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DISTRICT IV

November 20, 2015

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

2013AP2861-CRNM State of Wisconsin v. Kevin D. Parker (L.C. # 2012CF1877)

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

Kevin Parker appeals a judgment that convicted him of a sixth offense of operating a motor vehicle under the influence of an intoxicant (OWI-6th). Attorney William Schmaal has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***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

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

no-merit report addresses the validity of Parker's plea and sentence. Parker was sent a copy of the report, and has filed a response arguing that the results of his warrantless blood alcohol test should have been suppressed pursuant to ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013) (potential dissipation of blood alcohol levels does not constitute a per se exigent circumstance sufficient to provide an exemption from the warrant requirement). Upon reviewing the entire record, as well as the no-merit report and Parker's response, 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.

Parker entered a plea of guilty pursuant to a negotiated plea agreement that was presented in open court. In exchange for Parker's plea, the State agreed to dismiss a penalty enhancer and additional counts of operating after revocation and with a prohibited blood alcohol level.

The circuit court conducted a standard plea colloquy, inquiring into Parker's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Parker'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; ***Bangert***, 131 Wis. 2d at

266-72. The court made sure Parker understood that it would not be bound by any sentencing recommendations. In addition, Parker provided the court with a signed plea questionnaire. Parker 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 set forth in the complaint and acknowledged by Parker to be true—namely, that a police officer pulled Parker over after observing him swerving back and forth between the center line and curb and randomly stopping several times, and that Parker subsequently exhibited signs of intoxication, failed sobriety tests, and was subjected to a forced blood draw—provided a sufficient factual basis for the plea. In addition, Parker admitted his prior OWI convictions in open court. We see nothing in the record to suggest that counsel's performance was in any way deficient, and Parker has not alleged any other facts that would give rise to a manifest injustice. Therefore, Parker's 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; WIS. STAT. § 971.31(10).

As to suppression, we agree that the blood draw in this case would most likely be deemed unconstitutional under ***McNeely***. However, in ***State v. Reese***, 2014 WI App 27, 353 Wis. 2d 266, 844 N.W.2d 396, this court determined that the suppression of warrantless blood draws executed in this state prior to ***McNeely*** is not required because officers could rely in good faith on the prior bright line rule in Wisconsin that the dissipation of alcohol from a person's blood stream constitutes a sufficient exigency to justify a warrantless blood draw. ***Reese***, 353 Wis. 2d 266, ¶¶17, 22. ***Reese*** controls here because Parker's traffic stop was executed prior to the

McNeely decision, meaning that even if counsel had filed a suppression motion on Parker's behalf, it would have been denied.

A challenge to Parker'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 Parker was afforded an opportunity to comment on the PSI, to present a letter on his behalf, and to address the circuit court, both personally and through counsel. After hearing from both parties, 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 deemed probation inappropriate for a sixth offense. With respect to Parker's character, the court acknowledged that Parker had an extremely traumatic childhood, which may have been at the root of his alcohol issues. However, the court noted that Parker was forty-two, and that he had abilities and skills that he was not fully realizing because he was caught up in a pattern of thinking about how unfair life had treated him, rather than taking responsibility for his actions. The court concluded that a prison term was necessary to provide treatment in a confined setting, because Parker had not been able to address his issues in a community setting.

The circuit court then sentenced Parker to two years of initial confinement and three years of extended supervision. The court also awarded sixty-two days of sentence credit; determined that Parker was eligible for the Substance Abuse Program but not the Challenge

Incarceration Program, ordered license revocation and ignition interlock, and imposed standard costs and conditions of supervision, but waived the DNA surcharge because Parker had previously given a sample.

The components of the bifurcated sentence imposed were within the applicable penalty ranges, and the total imprisonment period constituted about 83% of the maximum exposure Parker faced. *See* WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)5. (classifying OWI-6th 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). That is particularly true when taking into consideration that this was a sixth offense, and that prison time imposed on the fifth offense had not deterred Parker from his pattern of conduct.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. 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