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DISTRICT IV

June 22, 2016

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

2015AP2496-CRNM State of Wisconsin v. Cristobal O. Guerrero-Kresovich
(L.C. # 2015CF24)

Before Lundsten, Sherman and Blanchard, JJ.

Cristobal Guerrero-Kresovich appeals a judgment convicting him of fourth offense operating while intoxicated (OWI) within five years, a class H felony.[1] Attorney Diane C. Lowe has filed a no-merit report and seeks to withdraw as appellate counsel. *See* WIS. STAT. RULE

[1] Guerrero-Kresovich was sentenced to three years of probation on June 16, 2015. On October 21, 2015, he was sentenced following revocation of his probation, with a judgment of conviction following revocation entered on October 22, 2015. No notice of intent to pursue postconviction relief was filed following entry of the judgment of conviction after the revocation of his probation. Our review is limited to the June 16, 2015 judgment of conviction.

809.32 (2013-14);[2] *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 no-merit report addresses the validity of the plea and whether trial counsel rendered ineffective assistance of counsel as a result of having failed to raise the issue that, following Guerrero-Kresovich's third conviction, neither the circuit court nor counsel advised Guerrero-Kresovich that, as a result of that third conviction, his prohibited alcohol concentration would be "more than 0.02," instead of .08. Guerrero-Kresovich was provided 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 basis for plea withdrawal. Having reviewed the plea colloquy, we conclude that Guerrero-Kresovich knowingly, intelligently, and voluntarily entered his plea to fourth offense OWI.[3] In order to invalidate the plea, Guerrero-Kresovich would be required to show that the plea colloquy was in some manner defective or that manifest injustice, such as coercion, lack of a factual basis to support the charges, ineffective assistance of counsel, or the prosecutor's failure to support the negotiated plea agreement, requires us to invalidate the plea. *See* ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991).

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

[3] At the plea hearing, Guerrero-Kresovich also entered a guilty plea to obstructing an officer. However, the obstructing count was subsequently dismissed and read in for sentencing purposes, along with two other dismissed counts.

Guerrero-Kresovich and the State entered into a negotiated plea agreement that was placed on the record. The circuit court, which had Guerrero-Kresovich's signed plea questionnaire before it, conducted a thorough plea colloquy which inquired of Guerrero-Kresovich's background, informed him of the many constitutional rights he was giving up, reviewed in detail the elements of the offense, the maximum penalties, and the factual basis for his plea, and advised him of the firearm and voting restrictions, as well as potential immigration consequences. Trial counsel indicated his belief that Guerrero-Kresovich was freely, voluntarily, intelligently, and knowingly entering his plea, and Guerrero-Kresovich affirmed that he had reviewed the plea questionnaire with counsel and had been promised nothing in addition to the plea agreement in exchange for his plea. We are satisfied that the plea colloquy meets our standard for completeness and that Guerrero-Kresovich's plea to fourth offense OWI is valid. *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 second issue the no-merit report addresses, and the one which counsel indicates Guerrero-Kresovich is particularly concerned with, is whether, at the time of his third OWI conviction, the circuit court presiding or counsel representing him should have informed him that henceforward his "prohibited alcohol concentration" would be "more than 0.02," instead of .08. *See* WIS. STAT. § 340.01(46m)(c). Appellate counsel discusses whether there is arguable merit to a claim that trial counsel was deficient in having failed to raise the issue that Guerrero-Kresovich was not warned of his resulting lower prohibited alcohol concentration following his third OWI conviction. Guerrero-Kresovich's blood alcohol content for the offense on appeal was .062.

We agree with appellate counsel that the issue is potentially interesting. However, here the count alleging that Guerrero-Kresovich operated a motor vehicle with a prohibited alcohol

concentration—that is, with an alcohol concentration above .02—was dismissed and read in for sentencing purposes. Guerrero-Kresovich pled guilty to Count 1 of the information, which alleged operation of a motor vehicle while under the influence of an intoxicant. At the plea hearing, the circuit court, noting that Guerrero-Kresovich's blood alcohol content was a bit lower than the .08 that usually marks the presumption of intoxication, specifically inquired of Guerrero-Kresovich whether he agreed that he was "impaired" at the time of the offense.[4] Guerrero-Kresovich responded, "Yes." Thus, there is no link connecting the applicable lower prohibited alcohol concentration issue to the OWI charge to which Guerrero-Kresovich admitted guilt. Although appellate counsel does not discuss the prohibited alcohol concentration issue in relation to the actual plea and conviction entered, counsel is accurate in concluding that there is no constitutional basis for vacating the judgment of conviction.

Appellate counsel is also correct in asserting that there is no case law or statute requiring a court to advise a defendant upon their third OWI conviction that they will be subject to the lower WIS. STAT. § 340.01(46m)(c) definition of "prohibited alcohol concentration." In addition, as counsel asserts, there is no basis to argue that the lower governing prohibited alcohol concentration is analogous to a maximum penalty of which the defendant must be advised prior to pleading because the new concentration level for future offenses does not relate to or serve to increase the penalty for the offense at hand. The maxim "ignorance of the law is no defense," *see* ***State v. Jensen***, 2004 WI App 89, ¶30, 272 Wis. 2d 707, 681 N.W.2d 230, governs in this

[4] WISCONSIN JI—CRIMINAL 2663 defines "under the influence of an intoxicant" as "the defendant's ability to operate a vehicle was impaired because of consumption of an alcoholic beverage." The instruction goes on to explain that "[w]hat must be established is that the person has consumed a sufficient amount of alcohol to cause the person to be less able to exercise the clear judgment and steady hand necessary to handle and control a motor vehicle." ***Id.***

case. Further, a due process fair notice challenge would not have arguable merit in this case. In ***State v. Neumann***, 2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560, the supreme court, reviewing a due process fair notice challenge to a criminal provision, explained: "Courts require the law be clear so that those who consult the law are not confused or misled." ***Id.***, ¶50 n.29. Had Guerrero-Kresovich consulted the relevant statutory provisions related to prohibited alcohol concentration offenses,[5] he would have been clearly advised that the prohibited alcohol concentration applying to anyone having three or more OWI convictions is "more than 0.02."

At sentencing, the circuit court imposed three years of probation and a 36-month revocation of Guerrero-Kresovich's operator's license, as well as a requirement that he not operate a motor vehicle for 36 months unless it is equipped with an ignition interlock device. The circuit court's imposition of probation obviously indicates that it adhered to the admonition in ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, that probation should be the disposition unless protection of the public, the defendant's rehabilitative needs, or undue depreciation of the seriousness of the offense dictates otherwise. *See* ***id.***, ¶44. Further, the circuit court adequately tied the imposed conditions of probation, which included six months in jail with electronic monitoring, to Guerrero-Kresovich's needs and public safety. *See* ***id.***, ¶45. The circuit court properly exercised its sentencing discretion.

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,

[5] The relevant provisions are WIS. STAT. §§ 346.63(1)(b); 340.01(46m)(c); and 343.307(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 Attorney Diane C. Lowe is relieved of any further representation of Cristobal Guerrero-Kresovich in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals