OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

April 29, 2015

To:

Hon. Jennifer Dorow
Circuit Court Judge
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Faun M. Moses
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7892

Susan Lee Opper
Assistant District Attorney
515 W. Moreland Blvd., Rm. G-72
Waukesha, WI 53188-2486

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

David W. Backhaus
W399 Little Prairie Rd.
Palmyra, WI 53156

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

2014AP893-CRNM State of Wisconsin v. David W. Backhaus (L.C. #2012CM2297)

Before Neubauer, P.J.[1]

Faun M. Moses, counsel for David W. Backhaus, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967), concluding that no grounds exist to challenge the judgment convicting Backhaus of fourth-offense operating while intoxicated (OWI). Backhaus was notified of his right to file a response but has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated

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

by ***Anders*** and RULE 809.32, we accept the no-merit report, as we conclude that there is no arguable merit to any issue that could be raised on appeal. We summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

A citizen informant reported a possibly intoxicated driver. The caller gave her name, contact information, the vehicle's description and license plate number, and reported that the vehicle had pulled into a certain apartment building parking lot. Police found the described vehicle in the specified parking lot. Backhaus was slumped over the steering wheel, reeked of intoxicants, and exhibited glassy eyes and slow, slurred speech. He claimed to have had one beer. He was uncooperative with sobriety testing, actively resisted the two officers, and refused a post-arrest blood test. A forcible draw indicated a blood alcohol concentration of .221.

After a hearing, the trial court denied Backhaus's motion to suppress for lack of reasonable suspicion to stop him. He pled guilty to fourth-offense OWI; a charge of resisting an officer was dismissed and read in. The court sentenced him to 300 days' jail, imposed an $1800 fine, plus costs and a $35 blood-draw fee, ordered him to attend a Victim Impact panel and alcohol assessment and to comply with a driver's safety plan, and revoked his license and ordered an ignition interlock device, both for thirty-six months. This no-merit appeal followed.

The no-merit report considers whether four issues have arguable merit. The first is whether the trial court erred in denying Backhaus's motion to suppress evidence based on lack of reasonable suspicion to stop him and lack of probable cause to arrest him.

When we review a trial court's ruling on a motion to suppress, we uphold its factual findings unless they are clearly erroneous. ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d

415, 724 N.W.2d 347. "[W]hether an investigatory stop meets constitutional and statutory standards is a question of law that we review de novo." ***Id.***

Only the first-responding police officer testified at Backhaus's suppression hearing. If accepted, the officer's testimony conclusively established that police did not violate Backhaus's constitutional rights before or during the stop. The trial court accepted his testimony. The court acting as factfinder is the ultimate arbiter of credibility and, even if more than one reasonable inference can be drawn from the credible evidence, we must accept the inference drawn by the trier of fact. ***State v. Green Bay***, 96 Wis. 2d 195, 204, 291 N.W.2d 508 (1980). Any challenge to the trial court's suppression decision therefore would be frivolous.

Whether probable cause to arrest exists is a question of law we determine independently. ***Washburn Cnty. v. Smith***, 2008 WI 23, ¶16, 308 Wis. 2d 65, 746 N.W.2d 243. "Probable cause" refers to that amount of evidence that would lead a reasonable law enforcement officer to believe that the defendant operated a motor vehicle while under the influence of an intoxicant. ***Id.***, ¶15. The totality of the circumstances within the officers' knowledge at the time of arrest convince us that probable cause existed. *See* ***State v. Sykes***, 2005 WI 48, ¶18, 279 Wis. 2d 742, 695 N.W.2d 277.

The report also examines whether trial counsel was ineffective for failing to seek to suppress evidence obtained through the warrantless, forced blood draw. To prove a claim of ineffective assistance of counsel, a defendant must show both deficient representation and resultant prejudice. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***Id.*** "To prove constitutional prejudice, the defendant

must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Id.*** (citation omitted).

Backhaus was arrested in 2012. The law in Wisconsin then was that the dissipation of alcohol in the bloodstream created a per se exigency allowing for a warrantless, nonconsensual search. ***State v. Bohling***, 173 Wis. 2d 529, 533, 494 N.W.2d 399 (1993). Now, the natural dissipation of alcohol does not categorically constitute an exigency that justifies a warrantless blood draw. ***Missouri v. McNeely***, ___ U.S. ___, 133 S. Ct. 1552, 1563 (2013). The reasonableness of a warrantless blood draw must be determined on the totality of the circumstances. ***Id.*** Although ***McNeely*** applies retroactively, the good-faith exception to the exclusionary rule precludes suppression here because police acted in objectively reasonable reliance on "clear and settled" Wisconsin precedent. ***State v. Foster***, 2014 WI 131, ¶30, 360 Wis. 2d 12, 856 N.W.2d 847; ***State v. Kennedy***, 2014 WI 132, ¶¶33, 35-37, 359 Wis. 2d 454, 856 N.W.2d 834. Based on the totality of the circumstances and reliance on the law at the time, law enforcement was justified in pursuing the forcible blood draw. Accordingly, counsel's decision to forego the motion did not constitute deficient performance. *See* ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

The report also considers whether Backhaus knowingly, voluntarily, and intelligently entered his plea. The record discloses no arguable basis for withdrawing Backhaus's guilty plea. The court's plea colloquy, supplemented by a plea questionnaire and waiver of rights form Backhaus completed, informed him of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a guilty plea. The court ascertained that Backhaus was a United States citizen, *see* WIS. STAT. § 971.08(1)(c), and confirmed his understanding that it was not bound by the terms of the plea agreement. *See* ***State v. Hampton***,

2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14. The court also found that a sufficient factual basis existed in the criminal complaint to support Backhaus's plea. The record establishes the plea was knowingly, voluntarily and intelligently made. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906; *see also* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Entry of a valid guilty plea constitutes a waiver of any non-jurisdictional defects and defenses. *See* ***Bangert***, 131 Wis. 2d at 265-66.

Finally, the no-merit report examines the validity of the sentence. The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offense, Backhaus's character and the need to protect the public. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The court specifically noted that despite the aggravated nature of the offense, Backhaus seemed not to recognize that he has a problem. The court amply detailed the reasons for selecting the particular penalties imposed. *See* ***State v. Gallion***, 2004 WI 42, ¶24, 270 Wis. 2d 535, 678 N.W.2d 197. It could not be reasonably argued that his sentence is so excessive as to shock public sentiment. *See* ***Ocanas***, 70 Wis. 2d at 185. Our independent review reveals no other arguable issues. Therefore,

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

IT IS FURTHER ORDERED that Attorney Faun M. Moses is relieved of any further representation of David W. Backhaus in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals