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DISTRICT III

March 24, 2015

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

2014AP2285-CRNM State of Wisconsin v. Timothy L. Denny (L. C. #2013CT20)

Before Stark, J.[1]

Counsel for Timothy Denny filed a no-merit report concluding there is no basis for Denny to withdraw his no contest plea or challenge the sentence imposed for fourth-offense operating a vehicle while intoxicated (OWI). Denny filed a response stating his belief that this should have been his third offense because a 2002 implied consent refusal should not be

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

considered. Upon this court's independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), no issue of arguable merit appears.

On March 3, 2013, a deputy stopped Denny's vehicle for speeding and driving with a revoked driver's license. Based on Denny's slurred speech, red glossy eyes and his admission that he was drinking, the deputy attempted to have Denny perform field sobriety tests. After Denny unsuccessfully attempted to perform some of the tests and refused the rest, he submitted to a preliminary breath test, which indicated a blood alcohol content of .16. The deputy then arrested Denny and drove him to a hospital for a blood draw. The State Laboratory of Hygiene determined his blood alcohol content to be .169 grams/mL.

Denny filed a pretrial motion to exclude evidence of his 2002 implied consent refusal. In 2002, Denny was charged with OWI third, operating with a prohibited blood alcohol content third, possession of drug paraphernalia and disorderly conduct. All of the charges were dismissed except for the disorderly conduct. Denny testified at his hearing that the court ordered the State to return his driver's license at the end of the 2002 plea hearing on the 2002 charges. Denny testified that over the next three years he contacted the Division of Motor Vehicles on several occasions and was ultimately "told something about a refusal," and that he had to pay $270 and have an assessment done.

Denny's 2002 counsel, Edward Burke, Jr., testified regarding the disposition of the 2002 charges. He testified the State dismissed the drunk driving charge without any negotiation and the refusal was not discussed. Burke did not recall anyone returning Denny's driver's license after the hearing. When Denny later became upset because he did not have a valid license, Burke tried to explain that the OWI and refusal were separate matters.

Denny's counsel then introduced into evidence the transcript of the plea hearing in the 2002 case. It did not confirm Denny's recollection that the judge ordered his license returned. Denny's counsel also put into evidence the driver's license in question, which showed an expiration date of January 3, 2003.

The court denied the motion to exclude evidence of the 2002 implied consent refusal. The court concluded the administrative revocation was not challenged by a request in writing for a hearing within ten days as required by WIS. STAT. § 343.305(9)(a)4. and (10)(a). The court also noted the motion was, in effect, a collateral attack on the refusal suspension, which could only be granted if Denny had been denied his constitutional right to counsel.

Denny then entered a no contest plea to fourth-offense OWI. The record discloses no arguable manifest injustice upon which Denny could withdraw the 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/Waiver of Rights form, informed Denny of the constitutional rights he waived by pleading no contest, the elements of the offense and the potential penalties. As required by ***State v. Hampton***, 2004 WI 117, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14, the court advised Denny it was not bound by the parties' sentence recommendations. The record shows the plea was knowingly, voluntarily and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The court properly rejected Denny's challenge to the 2002 implied consent refusal. A party collaterally attacking a prior conviction "has the initial burden of coming forward with evidence to make a prima facie showing of a deprivation of his or her constitutional right to counsel at the prior proceeding." ***State v. Krause***, 2006 WI App 43, ¶¶6-7, 289 Wis. 2d 573, 712

N.W.2d 67. Because implied consent hearings are civil in nature, there is no constitutional right to counsel and, in any event, the transcript shows Denny was represented by counsel at that time. Therefore, the court properly rejected Denny's collateral attack.

There was also no basis for a direct attack on the 2002 implied consent conviction. The court did not have authority to overturn the 2002 administrative revocation. Because the request for a refusal hearing was not made within ten days and the time cannot be extended, the circuit court had no discretionary authority to dismiss refusal charges. ***State v. Bentdahl***, 2013 WI 106, ¶26, 351 Wis. 2d 739, 840 N.W.2d 704; ***Village of Elm Grove v. Brefka***, 2013 WI 54, ¶40, 348 Wis. 2d 282, 832 N.W.2d 121, *as amended by* 2013 WI 86, ¶40, 350 Wis. 2d 724, 838 N.W.2d 87.

In his response to the no-merit report, Denny questions how there can be a refusal charge when the drunk driving charges have been dismissed. As Burke attempted to explain to him, they are separate matters. The implied consent suspension was handled administratively, was not charged in the 2002 complaint and was not a part of any plea negotiation. There is no reason to exclude the administrative suspension when calculating the number of prior offenses.

Denny also questions how he could be charged in 2002 with implied consent refusal when the police in fact took his blood. The court, at Denny's OWI-4th hearing, found that after the deputy completed the Informing the Accused form, Denny agreed to withdrawal of one vial of his blood but refused to cooperate with the blood draw for the second vial. Denny admits "I let them take one vial of blood and yes I pulled away but they did not take any more." Because Denny did not timely challenge the refusal, it was properly counted as a conviction for purposes

of determining the number of prior offenses under WIS. STAT. § 346.65(2)(am)4. regardless of whether he now claims to have had a defense.

Denny also questions why the judge would order his driver's license returned to him if the refusal charge was not dismissed. The record shows the refusal was not charged in the 2002 complaint and the transcript of the refusal hearing does not support Denny's allegation that the judge ordered his license returned. Upon administrative suspension or revocation of a license, the department of motor vehicles may order surrender of the license. WIS. STAT. § 343.35(1).

The record also discloses no arguable basis for Denny to challenge the sentence. The court withheld sentence and placed Denny on probation with conditions that he spend 125 days in the county jail, maintain absolute sobriety, and not possess or consume alcohol or illegal drugs of any kind. The court also fined Denny $1,978, revoked his driver's license for thirty-six months and required an ignition interlock device installed for three years. The court could have sentenced Denny to one year in jail and a $2,000 fine. The court specifically considered the severity of the offense, the need to protect the public and Denny's rehabilitative needs. The court considered no improper factors, and the 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).

This court's 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 Timothy C. Drewa is relieved of his obligation to further represent Denny in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals