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

August 18, 2015

To:

Hon. James K. Muehlbauer
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

John Richard Breffeilh
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4105

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

Josh L. Peschke
Drug Abuse Corr. Cntr
P.O. Box 190
Winnebago, WI 54985-0190

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

2014AP2320-CRNM State of Wisconsin v. Josh L. Peschke (L.C. # 2010CF378)

Before Higginbotham, Sherman and Blanchard, JJ.

Josh Peschke appeals a judgment convicting him, after entry of a guilty plea, of operating a motor vehicle with a prohibited alcohol concentration, as a fifth offense, as well as an order denying Peschke's postconviction motion to vacate the DNA surcharge. *See* WIS. STAT. § 346.63(1)(b) (2013-14).[1] Attorney John Breffeilh has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32; *see also* ***Anders v. California***, 386 U.S.

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

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 report addresses the circuit court's denial of Peschke's suppression motion, the validity of the plea and sentence, and the circuit court's denial of Peschke's postconviction motion to vacate the DNA surcharge. Peschke 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.

Suppression Motion

Peschke filed a motion to suppress, arguing that the officer who stopped him lacked probable cause to administer a preliminary breath test (PBT) and that, therefore, the results were inadmissible. WIS. STAT. § 343.303 permits a law enforcement officer to administer a PBT if the officer has "probable cause to believe" that a suspect is operating under the influence of an intoxicant or other drug. Our supreme court has held that "'probable cause to believe' refers to a quantum of proof greater than the reasonable suspicion necessary to justify an investigative stop … but less than the level of proof required to establish probable cause for arrest." ***County of Jefferson v. Renz***, 231 Wis. 2d 293, 316, 603 N.W.2d 541 (1999) (quoting § 343.303).

The circuit court held a hearing on the suppression motion. The arresting officer, Daniel Delmore, testified that he was completing another traffic stop and walking back to his squad car when he observed a white Chrysler move into the lane where his squad car was stopped. Delmore thought the Chrysler was going to hit the back of the squad. Instead, the Chrysler came within inches of the squad. Delmore followed the vehicle and determined that it was going between 45 and 50 miles per hour in a zone with a posted limit of 30 miles per hour. Delmore activated his lights, but the vehicle did not pull over right away. Delmore then followed the

vehicle into a parking complex, where the driver got out. Delmore made contact with Peschke, the driver. Delmore smelled an odor of intoxicants coming from Peschke and noticed that his eyes were bloodshot and watery. When Delmore asked if Peschke had had anything to drink, Peschke said he had had three glasses of wine. Delmore did a driver's license check and learned that Peschke had four prior impaired driving convictions.

Delmore testified that he believed Peschke's alcohol concentration was above .02 and that a person with four or more impaired driving convictions is prohibited from operating a vehicle with a concentration above that number. Delmore based his belief about Peschke's alcohol concentration on the time of day (approximately 2:50 a.m.), Peschke's driving behavior, his odor of intoxicants, his admission to having been drinking, and his prior driving violations. Delmore stated on cross-examination that he did not ask Peschke to perform field sobriety tests before asking him to submit to a PBT. The PBT resulted in a reading of .15 and, thus, Delmore arrested Peschke for operating a motor vehicle with a prohibited blood alcohol concentration. Delmore then transported Peschke to the hospital for a blood draw, which indicated that Peschke's blood alcohol level was .158. The circuit court concluded that Delmore had probable cause to arrest Peschke even before the PBT was administered.

We review the denial of a motion to suppress under a two-part standard of review: we uphold the trial court's findings of fact unless they are clearly erroneous, but we review de novo whether those facts warrant suppression. ***State v. Bullock***, 2014 WI App 29, ¶14, 353 Wis. 2d 202, 844 N.W.2d 429, *review denied*, 2014 WI 50, 848 N.W.2d 859. In this case, the court made detailed findings of fact to support its denial of the suppression motion, identifying nine pieces of information in the record that Delmore had available to him before he requested the PBT. Each piece of information is supported by Delmore's testimony, including Peschke's near-miss of the

squad car, the time of day, Peschke's sudden lane changes, Peschke's speeding, Peschke's failure to pull over right away when Delmore activated his lights, Peschke's odor of intoxicants, his bloodshot and watery eyes, his admission to drinking, and the prior convictions that showed up when Delmore ran Peschke's driver's license. Based on all of the above, we are satisfied that the circuit court's findings were not clearly erroneous and that they support a conclusion that Delmore had probable cause to request a PBT. Accordingly, there would be no arguable merit to challenging the circuit court's denial of the suppression motion on appeal.

Plea

Next, 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.

Peschke entered a guilty plea pursuant to a negotiated plea agreement. In exchange for his plea, the State agreed to dismiss and read in another count. The circuit court conducted a standard plea colloquy, inquiring into Peschke's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his 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. The court made sure Peschke understood that the court would not be bound by any sentencing recommendations.

In addition, Peschke provided the court with a signed plea questionnaire. Peschke 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). Peschke stipulated to a factual basis for the plea, and agreed that he had four prior convictions. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Peschke has not alleged any other facts that would give rise to a manifest injustice. Therefore, his plea was valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

Sentence

A challenge to Peschke's sentence would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record shows that Peschke was afforded an opportunity to comment on the PSI and to address the court, both personally and through counsel. The court proceeded to consider the standard 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. Regarding the severity of the offense, the court noted that this was Peschke's fifth offense and that he came close to hitting a

squad car. With respect to Peschke's character, the court noted that his attitude was improving and that he seemed to be gaining some maturity, but also noted his criminal record and drinking problem. The court identified a serious need to protect the public, and sentenced Peschke to two years of initial confinement and two years of extended supervision.

The components of the bifurcated sentence imposed were within the applicable penalty range. *See* WIS. STAT. §§ 346.65(2)(am)5. (classifying operating with a prohibited alcohol concentration as a fifth offense 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). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here was not "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

DNA Surcharge

Finally, we agree with counsel's assessment that there would be no arguable merit to challenging the circuit court's denial of Peschke's postconviction motion to vacate the DNA surcharge. Under ***State v. Cherry***, 2008 WI App 80, ¶9, 312 Wis. 2d 203, 752 N.W.2d 393, the circuit court had authority to impose the surcharge if it explained why the surcharge was appropriate. Here, the court explained its view that relevant factors justifying the surcharge included Peschke's behavior while the case was pending, which included "taking off to Germany for almost a year and a half," as well as his risk of reoffending. Because the record demonstrates

a proper exercise of the circuit court's discretion, we are satisfied that an appellate challenge to the DNA surcharge would be without arguable merit.

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 and order denying Josh Peschke's postconviction motion are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that John Breffeilh is relieved of any further representation of Josh Peschke in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals