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August 11, 2015

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Nathaniel L. Boyette
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You are hereby notified that the Court has entered the following opinion and order:

2013AP2051-CRNM State of Wisconsin v. Nathaniel L. Boyette (L.C. #2012CF656)

Before Lundsten, Higginbotham and Sherman, JJ.

Nathaniel Boyette appeals a judgment convicting him of a fifth offense of operating a motor vehicle under the influence of an intoxicant. Attorney Ellen Krahn has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***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). The no-merit

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

report addresses the validity of Boyette's plea and sentence. Boyette was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

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

Boyette entered a guilty plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Boyette's plea, the State agreed to make a joint recommendation for three years of probation conditioned on one year in jail with Huber privileges—along with a $600 fine, court costs, three years revocation, two years ignition interlock, alcohol and drug assessment, DNA sample and surcharge—and also to refrain from charging a separate worthless check charge. The State also dismissed and read-in a charge of operating while revoked, and merged a count of operating with a prohibited alcohol concentration.

The circuit court conducted a brief plea colloquy, inquiring into the defendant's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring the defendant's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, 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; and ***Bangert***, 131 Wis. 2d

at 266-72. In addition, Boyette provided the court with a signed plea questionnaire. Boyette 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 facts alleged in the complaint and acknowledged by Boyette to be true—namely, that police stopped him based upon a citizen's report that Boyette exhibited signs of intoxication, failed sobriety tests, and had a PBT of .167—provided a sufficient factual basis for the plea. Boyette only acknowledged three prior OWI convictions, but indicated that he understood the State's theory that an administrative refusal in Utah counted as a prior offense under Wisconsin law because he failed to timely appeal it, even though he was acquitted of the related OWI charge.

There is nothing in the record to suggest that counsel's performance was in any way deficient, and Boyette has not alleged any other facts that would give rise to a manifest injustice. Therefore, Boyette's plea was valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Boyette's sentence would also lack arguable merit because the court followed the joint recommendation of the parties and complied with all relevant statutes. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 517-18, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved); WIS. STAT. §§ 346.65(2)(am)5. (classifying OWI-5th as a Class H felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony); 973.09 (setting term of probation for a felony at not less than

one year and not more than the greater of three years or the initial period of confinement); and 973.09(4)(a) allowing up to one year of jail as a condition of probation).

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 counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals