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/IV

July 8, 2015

To:

Hon. James G. Pouros
Circuit Court Judge
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095

Theresa Russell
Clerk of Circuit Court
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Mark Bensen
District Attorney
Washington County
P.O. Box 1986
West Bend, WI 53095-1986

Brian Borkowicz
Law Office of John A. Best LLC
1797 Barton Ave
West Bend, WI 53090-1905

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

Michael L. Hudy 390639
Sanger Powers Corr. Cntr
N8375 County Line Rd.
Oneida, WI 54155-9300

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

2013AP2724-CRNM State of Wisconsin v. Michael L. Hudy (L.C. # 2012CF247)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Michael Hudy appeals a judgment convicting him, after entry of a guilty plea, of one count of operating while under the influence of a controlled substance, as a seventh offense. *See* WIS. STAT. § 346.63(1)(am) (2009-10).[1] Attorney Brian Borkowicz filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; *see also* ***Anders v.***

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

California, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). In an order dated April 28, 2015, we rejected the no-merit report on the basis that it did not address whether Hudy's plea was knowing, voluntary, and intelligent. Pursuant to our order, Borkowicz has filed a new no-merit report that addresses whether the plea was knowing, voluntary, and intelligent, whether the circuit court erred in denying Hudy's motion to suppress evidence, and whether the circuit court erroneously exercised its sentencing discretion. Hudy was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the new no-merit report, we conclude that there are no arguably meritorious appellate issues.

Guilty Plea

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. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

Hudy entered a guilty plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Hudy's plea, the State agreed to dismiss and read in two other counts and recommend a sentence of three years of initial confinement and five years of extended supervision to run concurrent to the sentence he was then serving.

The circuit court conducted a standard plea colloquy, inquiring into Hudy's ability to understand the proceedings and the voluntariness of his plea decision, and further exploring Hudy's understanding of the nature of the charges, the penalty ranges and other direct consequences of the plea, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***Bangert***, 131 Wis. 2d at 266-72. The court made sure Hudy understood that the court would not be bound by any sentencing recommendations. In addition, Hudy provided the court with a signed plea questionnaire. Hudy indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The court found that a factual basis existed for the plea, and nothing in the record or the no-merit report persuades us otherwise. Hudy admitted to six prior OWI offenses in open court. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Hudy has not alleged any other facts that would give rise to a manifest injustice. Therefore, we are satisfied that his plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

Suppression Motion

We also are satisfied that there would be no merit to challenging the circuit court's denial of Hudy's motion to suppress the lab results from his blood draw. The motion alleged that, in the police report, Officer Joseph Cashin placed his legal blood draw kit into evidence locker number five at the Slinger Police Department. The motion alleged that a later report stated that

Police Chief Dean Schmidt removed the legal blood draw kit from locker number eleven and mailed it to the State Laboratory of Hygiene. Hudy moved to suppress the lab results due to chain of custody defects.

The proponent of the evidence must provide testimony that is sufficiently complete so as to render it improbable that the original item has been exchanged, contaminated, or tampered with. ***B.A.C. v. T.L.G.,*** 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). The degree of proof necessary to establish a chain of custody is a matter within the circuit court's discretion. ***Id.*** "Alleged gaps in a chain of custody 'go to the weight of the evidence rather than its admissibility.'" ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54 (WI App 2006) (quoted source omitted).

The circuit court held an evidentiary hearing at which Cashin testified that he deposited the blood draw kit into evidence locker number five, as stated in his report. Schmidt testified that Schmidt and one other officer, Nick Garro, are the only persons with keys for the evidence lockers. Schmidt further testified that an administrative assistant prepared the form stating that the evidence was removed from locker number eleven. Schmidt testified that the administrative assistants use a cut-and-paste format from prior cases when preparing forms and that the locker number had not been changed from number eleven to number five. In a second evidentiary hearing, Schmidt testified that he had located additional paperwork from the Slinger Police Department, including an evidence inventory log sheet showing that he had taken Hudy's sample out of evidence locker number five and initialed the date and time he had done so. Schmidt testified as to how the inventory log is filled out and kept as part of the department's evidence protocol. The inventory log was admitted into evidence without objection by Hudy.

Lorrine Edwards, the lab analyst at the State Laboratory of Hygiene who analyzed Hudy's sample, testified that the sample arrived at the lab undamaged and did not appear to have been tampered with. Edwards testified that, along with the blood sample, the kit contained documents stating that the blood was drawn from Hudy and that the person who filled out the form was Cashin. The kit also listed a citation number matching the citation issued to Hudy and the correct name of the person who drew Hudy's blood.

The circuit court denied Hudy's motion to suppress. The court noted that Hudy was free to present the discrepancy regarding the chain of custody to the jury at trial. We agree with counsel's assessment that there would be no merit to challenging the court's exercise of discretion in making this ruling. There was other evidence, including the department's inventory log and testimony of the lab technician that the sample did not appear to have been tampered with, to support the circuit court's finding that the State had demonstrated a strong factual basis that a chain of custody had been established. We are satisfied that the alleged breach in the chain of custody was a matter that the circuit court appropriately left to the jury, and does not provide a basis for reversing the circuit court's discretionary decision.

Sentencing

There also would be no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. The court considered the proper sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court identified the primary goal of the sentencing in this case as community protection, and concluded that a prison term was necessary to accomplish that goal.

The court then sentenced Hudy to the minimum initial confinement period of three years, followed by five years of extended supervision, consecutive to any other sentence. The components of the bifurcated sentence imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 346.63(1)(am), 346.65(2)(am)6. (classifying operating under the influence of a controlled substance, as a seventh offense, as a Class G felony, with a minimum confinement period of three years); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony) (all 2009-10 statutes).

Despite the joint recommendation that Hudy's sentence be concurrent to the sentence he was then serving, the court imposed a consecutive sentence. The court reasoned that a consecutive sentence was necessary to protect the community. When considered along with the fact that the court imposed the minimum confinement period, we are satisfied that there would be no merit to challenging the court's imposition of a consecutive sentence.

The no-merit report asserts that Hudy might argue on appeal that the circuit court erred in refusing to find him eligible for the Earned Release Program (ERP). We agree with counsel's assessment that there would be no merit to challenging that decision on appeal. The determination of whether a defendant is eligible for the ERP is part of the exercise of the court's sentencing discretion. *See* WIS. STAT. § 973.01(3g) (2009-10). In this case, the court took into consideration the fact that Hudy had already participated in and completed the ERP during one of his prior sentences, yet still continued to drive under the influence. The court also stated that, although Hudy was statutorily eligible for the program, it was not in the best interest of the public that he be allowed to participate a second time, due to the seriousness of the offense and the repeat nature of the offense. We are satisfied that the record reflects that the circuit court properly exercised its discretion in determining that Hudy was not eligible for the ERP.

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 Attorney Brian Borkowicz is relieved of any further representation of Michael Hudy in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals