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DISTRICT III

June 9, 2015

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

2015AP246-CRNM State of Wisconsin v. Troy James Johnson (L. C. #2012CT221)

Before Hoover, P.J.[1]

Counsel for Troy Johnson has filed a no-merit report concluding there is no arguable basis for Johnson to withdraw his guilty plea or challenge the sentence imposed for fourth offense operating a vehicle under the influence of an intoxicant (OWI). Johnson filed a late response addressing: (1) his conviction for refusing to take an intoxication test; (2) the good

[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

faith exception to the ***McNeely***[2] rule; and (3) the lack of qualified personnel to perform an AODA assessment. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

A sheriff's deputy stopped Johnson's vehicle at 12:30 a.m. after he determined the license plate had not been registered for at least two years. The deputy also learned that Johnson was the registered owner of the vehicle, and Johnson's driver's license had been suspended based on three prior OWI convictions. The driver matched the physical description for Johnson. Upon stopping the vehicle, the deputy could smell the odor of intoxicants, and Johnson admitted he had consumed three beers. Johnson declined to perform the walk-and-turn and one-legged stand tests because of physical problems. He successfully completed a finger dexterity exercise but failed to correctly recite the alphabet from the letter D through R. The deputy then administered a preliminary breath test which registered 0.166, more than eight times the legal limit for a person with three prior OWI convictions. The deputy then arrested Johnson and took him to a hospital for a blood test, which showed a blood alcohol level of 0.197.

Johnson entered a guilty plea after the court denied two motions to suppress evidence. Any challenge to the court's decision on those motions would lack arguable merit. First, Johnson challenged what he alleged to be an "unlawful stop, arrest, search and seizure." The court properly denied the motion because knowledge that a vehicle's registered owner has a revoked or suspended license is sufficient to support a reasonable suspicion of criminal activity when the officer observes the vehicle being driven. ***State v. Newer***, 2007 WI App 236, ¶¶2, 5,

[2] ***Missouri v. McNeely***, 596 U.S. ___, 133 S.Ct. 1552 (2013).

306 Wis. 2d 193, 742 N.W.2d 923. The deputy also had a sufficient basis for stopping the vehicle based on its expired license plate. He had probable cause to arrest Johnson based on the smell of intoxicants, Johnson's admission that he had consumed three beers, the fact that the law prohibited him from driving with a blood alcohol content greater than 0.02, his failure to pass the alphabet test and the result of the preliminary breath test.

Johnson's second motion to suppress evidence was based on the deputy's failure to get a search warrant for the blood draw as required by ***Missouri v. McNeely***, 596 U.S. ___, 133 S.Ct. 1552 (2013). The circuit court correctly denied the motion to suppress, finding the deputy acted in good faith based on the law as it existed at the time. *See* ***State v. Kennedy***, 2014 WI 132, ¶37, 359 Wis. 2d 454, 856 N.W.2d 834. Johnson questions how violation of his right to a search warrant before the blood draw could be subject to the good faith exception. The good faith exception was applied to ***McNeely*** violations by the Wisconsin Supreme Court, and this court has no authority to contradict that precedent. *See* ***State v. Clark***, 179 Wis. 2d 484, 493, 507 N.W.2d 172 (Ct. App. 1993).

The record discloses no arguable manifest injustice upon which Johnson could withdraw his guilty plea. *See* ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836. The court's colloquy, supplemented by a Plea Questionnaire/Waiver of Rights form, advised Johnson of the constitutional rights he waived by pleading guilty. Johnson stated he understood the two elements of the offense, and the court informed Johnson of the maximum penalties. Johnson conceded the three prior OWI convictions, and the parties agreed the court could rely on the police reports attached to the criminal complaint as the factual basis for the plea. The court failed to inform Johnson that it was not bound by the plea agreement as required by ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. However, that defect does not

create a basis for appeal because the court accepted all of the terms of the plea agreement including the agreed-upon sentence. Therefore, Johnson could not establish a manifest injustice. ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441.

The record discloses no arguable basis for challenging the sentence. The court imposed the jointly recommended sentence of probation with sixty days in jail as a condition of probation, a mandatory penalty, in addition to a fine, and license revocation and AODA assessment. Johnson cannot challenge on appeal a sentence he recommended. *See* ***State v. Sherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Johnson's response to the no-merit report addresses his right to counsel for his refusal conviction. That civil forfeiture is not the subject of this appeal. Likewise, his complaint that he is required to have an AODA assessment and "there are no qualified people working there" is beyond the scope of this appeal.

Our 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 Suzanne Hagopian is relieved of her obligation to further represent Johnson in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals