney fees and fines. The court indicated that it believes that Shierk could be successful during extended supervision. It concluded its remarks by telling Shierk that his life is not going to be over after serving the term of confinement and that he would have the chance to become a

[5] The no-merit report does not identify the imposition of the DNA surcharge as giving rise to any potential appellate issue.

productive, sober member of society by following through on his plans to remain sober. These comments support imposition of the DNA surcharge because Shierk has the ability to pay the surcharge and the financial obligation during extended supervision gives Shierk incentive to follow through on plans to remain sober and become a productive member of society. *See* ***id.***, ¶¶11, 13 (it is reasonable to impose the surcharge where there is the ability to pay and the court need not use "magic words" in imposing the surcharge for that reason). Shierk could not show that imposition of the surcharge is unreasonable. No arguably meritorious issue exists regarding the surcharge.

In his response Shierk questions the circuit court's entry of an amended judgment of conviction reducing his sentence credit on the OWI seven conviction to 119 days. He contends the amendment was done ex parte and without proper notice to him and without a hearing. At sentencing the parties agreed that Shierk would have 126 days of sentence credit and the court ordered 126 days of credit on both convictions because they were ordered to be served concurrently. After sentencing the Department of Correction wrote the court questioning how Shierk could have 126 days of sentence credit when that exceeded the 119 days that passed between his arrest on the OWI seven charge on May 7, 2013, and sentencing on September 3, 2013. It was proper to amend sentence credit on the OWI seven conviction because Shierk is not entitled to credit on that conviction for days he was not confined on that charge.[6] The reduction of sentence credit on the OWI seven conviction does not present an issue of arguable merit.

[6] The additional seven days of credit that Shierk was awarded on his OWI six conviction was for time he spent in jail after his arrest on that charge and the separate bail jumping case.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the convictions, and discharges appellate counsel of the obligation to represent Shierk further in these appeals.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Katie R. York is relieved from further representing Philip C. Shierk in these appeals. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals