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/I

October 26, 2015

To:

Hon. Todd K. Martens
Circuit Court Judge
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

Eileen A. Hirsch
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

Keith L. Wiedmeyer 299898
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2015AP1197-CRNM State of Wisconsin v. Keith L. Wiedmeyer (L.C. #2012CF475)

Before Curley, P.J., Kessler and Brennan, JJ.

Keith L. Wiedmeyer appeals from a judgment of conviction, entered upon his guilty pleas, on one count of homicide by intoxicated use of a motor vehicle and one count of second-degree recklessly endangering safety, both as a repeater. Appellate counsel, Eileen A. Hirsch, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Wiedmeyer was advised of his right to file a response, but has

---

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

not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Shortly before 10 p.m. on December 24, 2012, Wiedmeyer was driving northbound on State Highway 45 in the Village of Kewaskum. A witness estimated his speed to be approximately eighty[2] miles per hour in a zone where the speed limit was thirty miles per hour. Witnesses watched as Wiedmeyer's car drifted into the southbound lane, completely crossing the double center line, and hit a southbound Chevrolet Cobalt head on. Wiedmeyer's car spun around and also hit a truck.

The truck, driven by M.P., was damaged, but the occupants were uninjured. The Cobalt, driven by M.M., was totaled; in fact, the front doors could not be opened to extract the occupants. M.M. suffered a broken ankle and had no recollection of the crash. His brother, P.M., was the front passenger. P.M. had a broken nose and lacerations to the face, including skin missing from his eyelid that required emergency plastic surgery. Their mother, Pamela M., was in the back seat. She was pronounced dead on December 25, 2012, the result of multiple chest and abdominal injuries.

At the scene, Wiedmeyer had slurred speech, bloodshot and glassy eyes, and a strong odor of intoxicants on his breath. He admitted driving and having a couple of drinks just beforehand. He also said he had been texting. Wiedmeyer refused to take a preliminary breath

[2] An accident reconstruction team calculated Wiedmeyer was traveling approximately sixty-seven miles per hour.

test and was either unwilling or unable to perform field sobriety tests. He was transported to the hospital to treat minor injuries sustained in the crash and for a blood draw. The blood draw, taken about ninety minutes after the crash, revealed a blood-alcohol concentration of approximately .124%. Wiedmeyer later moved to suppress the results of the blood draw, claiming a constitutional violation because the draw had been completed without a warrant, but the circuit court denied the motion.

The information in this case charged Wiedmeyer with homicide by intoxicated use of a motor vehicle, homicide by use of a motor vehicle with a prohibited alcohol concentration, second-degree reckless injury, two counts of causing injury while operating a motor vehicle while under the influence of an intoxicant, two counts of causing injury while operating a motor vehicle with a prohibited alcohol concentration of less than .15%, second-degree recklessly endangering safety, and disorderly conduct,[3] all as a repeater.

Wiedmeyer agreed to resolve the case through a plea agreement. In exchange for his guilty pleas to homicide with intoxicated use of a motor vehicle and second-degree recklessly endangering safety, the remaining counts would be dismissed and read in. Both parties would request a presentence investigation, and both parties would be free to argue for an appropriate sentence. The circuit court accepted the pleas and sentenced Wiedmeyer to twenty years' initial confinement and ten years' extended supervision on the homicide charge, and eight years' initial confinement and five years' extended supervision on the endangering-safety charge, to be served

[3] The disorderly conduct charge was based on Wiedmeyer's belligerent behavior at the hospital.

consecutively. Following a restitution hearing, the circuit court ordered Wiedmeyer to pay approximately $215,000 in restitution.

The first of four issues that counsel has identified for appeal is whether the circuit court judge erred when it declined to recuse himself from this case. The case was originally assigned to the Honorable Andrew T. Gonring, against whom Wiedmeyer exercised his right of substitution. The matter was then assigned to the Honorable Todd K. Martens. Wiedmeyer asked Judge Martens to recuse himself because the judge, while he was an assistant district attorney, had prosecuted three cases against Wiedmeyer and represented the State at sentencing in a fourth case.

WISCONSIN STAT. § 757.19(2) specifies situations in which a judge "shall disqualify himself" from the proceedings. The first six paragraphs, §§ 757.19(2)(a)-(f), are objective situations that require disqualification, but none are applicable here. The last paragraph, § 757.19(2)(g), is a subjective test that requires disqualification of a judge when he or she "determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner." This is the only paragraph that might be applicable to Wiedmeyer's case.

We presume a judge is unbiased. *See* ***State v. Pinno***, 2014 WI 74, ¶92, 356 Wis. 2d 106, 850 N.W.2d 207. We determine objectively whether the judge made the subjective determination about his impartiality. *See* ***id.***, ¶93. Judge Martens noted "some recollection" of Wiedmeyer, but he could not recall any specific cases or facts. Thus, the judge concluded that he could be fair and impartial. This was a proper exercise of discretion, and the record does not provide a basis for asserting the judge was nevertheless biased. Thus, there is no arguable merit to a claim the circuit court judge erred in refusing to recuse himself.

Counsel next discusses whether the circuit court erred in denying Wiedmeyer's motion to suppress the results of his blood draw. *See* WIS. STAT. § 971.31(10) (orders denying motions to suppress evidence may be challenged on direct appeal, notwithstanding entry of a plea).

Wiedmeyer's blood was drawn without a warrant on December 24, 2012. The law in Wisconsin at the time was that the natural dissipation of alcohol in the bloodstream is a sufficiently exigent circumstance to justify a warrantless, investigatory blood draw. *See* ***State v. Bohling***, 173 Wis. 2d 529, 547, 494 N.W.2d 399 (1993). The United States Supreme Court effectively abrogated ***Bohling*** with its decision in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), released in April 2013. Because of ***McNeely***, Wiedmeyer argued that the results of his blood test should be suppressed.

The circuit court denied the motion, concluding the good faith exception to the exclusionary rule applied. In ***State v. Kennedy***, 2014 WI 132, ¶¶36-37, 359 Wis. 2d 454, 856 N.W.2d 834, our supreme court confirmed that application of the good faith exception was appropriate in pre-***McNeely***, warrantless blood draw cases. Thus, there is no arguable merit to a challenge to the circuit court's denial of the suppression motion.

Counsel next discusses whether there is any basis for a challenge to the validity of Wiedmeyer's guilty pleas. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986) (to be valid, a plea must be knowing, intelligent, and voluntary). Wiedmeyer completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of the offenses. The form correctly acknowledged the maximum penalties Wiedmeyer

faced and specified the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court also conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court did not expressly review all of the constitutional rights Wiedmeyer was surrendering with his plea, though it confirmed that Wiedmeyer knew he was giving up the rights that were listed on the front of the plea questionnaire. *See* ***State v. Hoppe***, 2009 WI 41, ¶31, 317 Wis. 2d 161, 765 N.W.2d 794. The rest of the colloquy complied with the requirements for a valid plea, with one exception: the circuit court failed to provide the immigration warning required by WIS. STAT. § 971.08(1)(c). However, in order to bring a motion to withdraw the pleas because of that omission, Wiedmeyer would have to be able to allege that adverse immigration consequences are likely. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749; ***State v. Douangmala***, 2002 WI 62, ¶¶3-4, 253 Wis. 2d 173, 646 N.W.2d 1. Nothing in the record suggests Wiedmeyer is anything other than a United States citizen, so he could not seek plea withdrawal on this ground. Thus, we conclude there is no arguable merit to a challenge to the pleas' validity.

The final issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of

factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Our review of the record satisfies us that the circuit court properly exercised its sentencing discretion. It described Wiedmeyer as having "one of the most antisocial lives I have ever seen in criminal court." It noted that, at the age of thirty-five, Wiedmeyer had twenty-two prior convictions and had spent ten years in jail already. Though Wiedmeyer had drug and alcohol issues, he repeatedly quit or refused treatment for those issues. The circuit court also commented that Wiedmeyer had little true remorse, only regret.

The maximum possible sentence Wiedmeyer could have received was forty-five years' imprisonment.[4] The sentence totaling forty-three years' imprisonment is within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion in setting the term of imprisonment.

There is also no arguable merit to a claim the circuit court erred in setting approximately $215,000 in restitution. The original amounts requested totaled over $645,000 from M.M., P.M.,

---

[4] *See* WIS. STAT. §§ 940.09(1)(a) & (1c)(a) (homicide by intoxicated use a class D felony); 941.30(2) (endangering safety a class G felony); 939.50(3)(d) & (g) (penalties for class D and G felonies); 939.62(1)(b)-(c) (repeater enhancer provisions); 973.01(2)(b)4. & 7. (bifurcated structure for class D and G felony sentences); and 973.01(2)(c)1. (application of penalty enhancer to term of initial confinement).

M.P., and Pamela M.'s estate. The circuit court considered the reasons for each cost—*i.e.*, medical bills, property damage, and, in the estate's case, loss of Pamela M.'s earnings—as well as the other required factors under WIS. STAT. § 973.20(13)(a). *See* ***State v. Fernandez***, 2009 WI 29, ¶¶22-23, 316 Wis. 2d 598, 764 N.W.2d 509. The final amount ordered reflected the circuit court's consideration of those factors, most notably including Wiedmeyer's ability to pay. The circuit court's assessment of that ability is why the final total is one-third of the amounts requested. There is no arguable merit to a claim the circuit court erroneously exercised its discretion in setting the amount of restitution. *See* ***id.***, ¶20.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Eileen A. Hirsch is relieved of further representation of Wiedmeyer in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals