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DISTRICT II

August 19, 2015

To:

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

2015AP309-CRNM State of Wisconsin v. Charles S. Green III (L.C. #2012CM594)
2015AP310-CRNM State of Wisconsin v. Charles S. Green III (L.C. #2013CM406)

Before Gundrum, J.

In these consolidated cases, Charles S. Green III appeals from judgments convicting him, upon his guilty pleas, of second- and third-offense operating a motor vehicle while intoxicated (OWI). Green's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Green has elected not to exercise his right to file a response. Upon consideration of the no-merit report and our

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

independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that the appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21. We accept the no-merit report, affirm the judgments of conviction, and relieve Attorney Kathilynne A. Grotelueschen of further representing Green in this matter.

Green pled guilty to second- and third-offense OWI for operating his motorcycle while intoxicated. This no-merit appeal followed.

The no-merit report considers these possible appellate issues: (1) whether the trial court committed error when it denied Green's motions to suppress evidence, (2) whether the trial court erroneously exercised its discretion in sentencing him, (3) whether the trial court relied on inaccurate information in sentencing Green, (4) whether new factors exist to permit sentence modification, (5) whether the plea colloquy was sufficient, and (6) whether a manifest injustice requires Green's pleas to be withdrawn. We independently consider whether the trial court erred in revoking Green's Huber privileges. We conclude that pursuing any of these issues in further postconviction proceedings would lack arguable merit.

Green moved to suppress his preliminary breath test (PBT) results and the investigating officers' observations on grounds that the officers did not have the requisite reasonable suspicion to detain him[2] or the requisite probable cause to arrest him. Only police officers testified at Green's suppression hearings. If accepted, the officers' testimony conclusively established that police did not violate Green's constitutional rights surrounding the detentions and arrests. The

[2] Police did not "stop" Green. In one incident, Green was observed straddling his tipped-over motorcycle. In the other, he had had an accident with his motorcycle and was sitting near it.

trial court accepted their testimony, implicitly declaring it credible. A court acting as factfinder is the ultimate arbiter of credibility. ***State v. Bailey***, 2009 WI App 140, ¶15, 321 Wis. 2d 350, 773 N.W.2d 488. Although the evidence supports the drawing of conflicting but reasonable inferences, we must accept the inferences the trial court drew. *See* ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). Any challenge to the trial court's suppression decision would be frivolous.

The report also considers whether the trial court erroneously exercised its discretion in sentencing Green.[3] For the second-offense conviction, 12CM594, the court ordered five days in jail, a $350 fine plus costs, a ten-month revocation of his driving privileges and use of an ignition interlock device, an alcohol and drug assessment, and payment of the $200 DNA analysis surcharge. For the third offense, the court ordered two years' probation with a withheld sentence, a thirty-three-month license revocation and ignition interlock device, consecutive to that in 12CM594, and three months' jail as a condition of probation with Huber privileges for child care. Green's Huber privileges later were revoked when he tested positive for THC.

Sentencing lies within the trial court's discretion, and our review is limited to whether the trial court misused its discretion. ***State v. Larsen***, 141 Wis. 2d 412, 426, 415 N.W.2d 535 (Ct. App. 1987). The primary factors for the sentencing court to consider are the gravity of the offense, the character of the offender, and the public's need for protection. ***Id.*** at 427.

The court considered the short time span between the offenses but, noting Green's low blood alcohol concentration, his supportive family, and his lack of a criminal history, stated that

[3] We recognize that probation is not a sentence.

this was "a case for minimums." The dispositions were sufficiently explained. It could not be said that his punishment was unduly harsh or excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

No viable challenge could be raised to the revocation of Green's Huber privileges. Granting Huber privileges is a matter within the trial court's discretion. *See* WIS. STAT. § 973.09(4). Child care is an acceptable purpose. *See* WIS. STAT. § 303.08(1)(c). The court warned Green at sentencing that he was to maintain "absolute sobriety; no beer, no wine, no liquor. No cutting corners on that. No controlled substances; no pot, no hash, no Ecstasy, K2. No drug paraphernalia." Green tested positive for THC, explaining that he had not smoked any but simply was around people who did. The court stated that even if that were the case, Green should not have been in that situation. No arguable issue could be raised to the court's determination to revoke Green's Huber privileges. *See* § 303.08(2) ("The court may withdraw the privilege at any time by order entered with or without notice.").

As to whether Green was sentenced in reliance on inaccurate information or merits resentencing due to a new factor, we agree with counsel nothing in the record suggests that either poses an issue of arguable merit. Green's decision not to file a response to the no-merit report further satisfies us that any claim in this regard would be frivolous.

Finally, the report addresses whether the plea was properly entered and whether withdrawal is necessary to avert a manifest injustice. The court engaged in a colloquy largely satisfying the requirements of ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, and specifically referred to and reviewed with Green the plea questionnaire/waiver of rights forms, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987);

see also ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. The court failed to advise Green of a plea's potential deportation consequences, *see* WIS. STAT. § 971.08(1)(c), but nothing in the record suggests Green faces such risk, and the no-merit report asserts that he is a United States citizen. Green also told the court that he read and understood the whole of the plea questionnaire/waiver of rights form, which gives the deportation advisement. He could not show that the plea is likely to result in his being deported. *See* ***State v. Douangmala***, 2002 WI 62, ¶23, 253 Wis. 2d 173, 646 N.W.2d 1; *see also* § 971.08(2).

Our review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kathilynne A. Grotelueschen is relieved from further representing Green in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals