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February 25, 2015

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

2014AP150-CRNM State of Wisconsin v. Gary Leigh Rosengren (L.C. #2012CF150)

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

Gary Leigh Rosengren appeals from a judgment of conviction entered upon his no contest plea to one count of felony operating while intoxicated as a seventh offense. Rosengren's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Rosengren received a copy of the report, and filed a response. Upon consideration of the no-merit report, Rosengren's response,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and our independent review of the record, we conclude that the 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.

In 2012, an identified citizen called the police to report that a blue Honda motorcycle had just driven off the road and crashed near his house. The caller reported that he went to check on the driver and discovered a white male unconscious on the ground. By the time the police arrived, the driver, later identified as Rosengren, was conscious.[2] Another man arrived on the scene and said to Rosengren: "We told you not to drive because you were drinking all day and you're on drugs." Rosengren was transported to the emergency room while police followed the rescue squad "due to the defendant being combative." Police observed that Rosengren smelled of intoxicants and his speech was slurred. A blood draw showed his blood alcohol level to be 0.162 grams per 100 milliliters.

The State filed an amended criminal complaint charging Rosengren with operating after revocation, alcohol related, operating while intoxicated (OWI) as a seventh offense, and operating with a prohibited blood alcohol concentration as a seventh offense. Following a preliminary hearing, the State filed an information containing the same three charges. At a pretrial motions hearing, Rosengren formally acknowledged that he had six prior OWI convictions, though he raised a potential issue about the procedural validity of his prior conviction in Florence County Circuit Court case No. 2003CF24. Specifically, Rosengren

[2] Minutes before the crash, police had received an anonymous tip that a blue Honda motorcycle was in the area driving erratically and cutting in and out of traffic.

asserted that he appeared by telephone for plea and sentencing in his Florence County felony case and, therefore, the proceedings were conducted without his personal appearance.

At the start of Rosengren's July 2013 plea hearing, the parties informed the court that there remained a question as to the validity of the Florence County conviction and, therefore, whether the present offense was properly a sixth offense (a Class H felony) or a seventh offense (a Class G felony). The parties informed the court that they had been investigating the circumstances of Rosengren's Florence County conviction, but had not been able to gather sufficient information. They proposed a plan, approved by Rosengren, wherein he would plead no contest to the OWI and acknowledge that it was either a sixth or a seventh offense. The State would move to dismiss and read in count one and to dismiss count three outright. The parties would agree to make one of two joint sentencing recommendations, depending on the outcome of the investigation into the Florence County prior conviction.[3]

The trial court suggested that whether Rosengren personally appeared in the Florence County case seemed irrelevant to whether the present offense was a sixth or seventh offense, noting that collateral attacks on prior convictions are generally colorable only where an unrepresented defendant was previously convicted in the absence of a voluntary and knowing waiver of the right to counsel. Nonetheless, the court agreed to follow the parties' plan to allow Rosengren to plead to an OWI sixth or seventh, with full knowledge of the penalties and plea

[3] The parties informed the court that if the present conviction was determined to be a sixth offense, they would jointly recommend a six-year bifurcated sentence, with three years each of initial confinement and extended supervision, to run concurrent with the Michigan state sentence Rosengren was presently serving. If, however, the present conviction was determined to be a seventh offense, they would jointly recommend a seven-year bifurcated sentence, with three years of initial confinement and four years of extended supervision, to run concurrent with the Michigan sentence. In either case, the State was moving to dismiss and read in count one and to dismiss count three outright.

agreements applicable to both charges. The trial court agreed that the parties could continue their investigation into the Florence County conviction and that the court would make a finding at the time of sentencing as to whether the present offense was properly a sixth or a seventh offense. During the plea colloquy, the trial court ascertained Rosengren's understanding of the maximum and minimum penalties applicable for both a sixth and a seventh offense, as well as the alternative plea agreements. Rosengren agreed that the present offense was at least a sixth and might be considered a seventh offense at sentencing. Pursuant to the plea agreement, the trial court ordered a presentence investigation report and set the matter over for sentencing.

At sentencing on September 20, 2013, the court was informed that trial counsel had attempted to vacate the Florence County conviction, but that the motion was denied. The parties did not dispute that Rosengren was, in fact, not present at his Florence County plea and sentencing and that he had instead appeared by telephone. Trial counsel argued that though the Florence County Circuit Court had denied his motion to vacate the prior conviction, the present offense should be considered a sixth offense due to the acknowledged procedural irregularities. The State argued that though the Florence County conviction might be voidable, it nonetheless constituted a countable prior conviction because it remained unreversed and could not properly form the basis for a collateral attack because Rosengren was represented by counsel. *See* ***State v. Hahn***, 2000 WI 118, ¶28, 238 Wis. 2d 889, 618 N.W.2d 528 (holding that "a circuit court may not determine the validity of a prior conviction during an enhanced sentencing proceeding predicated on the prior conviction unless the offender alleges that a violation of the constitutional right to a lawyer occurred in the prior conviction.").

After considering the parties' arguments, the trial court agreed with the State that because Rosengren had counsel in the Florence County proceedings, his unreversed conviction could not

form the basis for a collateral attack. The court stated that though the prior conviction sounded problematic, it was "up to Florence County to vacate that judgment" and this court was "stuck for today's purposes dealing with a seventh offense." Nevertheless, the court determined that it would treat this matter as if it were a sixth offense for sentencing purposes and would confine itself to the penalties available for a sixth offense. The trial court imposed a six-year bifurcated sentence, with three years of initial confinement and three years of extended supervision. The court remitted all fines and costs and found that Rosengren was eligible for the earned release program.

The no-merit report addresses whether there is any basis for a challenge to the validity of Rosengren's no contest plea and whether the trial court appropriately exercised its sentencing discretion. We agree with counsel's conclusion that these issues lack arguable merit.

The record demonstrates that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). As part of the plea colloquy, the trial court drew Rosengren's attention to the signed plea questionnaire/waiver of rights form and its attachments and ascertained that he had reviewed and understood the documents. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken). The trial court questioned Rosengren about his mental health and medical conditions, and Rosengren confirmed that he understood the proceedings and that his medications were not causing any confusion. The trial court specifically ascertained Rosengren's understanding of the minimum and

maximum penalties for both a sixth and a seventh offense, the alternative nature and substance of the parties' plea agreements, and that the court was not bound by any recommendations and could impose the maximum sentence for a seventh offense. The court explained the significance of the read-in offenses, including that they could be considered for sentencing and restitution purposes. The trial court drew Rosengren's attention to the constitutional rights portion of the plea questionnaire and ensured that Rosengren had read through each individual right and understood that by pleading no contest, he was waiving those rights and would be found guilty. *See* ***Hoppe***, 317 Wis. 2d 161, ¶42 (use of the plea questionnaire at the plea hearing lessens the extent and degree of the requisite colloquy). The trial court ascertained Rosengren's understanding of the nature of and factual basis for the charge and determined that the criminal complaint contained a factual basis for operating while intoxicated. The trial court went through and Rosengren acknowledged each of the prior OWI convictions alleged by the State to enhance the present charge to a seventh offense. There is no arguably meritorious challenge to the plea-taking procedures in this case.

Appointed counsel next addresses whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (sentencing is committed to the trial court's discretion, and our review is limited to determining whether the court erroneously exercised that discretion). Here, in fashioning its sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court considered the offense to be serious given Rosengren's accident and the potential for great harm when a drunk person gets behind the wheel. The court considered protection of the public to be its primary objective of "paramount concern" and found that Rosengren

presented a great risk to the community given his long and varied criminal record, history of OWI offenses, and because he committed a new offense in the State of Michigan after he committed and was released in connection with this case. The court determined:

> I think the only way you're going to change is if you are locked up and get into some kind of a treatment program perhaps within the prison system because it isn't going to work to have you out there in the world trying to get that treatment. You haven't sought any treatment on your own over all of these years. This isn't a new problem for you.

The court stated that though it could easily justify a maximum ten-year sentence on these facts, it would consider the potential irregularities in the Florence County case "so that if that were to get voided, that would not affect this sentence in any way because I will confine myself to the penalties available if this were a sixth offense." The trial court identified the proper sentencing factors, explained its process, and reached a reasonable conclusion. There is no meritorious challenge to the trial court's exercise of sentencing discretion. [4]

Further, we cannot conclude that the sentence imposed was unduly harsh. A sentence may be considered unduly harsh or unconscionable only when it is "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.

[4] The trial court determined that Rosengren was not entitled to sentence credit because he was serving a sentence in Michigan. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) ("Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively."); ***State v. Beets***, 124 Wis. 2d 372, 385, 369 N.W.2d 382 (1985) (a defendant is not entitled to credit for presentence time during which he was actually serving another sentence for an unrelated crime). The record supports the trial court's determination because it appears that Rosengren was released after committing the present offense and was not returned to Wisconsin until after he was sentenced in Michigan and filed a request under the Interstate Agreement on Detainers. *See* WIS. STAT. § 976.05.

State v. Grindemann, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***Id***. at ¶¶31-32 (citation omitted). Here, the six-year bifurcated sentence was well below the ten-year maximum authorized by statute, and is not so excessive or unusual as to shock the public's sentiment.

In his response to the no- merit report, Rosengren complains that appointed counsel did not address "the fact that my trial court attorney filed a motion to be dismissed" or "the judge denying the motion forcing me to go ahead with kangaroo court, no contest plea." Because there was never a motion to dismiss filed in the present case, we construe Rosengren's response as referring to trial counsel's Florence County motion to vacate the prior conviction. We take no position on the Florence County Circuit Court's decision because that case is not before us. However, we agree with the instant court's analysis and conclusion that because Rosengren was represented by counsel in the Florence County proceedings, that conviction is not subject to collateral attack in the present case. *See* ***Hahn***, 238 Wis. 2d 889, ¶¶17, 28.

Our review of the record discloses no other potential issues for appeal.[5] Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Rosengren further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney William E. Schmaal is relieved from further representing Gary Leigh Rosengren in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[5] Though not discussed in counsel's no-merit report or Rosengren's response, we have reviewed Rosengren's case in light of ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), a United States Supreme Court decision released on April 17, 2013, after the blood draw in Rosengren's case. In ***McNeely***, the Supreme Court declared that the natural dissipation of alcohol in a suspect's blood stream does not always constitute an exigent circumstance justifying a warrantless blood draw. ***Id***., at 1568. Though the complaint indicates that Rosengren's blood may have been involuntarily drawn without a warrant, we conclude that there is no arguably meritorious challenge to the blood draw. First, pursuant to ***State v. Foster***, 2014 WI 131, ¶¶8, 56, 58, __Wis. 2d __, 856 N.W.2d 847, the good faith exception to the exclusionary rule applies to preclude suppression because at the time of Rosengren's blood draw, officers were entitled to rely on the clear and settled precedent in ***State v. Bohling***, 173 Wis. 2d 529, 547-48, 494 N.W.2d 399 (1993) (the natural dissipation of alcohol in a person's bloodstream constitutes a per exigency justifying a warrantless blood draw). Second, the record establishes that the State had access to Rosengren's blood alcohol level through medical tests ordered by his treating physician. Third, Rosengren was convicted only of OWI, and the facts in the complaint provide ample evidence supporting his plea and conviction without any reference to his blood alcohol concentration.