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July 29, 2015

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

2014AP2416-CRNM State of Wisconsin v. David A. Burgeson (L.C. # 2013CF726)

Before Brown, C.J., Reilly and Gundrum, JJ.

David Burgeson appeals from a judgment convicting him of operating with a restricted controlled substance (tetrahydrocannabinols) (sixth offense) contrary to WIS. STAT. § 346.63(1)(am) (2013-14).[1] Burgeson's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Burgeson received a copy of the report and has filed two responses to it. Upon consideration of the report, Burgeson's responses, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

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

The no-merit report addresses the following possible appellate issues: (1) whether Burgeson's guilty plea was knowingly, voluntarily, and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether Burgeson received effective assistance from his trial counsel. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his guilty plea, Burgeson answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The circuit court confirmed that Burgeson had discussed with his counsel possible defenses and any circumstances that might reduce his culpability. Burgeson stated that he was satisfied with his trial counsel. The record discloses that Burgeson's guilty plea was knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that it had a factual basis in the complaint, whose allegations Burgeson agreed were "basically accurate," ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Burgeson signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. The circuit court warned Burgeson of the consequences of dismissing and reading in the possession of tetrahydrocannabinols and drug paraphernalia charges. Burgeson admitted his five prior operating while intoxicated offenses.

We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Burgeson's guilty plea.

With regard to the sentence, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. The court adequately discussed the facts and factors relevant to sentencing Burgeson to a three-year term consisting of eighteen months of initial confinement and eighteen months of extended supervision. In fashioning the sentence, the court considered the seriousness of the offense, Burgeson's character and history of other offenses, including the dismissed and read-in offenses, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court deemed Burgeson eligible for the Substance Abuse Program. The felony sentence complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

We briefly address the $250 DNA surcharge the circuit court imposed at the sentencing hearing. The surcharge does not appear on the judgment of conviction. We deem the DNA surcharge outside of the record we review in this appeal, and we affirm the judgment of conviction without the DNA surcharge. If the judgment of conviction is to be altered to include the DNA surcharge, the circuit court must address the merits of such an alteration to correct the omission of the surcharge from the judgment, which may have been a clerical error. ***State v.***

Prihoda, 2000 WI 123, ¶27, 239 Wis. 2d 244, 618 N.W.2d 857. If the circuit court seeks to impose the DNA surcharge, further proceedings must occur.[2]

Burgeson experienced a warrantless blood draw[3] and alleges ineffective assistance of trial counsel for not challenging the warrantless blood draw. Additionally, Burgeson now claims that he did not consent to the blood draw. Burgeson also contends that there was no probable cause to arrest him because his preliminary breath test was negative for alcohol. These issues lack arguable merit.

The complaint, which Burgeson agreed was "basically accurate," alleged that a police lieutenant observed Burgeson run a red light and stopped Burgeson's vehicle. Upon making contact with Burgeson, the lieutenant immediately noticed that Burgeson's eyes appeared abnormal in that his pupils were small and constricted in response to light,[4] which the lieutenant recognized as an indication that Burgeson may have been under the influence of an opiate. During the field sobriety tests, Burgeson did not recall or follow certain of the lieutenant's instructions and was unable to perform certain of the physical challenges. Although Burgeson's preliminary breath test was negative for alcohol, he continued to exhibit signs of impairment. The lieutenant arrested Burgeson for operating with a controlled substance. There was probable

[2] We do not address any issue arising from the following: Burgeson committed the crime of conviction at a time when the circuit court was required to exercise discretion to impose the DNA surcharge for Burgeson's felony. ***State v. Cherry***, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d 393. By the time Burgeson was sentenced, the law had changed to deem the DNA surcharge mandatory for all felonies. 2013 Wis. Act 20, §§ 2354-55, 9426(1)(am).

[3] Warrantless blood draws were addressed in ***Missouri v. McNeely***, 569 U.S. ___, 133 S. Ct. 1552 (2013).

[4] This fact is taken from the lieutenant's preliminary examination testimony.

cause to arrest Burgeson. The complaint further alleges that Burgeson consented to the blood draw which showed tetrahydrocannabinols in his blood.

At the plea hearing, the factual basis for Burgeson's guilty plea was the complaint and the lab report showing tetrahydrocannabinols in Burgeson's blood. The court asked Burgeson if he read the complaint, Burgeson acknowledged that he had read it and that the allegations were "basically accurate." Included among those allegations was Burgeson's consent to the blood draw. At sentencing, Burgeson admitted, during allocution, that he had a "little amount of THC in me."

Counsel's no-merit report addresses the consent issue and a related ineffective assistance of trial counsel claim arising from counsel's failure to file a motion to suppress evidence obtained as a result of Burgeson's warrantless and allegedly nonconsensual blood draw. In his response, Burgeson urges that his trial counsel was ineffective.[5]

With his no-merit report, appellate counsel provides this court with the "Informing the Accused" form signed by the arresting lieutenant stating that he read the form to Burgeson and Burgeson consented to a blood draw. Counsel states that Burgeson offered him no evidence that he did not to consent to the blood draw. Counsel relates that the discovery shows that Burgeson was cooperative post-arrest. In letters between appellate counsel and Burgeson, which Burgeson provides to this court with his no-merit responses, counsel tells Burgeson that he spoke with trial

[5] We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing.

counsel, and trial counsel did not recall that Burgeson told him that he did not consent. Burgeson does not claim in this court that he told trial counsel he did not consent. Burgeson's lack of consent claim is contrary to the record he created in the circuit court at the plea and sentencing hearings and contrary to the materials from outside the record provided by appellate counsel and Burgeson. WIS. STAT. RULE 809.32(1)(f). An ineffective assistance of trial counsel claim would lack arguable merit.

Burgeson contends that he is innocent. This contention lacks arguable merit. Burgeson was operating a vehicle when he was stopped for running a red light. At sentencing, Burgeson admitted that he had tetrahydrocannabinols in his blood. In Burgeson's second response, he admits that he had tetrahydrocannabinols in his system.

Burgeson argues that the marijuana and drug paraphernalia found in his vehicle after his arrest were not his. The charges of possession of tetrahydrocannabinols and drug paraphernalia were dismissed and read-in. At the plea hearing, the circuit court confirmed that Burgeson understood that he was waiving defenses by pleading guilty and warned Burgeson that the dismissed and read-in charges could be considered at sentencing. That Burgeson now denies these charges does not change that the charges were properly dismissed and read in and considered at sentencing. This issue lacks arguable merit for appeal.

In his response, Burgeson contends that he did not receive a probable cause determination at his initial appearance. WIS. STAT. § 970.01(1). Probable cause must be determined within forty-eight hours of an arrest. ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991). However, a ***Riverside*** violation is not a jurisdictional defect. ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994).

While it is true that the court commissioner did not say, "I find probable cause," the commissioner reviewed the complaint, noted that the complaint alleged that there was evidence of impairment, advised Burgeson of the penalties, and addressed right to counsel issues. If the commissioner did not say enough, then the probable cause determination issue was waived by Burgeson's plea. ***State v. Aniton***, 183 Wis. 2d 125, 128-30, 515 N.W.2d 302 (Ct. App. 1994). And, if not waived by Burgeson's plea, the remedy for a ***Riverside*** violation is suppression of evidence obtained after the delayed (or defective) initial appearance. ***Golden***, 185 Wis. 2d at 769. Here, the record shows that the blood draw occurred within eighty minutes of Burgeson's arrest, that blood tested positive for tetrahydrocannabinols, and the initial appearance occurred the day after Burgeson's arrest. No further evidence figured into the case, so there would have been no basis to suppress evidence due to a ***Riverside*** violation. This issue lacks arguable merit for appeal.

Burgeson argues that he should have had a ***Gerstein***[6] hearing to address probable cause for his extended pretrial custody. Burgeson's guilty plea waived the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). This issue was waived by Burgeson's guilty plea.

Burgeson argues that he was detained without bond for three weeks while awaiting the crime laboratory's analysis of his blood for a detectable amount of a restricted controlled

[6] ***Gerstein v. Pugh***, 420 U.S. 103 (1975).

substance.[7] Burgeson was placed on a cash bond, but he was unable to post the cash bond. This issue was waived by Burgeson's guilty plea and lacks arguable merit for appeal. ***Id.***

Burgeson claims that he did not waive his trial rights. We have already upheld Burgeson's guilty plea as knowingly, voluntarily and intelligently entered. During the plea colloquy, the circuit court reviewed Burgeson's constitutional rights, including the right to a jury trial. Burgeson waived that right. This issue lacks arguable merit for appeal.

Burgeson challenges the constitutionality of the implied consent law. The implied consent law regime has long been upheld. ***State v. Thorstad***, 2000 WI App 199, ¶¶8-9, 238 Wis. 2d 666, 618 N.W.2d 240. This issue lacks arguable merit for appeal.

In one of his responses, Burgeson asks the Wisconsin Supreme Court for relief. We take no action on that request.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction, and relieve Attorney Gabriel Houghton of further representation of Burgeson in this matter.

Upon the foregoing reasons,

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[7] Burgeson was arrested on June 20, 2013, and the blood was drawn the same day. The crime laboratory received the blood sample on June 25, reported on July 2 that the blood sample was negative for blood alcohol, and reported on August 21 that the blood sample had a detectable level of tetrahydrocannabinols, a restricted controlled substance.

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

IT IS FURTHER ORDERED that Attorney Gabriel Houghton is relieved of further representation of David Burgeson in this matter.

Diane M. Fremgen
Clerk of Court of Appeals