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DISTRICT IV

July 15, 2015

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

2014AP1703-CRNM State of Wisconsin v. Michael J. Grant (L.C. # 2011CT33)

Before Kloppenburg, J.[1]

Michael Grant appeals a misdemeanor judgment convicting him, after entry of a no contest plea, of a second offense of operating a motor vehicle while intoxicated. Attorney Eileen Hirsch has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14); *see also* ***Anders v. 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

[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.

(1988). The no-merit report addresses the validity of Grant's plea and sentence. Grant was sent a copy of the report and has filed a response in which he points out what he believes to be inconsistencies in the arresting officer's testimony at a suppression motion hearing. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. The court's plea colloquy, along with the plea questionnaire signed and submitted by Grant, confirmed that Grant understood the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no contest plea. Grant's counsel stated that he was stipulating that a factual basis existed for the plea, and the court confirmed personally with Grant that he understood. Grant admitted on the record that this was a second OWI offense. The court did not confirm that Grant understood that it could impose up to the maximum sentence, but because the court followed the joint sentencing recommendation, we agree with counsel that there would be no merit to an argument for plea withdrawal on that basis.

Grant asserts in his response to the no-merit report that he has a disability that makes it difficult for him to follow directions. During the plea colloquy, the court acknowledged that Grant was receiving treatment for a mental health diagnosis. Grant confirmed that he had been diagnosed with ADHD, but stated that he was not taking any prescribed medications for it. When the court asked if there was anything that would interfere with his ability to understand the proceedings, Grant replied, "My attorney explained it better to me, so I understand it." Grant's trial counsel confirmed that they had had many conversations about Grant's rights and stated that he believed Grant understood what was going on in the proceedings and his rights. Throughout the plea colloquy, Grant confirmed in response to the court's questions that he understood his

rights. We are satisfied that the record demonstrates that the plea was knowingly, voluntarily, and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record also discloses no arguable basis for challenging the sentence imposed. Grant was given the opportunity to address the court prior to sentencing, but elected not to do so. The court followed the joint sentencing recommendation and imposed the minimum jail time of five days with Huber privileges and ordered that Grant pay a fine of $1,143, inclusive of costs. The court also ordered a twelve-month revocation of his driving privilege, giving Grant credit for any administrative suspension he was then serving. The court also ordered AODA assessment and attendance at the county's victim impact panel.

Where a defendant affirmatively joins or approves a sentence recommendation, the defendant cannot attack the sentence on appeal. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989). That is the case here. Additionally, it cannot reasonably be argued that Grant's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Thus, we agree with counsel's assessment that a challenge to the circuit court's exercise of sentencing discretion would be without arguable merit on appeal.

Finally, we turn to the issue raised in Grant's response to the no-merit report. Grant asserts that there were inconsistencies between the testimony of the state trooper who arrested him, Kendi Linjer, and what occurred, as shown on the video recording of the traffic stop and according to Grant's recollections. Linjer's testimony was taken on behalf of the State at the hearing on Grant's motion to suppress the evidence obtained as a result of his traffic stop and arrest. At that hearing, the parties requested by stipulation that the court watch a DVD recording

of the stop, and asked to schedule a second hearing for arguments of counsel and a decision. The no-merit report informs us that the parties reached a plea agreement before a decision was issued on the suppression motion.

Grant does not assert in his response to the no-merit report that his traffic stop was unlawful or that he was not operating while intoxicated. Nor does he challenge anything about the way his trial counsel handled the motion to suppress or assert that he regrets not having waited for a ruling on the motion before entering his plea. Rather, Grant points out inconsistencies between Linjer's testimony at the motion hearing and either what he remembers about the stop or what appears on the video. First, Grant notes that Linjer testified that she stopped him at 9:21, but he asserts that the actual time of the stop was 9:31. Our review of the hearing transcript reveals that Linjer testified that the time was 9:21 when she stopped Grant, but that the computer printed a time of 9:31 because it imported the time the citation was actually filled out. Grant fails to explain why the exact time of the stop is relevant versus the time of the speeding citation. Thus, he fails to identify an issue of arguable merit as to the time discrepancy.

Next, Grant argues that Linjer testified that she stopped him for speeding, but that on the video she states that she stopped him for OWI. From our review of the video recording of the traffic stop, we note that Linjer states upon making initial contact with Grant, "I stopped you for speeding." She then asks him where he is headed, how fast he thinks he was going, where he is coming from, and if she can see his identification. After hearing Grant's responses, Linjer asks him if he has been drinking and he admits to having had beer. Linjer states that she can smell alcohol and explains that is why she asked. In light of the above, we are satisfied that Linjer's testimony that she stopped Grant for speeding is not inconsistent with the video recording of the stop and, thus, Grant's argument to that effect is without arguable merit.

Grant also points out in his response that Linjer testified that he was nervous and fumbling through things. He states that it was very cold outside and the heater in his car was not working, presumably as a way of explaining a reason for his behavior other than intoxication. However, Linjer's testimony reflects other signs that led her to believe that Grant was intoxicated, including the fact that Grant had red and glassy eyes and admitted to having had beer. Thus, we fail to see how Grant's remarks about the temperature in his response raise any issue of arguable merit.

Grant also brings to our attention the fact that the traffic stop and the field sobriety tests were done in what he thought was a dangerous location. Indeed, the hearing transcript reflects that, on cross-examination, Linjer admitted that the field sobriety tests were done in an unsafe spot. She ended the field sobriety tests for safety reasons after Grant had done the walk and turn test and failed. Grant does not assert that the location where the test was done impacted his performance on the tests in any way and, therefore, we are satisfied that Grant's counsel sufficiently developed testimony on this issue for the court to consider in a potential decision on the suppression motion. Furthermore, the record reflects that Linjer observed several other signs that gave her probable cause to believe Grant was intoxicated, including slurred speech, the scent of intoxicants, his admission to drinking beer, and four of six eye clues indicating intoxication during the horizontal gaze nystagmus test she administered.

Finally, Grant asserts that he requested a preliminary breath test (PBT) but that Linjer did not give him one until two hours later, after he was arrested. The criminal complaint reflects that the result of the test showed an alcohol concentration above the legal limit. Grant does not explain why the delay in administration of the PBT is relevant to any issue of arguable merit. On the contrary, it is a generally known fact that blood alcohol concentration decreases with the

passage of time as the body metabolizes alcohol consumed. Accordingly, Grant probably had a higher blood alcohol concentration at the beginning of the traffic stop than when he took the PBT. Grant fails to identify any arguably meritorious appellate issue with respect to the delay in administration of the PBT, especially given the other indicators of intoxication that led Linjer to believe she had probable cause to arrest Grant.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. 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 Eileen Hirsch is relieved of any further representation of Michael Grant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals