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DISTRICT I

April 13, 2015 Amended

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

2014AP1677-CRNM State of Wisconsin v. Mark Alan Ollenburg
(L.C. #2012CF4233)

Before Curley, P.J., Kessler and Brennan, JJ.

Mark Alan Ollenburg pled guilty to one count of driving while under the influence of an intoxicant (sixth offense), contrary to WIS. STAT. § 346.63(1)(a) (2011-12).[1] He now appeals the amended judgment of conviction. Ollenburg's postconviction/appellate counsel, Randall E. Paulson, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32.[2] Ollenburg has not filed a response. We have independently reviewed the

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

[2] Attorney Paulson subsequently left the Office of the State Public Defender. Assistant State Public Defender John R. Breffeilh has been appointed to replace Paulson as Ollenburg's counsel.

record and the no-merit report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

According to the criminal complaint, a citizen witnessed Ollenburg driving erratically. The citizen saw Ollenburg's car strike the wall of a ramp and later strike a curb, resulting in a blown tire. Ollenburg drove a little farther and then stopped to change the tire. The citizen notified law enforcement, and officers approached Ollenburg as he was changing the tire. Ollenburg failed several sobriety tests and was arrested for driving while intoxicated, sixth offense. Ultimately, blood tests revealed that Ollenburg did not have a detectable amount of alcohol in his blood, but did have two times the therapeutic dose of the prescription sleep aid Zolpidem in his body, which the parties later agreed caused him to be impaired.

While Ollenburg was on bail awaiting the results of the blood tests, he once tested positive for alcohol consumption, even though he had been ordered to maintain absolute sobriety and was being regularly tested.

Ollenburg entered a plea agreement with the State pursuant to which he agreed to plead guilty to driving while under the influence of an intoxicant, sixth offense. In exchange, the State agreed to recommend "incarceration with length and place up to the Court, a fine of $600, plus costs and surcharges, a 36 month license revocation, A.O.D.A., and ignition interlock." The State told the trial court that the parties had not reached an agreement as to the recommended length of time for the ignition interlock.

The trial court conducted a plea colloquy with Ollenburg, accepted Ollenburg's guilty plea, found him guilty, and immediately proceeded to sentencing. The trial court imposed a sentence of two-and-a-half years of initial confinement and two years of extended supervision.

The trial court stayed that sentence and placed Ollenburg on probation for three years, with eleven months and fifteen days of condition time in the House of Correction with Huber privileges so that Ollenburg could continue receiving treatment for cancer. The trial court suspended Ollenburg's driver's license for thirty-six months and ordered that Ollenburg use an ignition interlock device for thirty-six months. The trial court also declared Ollenburg eligible for the substance abuse program. The trial court ordered Ollenburg to provide a DNA sample and pay the DNA surcharge if he had not already done so.

Before postconviction/appellate counsel was appointed, Ollenburg filed several postconviction motions, some with the assistance of counsel and some *pro se*. The trial court granted motions to allow Ollenburg Huber release for dental care, to grant Ollenburg good time credit for the conditional jail time he was serving, and to modify the payment plan that had been set up for Ollenburg to reimburse the county for attorney fees.[3]

The trial court denied Ollenburg's postconviction motion for Huber release privileges to care for his elderly parent. It also denied Ollenburg's motion for sentence modification in which Ollenburg sought "to modify the sentence and ensure that [he] receives proper medical care, receives his prescribed medication, receives food to meet his dietary needs, and to further address his medical condition." In doing so, the trial court explained that there was no indication that the House of Correction could not meet Ollenburg's needs.

[3] The record reflects that Ollenburg did not qualify for public defender representation initially, but the trial court appointed counsel at county expense with the understanding that Ollenburg would enter a payment plan with the county.

After postconviction/appellate counsel was appointed, counsel filed a motion for postconviction relief seeking to vacate the DNA surcharge and reduce both the driver's license suspension and the ignition interlock requirement from thirty-six to twenty-four months. The trial court granted the request to vacate the DNA surcharge based on evidence that Ollenburg paid it previously. The trial court denied the request to reduce the time periods for the driver's license suspension and ignition interlock, rejecting Ollenburg's argument that his risk to reoffend was low. The trial court explained: "This was his sixth [operating while intoxicated] offense and he consumed alcohol while on bail. The danger he poses to the community is greater than he thinks, and it is in the community's interest that the maximum revocation and [ignition interlock] period be imposed." The trial court also rejected Ollenburg's suggestion that the ignition interlock period should be reduced by the time he actually spent in custody, based on the trial court's conclusion that such a reduction was not supported by WIS. STAT. § 343.30(1r).

Postconviction/appellate counsel subsequently filed a no-merit report that concludes there would be no arguable merit to assert that: (1) the plea was not knowingly, voluntarily, and intelligently entered; and (2) the trial court erroneously exercised its sentencing discretion at sentencing or when it partially denied the postconviction motion concerning the length of the driver's license suspension and ignition interlock requirement. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In addition to agreeing with postconviction/appellate counsel's description and analysis, we will briefly discuss the identified issues.

We begin with the guilty plea. There is no arguable basis to allege that Ollenburg's guilty plea was not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***,

131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Attached to those documents was an addendum reciting additional understandings, such as the fact that Ollenburg was giving up his "right to challenge the constitutionality of any police action." The printed jury instructions for the crime were also attached. The trial court conducted a plea colloquy that addressed Ollenburg's understanding of the plea agreement and the charges to which he was pleading guilty, the penalties he faced, and the constitutional rights he was waiving by entering his plea.[4] *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

The trial court referenced the guilty plea questionnaire that Ollenburg completed with his trial counsel, and the trial court summarized the elements of the crime for Ollenburg. The trial court confirmed with Ollenburg that he knew the trial court was free to impose the maximum sentence, and it reiterated the maximum sentences and fines that could be imposed. The trial

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[4] WISCONSIN STAT. § 971.08(1)(c) requires the court, before accepting a guilty plea, to:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

See ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (explaining that § 971.08(1)(c) "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter'") (citation omitted). In this case, the trial court paraphrased this statement. This does not provide a basis for plea withdrawal in this case. Even in cases where the warning is not given at all, a defendant is required to show "that the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the record that Ollenburg could make such a showing.

court noted that Ollenburg drove under the influence of a prescription sleep aid and both Ollenburg and his trial counsel stipulated that the facts in the complaint provided a factual basis for the plea. The trial court also discussed with Ollenburg the constitutional rights Ollenburg was waiving, such as his right to a jury trial and his right to testify in his own defense.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form and attached jury instructions, Ollenburg's conversations with his trial counsel, and the trial court's colloquy appropriately advised Ollenburg of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. There would be no basis to challenge Ollenburg's guilty plea.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that 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, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***,

2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court recognized that Ollenburg claimed he accidentally ingested a houseguest's sleeping pills that resembled Ollenburg's cancer medication, but it found that Ollenburg was still a danger to society based on his past record of five operating while intoxicated offenses and the fact that while he was on bail, he tested positive for alcohol, despite having been ordered to maintain absolute sobriety. The trial court said that it had to punish Ollenburg "so you get the message." The trial court agreed with trial counsel's requests to put Ollenburg on probation and to order less than twelve months of condition time so that Ollenburg did not lose his disability benefits.

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The trial court could have imposed a six-year sentence. Instead, it imposed a sentence of four-and-one-half years, stayed that sentence, and placed Ollenburg on probation, as he requested. We discern no erroneous exercise of discretion. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

We further agree with postconviction/appellate counsel that there would be no basis to challenge the trial court's decision to deny Ollenburg's postconviction motion asking the trial court to exercise its discretion and reduce Ollenburg's driver's license suspension and ignition

interlock requirement. The trial court's original sentencing decision on those issues reflects a proper exercise of discretion, as does the trial court's subsequent decision that the length of time imposed for the suspension and ignition interlock was required to protect the community. There would be no arguable merit to challenge the sentence or the partial denial of Ollenburg's postconviction motion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney John R. Breffeilh is relieved of further representation of Ollenburg in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals