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November 10, 2015

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

2013AP2796-CRNM State v. Robert Alan Schumacher, Jr. (L. C. No. 2012CF2359)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Robert Schumacher has filed a no-merit report concluding there is no basis to challenge Schumacher's conviction for seventh-offense operating while intoxicated (OWI). Schumacher has responded and counsel submitted a supplemental no-merit report. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised and summarily affirm.

A criminal complaint charged one count of seventh-offense OWI and one count of operating while revoked. The complaint alleged that a police officer encountered a pickup truck

abandoned in the traffic lane on a street in Janesville. Schumacher was found hiding in a backyard nearby. The officer noticed a strong odor of intoxicants coming from Schumacher, who was unable to walk without losing his balance. Schumacher also had very slurred speech. He initially told police he was James Whitney. Schumacher acknowledged drinking but denied driving. He was in possession of the keys for the abandoned pickup truck.

A witness reported to police that he and his wife observed the pickup in the middle of the roadway with one male in the vehicle whose description matched Schumacher. The witness said the male was sitting in the driver's seat of the vehicle and was turning the key trying to get the vehicle to start. The male in the vehicle told the witness he thought he ran out of gas.

Schumacher was arrested on an outstanding warrant. Schumacher was given field sobriety tests, which he failed. He agreed to give a preliminary breath test, which registered .279. A blood draw was administered, which indicated a blood alcohol content of .321.

An amended complaint added a count of operating with a prohibited alcohol concentration, as a seventh offense. Schumacher pled guilty to the OWI count, and the remaining counts were dismissed and read in. The court imposed a sentence consistent with a joint sentencing recommendation of three and one-half years' initial confinement and five years' extended supervision, concurrent with a reconfinement for a prior OWI.

There is no manifest injustice upon which Schumacher could withdraw his guilty plea. *See State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court engaged Schumacher in a lengthy plea colloquy, buttressed by a plea questionnaire and waiver of rights form. Schumacher advised the court that he signed the plea questionnaire, understood the constitutional rights he waived by pleading guilty, and had no questions regarding those rights.

Schumacher also represented to the court that he understood the elements of the offense as indicated on the attachment to the plea questionnaire entitled “Elements of Common Criminal Offenses.” The court informed Schumacher of the maximum sentence and that it was not bound by the parties’ agreement. Schumacher was also advised of the potential deportation consequences of his plea. An adequate factual basis supported the conviction. The record shows the plea was knowingly, voluntarily and intelligently entered. *See State v. Bangert*, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986).

The record also discloses no basis for challenging the court’s sentencing discretion. The court adopted the parties’ joint sentencing recommendation. Schumacher is therefore estopped from challenging the sentence on appeal. *See State v. Sherreiks*, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

In response to the no-merit report, Schumacher argues that his trial counsel should have collaterally attacked a 1989 California conviction for driving while under the influence, as being obtained without a valid waiver of counsel. However, an affidavit attached to the supplemental no-merit report from an investigator for the Wisconsin Public Defender averred that the California courts provided information indicating Schumacher was, in fact, represented by counsel at both the plea and sentencing hearings in that case.

Schumacher also insists he did not drive the vehicle when he was intoxicated. Schumacher insists he was in the process of “pushing” the inoperable vehicle out of the roadway. Schumacher acknowledges a “witness did appear that made statements Schumacher was in the driver’s seat, but that same witness never stated Schumacher was actively ‘driving’ the truck, nor did they state the ‘Engine’ was ‘running’” However, Schumacher’s valid guilty plea

constitutes a waiver of nonjurisdictional defenses and defects. *See Bangert*, 131 Wis. 2d at 265-66. As both parties advised the court at sentencing: “A lot went into the [plea] agreement ... it is a compromise on both sides. There are potential problems for both of us. That’s why we felt under all the circumstances this was a fair resolution.” By entering into the plea agreement, Schumacher waived the argument that he did not drive the vehicle while intoxicated.

Schumacher also argues “probable cause was NEVER established and the blood draw was unconstitutionally obtained, in violation of a new precedent, *Missouri v. McNeely*, [133 S.Ct. 1552 (2013)]” Schumacher is incorrect. The record establishes that Schumacher showed signs of intoxication, he acknowledged drinking, he failed field sobriety tests, he was arrested on a warrant, and he agreed to a preliminary breath test indicating .279. The blood draw in this case occurred prior to the decision in *McNeely*, and the police reasonably relied on the clear and settled precedent in Wisconsin at the time. Thus, the good faith exception applied to the exclusionary rule. *See State v. Foster*, 2014 WI 131, ¶30, 360 Wis. 2d 12, 856 N.W.2d 847.

Finally, we note Schumacher, pro se, filed a motion “for the purpose of withdrawing my appeal.” Subsequently, Schumacher, pro se, filed a motion “To Not Withdraw Appeal.” The motion is dismissed as moot.

Our independent review of the record discloses no other issues of arguable merit. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See WIS. STAT. RULE 809.21* (2013-14).

IT IS FURTHER ORDERED that the motion to not withdraw appeal is dismissed as moot.

IT IS FURTHER ORDERED that attorney Andrew Hinkel is relieved of further representing Schumacher in this matter.

Diane M. Fremgen
Clerk of Court of Appeals