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May 12, 2015

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

2014AP278-CRNM State of Wisconsin v. Brandy L. Allen (L.C. # 2011CF6153)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Brandy Allen appeals a judgment convicting her, after entry of a guilty plea, of one count of homicide while operating a vehicle with a prohibited alcohol concentration and one count of injury by use of a vehicle with a prohibited alcohol concentration, as well as an order denying

her motion for sentence modification. *See* WIS. STAT. §§ 940.09(1)(b), 940.25(1)(b) (2013-14).[1] Attorney Thomas Voss has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin Ct. of App.***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429. The no-merit report addresses whether there is any basis for challenging Allen's guilty plea, whether the circuit court properly exercised its sentencing discretion, and whether Allen had a right to sentence modification. Allen was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Allen entered her pleas pursuant to a negotiated plea agreement that was presented in open court. In exchange for Allen's guilty pleas, the State agreed to dismiss three other counts. Allen executed a plea questionnaire and waiver of rights form in which she acknowledged the elements of the offense, the penalties that could be imposed, and the constitutional rights she

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

waived by entering a guilty plea. At the plea hearing, the circuit court ascertained that Allen understood the form she signed, the elements of the offense, and her constitutional rights. The court followed the procedure for accepting a guilty plea set out in ***Bangert***, 131 Wis. 2d at 266-72. Our independent review of the record confirms that there is no basis to challenge whether Allen's plea was knowingly, voluntarily, and intelligently entered. *See* ***id.*** at 260.

There also would be no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). In imposing sentence, the court considered the seriousness of the offenses, Allen's character, and the need to protect the public. The record shows that Allen was afforded an opportunity to present witnesses to speak on her behalf and to address the court, both personally and through counsel. The court concluded that a prison term was necessary to protect the public and to deter her dangerous behavior.

The court then sentenced Allen to four years of initial confinement and five years of extended supervision on the homicide by intoxicated use of a vehicle count and to one year of initial confinement and one year of extended supervision on the injury by intoxicated use of a vehicle count, to be served consecutively. The court also awarded 22 days of sentence credit; ordered restitution in the amount of $529.00; and imposed standard costs and conditions of supervision. The judgment of conviction reflects that the court determined that Allen was not eligible for the challenge incarceration program or substance abuse program.

The components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. § 940.09(1c)(a) (classifying homicide by intoxicated use of a vehicle as a Class D felony); WIS. STAT. §§ 973.01(2)(b)4. and (d)3. (providing maximum terms of fifteen years of initial confinement and ten years of extended supervision for a Class D felony); WIS. STAT. § 940.25(1) (classifying injury by intoxicated use of a vehicle as a Class F felony); §§ 973.01(2)(b)6m. and (d)4. (providing maximum terms of seven and a half years of initial confinement and five years of extended supervision for a Class F felony). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and we are satisfied that the sentences imposed here are not "'so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

Finally, there is no arguable merit to a claim that Allen's sentence should be modified. Allen filed a postconviction motion asserting that her youngest daughter had begun to exhibit memory difficulties, emotional outbursts, and difficulties in school and during speech therapy while Allen was incarcerated. The motion argued that these behaviors by Allen's daughter warranted modification of Allen's sentence. The circuit court denied the motion, concluding that the behaviors of Allen's daughter were not a new factor. We agree with counsel's assessment that there would be no merit to challenging this ruling on appeal. The record reflects that the circuit court considered at sentencing the impact that her mother's imprisonment would have on Allen's daughter, but still rejected the idea of a lesser sentence because of the seriousness of the

offenses. Therefore, we are satisfied that a challenge to the court's decision on the motion for sentence modification on appeal would be without arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Thomas Voss is relieved of any further representation of Brandy Allen in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals