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DISTRICT IV

September 30, 2016

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

2016AP577-CRNM State of Wisconsin v. Oluwagbenga B. Awe (L.C. # 2013CT419)

Before Kloppenburg, J.[1]

Oluwagbenga Awe appeals a judgment convicting him of third offense operation of a motor vehicle while under the influence of an intoxicant. Attorney Tristan Breedlove has filed a no-merit report and seeks to withdraw as appellate counsel. WIS. STAT. RULE 809.32; *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

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

report addresses the circuit court's denial of a motion to suppress evidence, as well as the validity of the plea colloquy and sentencing. Awe was provided a copy of the report, but has not filed a response. We subsequently requested that appellate counsel submit a supplemental report addressing the $25 "agency reimbursement" fee which appears in the judgment of conviction, but which was not discussed on the record. Counsel has submitted his supplemental report. Upon reviewing the entire record, as well as the no-merit and supplemental reports, we conclude that there are no arguably meritorious appellate issues.

The following facts underlying this appeal are taken from the hearing on Awe's motion to suppress. An officer working for the Village of Lake Delton Police Department stopped Awe for speeding in the early morning hours of July 28, 2013, and noted that the registration for the vehicle was expired. When the officer stopped Awe, he noticed that Awe's eyes were bloodshot and that an odor of intoxicants was coming from Awe's mouth. The officer described Awe's demeanor as "argumentative." Upon checking Awe's driver's license status, the officer discovered that Awe's operating privileges were suspended. Based on Awe's bloodshot eyes and demeanor, the odor of intoxicants, the speed at which Awe was traveling when stopped, and Awe's failure to immediately pull over when the officer commenced using his emergency lights, the officer determined it was appropriate to request that Awe perform field sobriety tests. When the officer asked Awe to step out of his car, the officer noticed Awe fumbling with his cell phone and experiencing apparent difficulty manipulating the phone. The officer asked Awe to complete the horizontal gaze nystagmus [HGN] test, but Awe refused the officer's multiple requests that he comply. The officer described Awe's continued demeanor as argumentative. The officer then asked Awe to perform various field sobriety tests: the walk-and-turn test, the one-leg stand, and a non-standard finger dexterity test, which the officer requested due to the fact

that Awe had refused to complete the HGN test. Awe failed to successfully complete any of the three tests. Based on Awe's performance, the officer requested that Awe submit to a preliminary breath test (PBT). Despite the officer's multiple requests, Awe refused to submit. The officer then advised Awe that he was placing Awe under arrest for operating while intoxicated. The officer testified that Awe became resistant and continued to be argumentative and also profane. Awe was transported to the jail and submitted to a blood draw, the results of which indicated that Awe's blood ethanol level was over the legal limit. Awe moved to suppress the blood evidence. The circuit court denied the motion, concluding that the officer had both reasonable suspicion to believe that Awe was operating while under the influence and probable cause to support the arrest.

Whether undisputed facts constitute probable cause is a question of law that this court reviews without deference to the circuit court. ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996). Probable cause exists when the totality of the circumstances, within the arresting officer's knowledge at the time of the arrest, is such that a reasonable police officer would believe that the defendant probably operated a vehicle under the influence of an intoxicant. ***State v. Babbitt***, 188 Wis. 2d 349, 356, 525 N.W.2d 102 (Ct. App. 1994). The court applies an objective standard, "considering the information available to the officer and the officer's training and experience." ***State v. Lange***, 2009 WI 49, ¶20, 317 Wis. 2d 383, 766 N.W.2d 551.

We agree with appellate counsel that under the facts of the case, there is no meritorious argument to be made on appeal that the officer lacked probable cause for the arrest. Under the totality of the circumstances, the officer had probable cause to arrest Awe.

Having reviewed the plea colloquy, we find no substantial defects and conclude that Awe knowingly, intelligently, and voluntarily entered his no contest plea. To support withdrawal of a plea following sentencing, a defendant is required to show that the plea colloquy was defective and that he did not understand information that should have been provided at the plea hearing, or that a manifest injustice such as coercion, the lack of a factual basis to support the charges, ineffective assistance of counsel, or the prosecutor's failure to support the negotiated plea agreement undermined the plea's validity. ***State v. Brown***, 2006 WI 100, ¶43, 293 Wis. 2d 594, 716 N.W.2d 906; ***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). The record reveals no such defect.

Awe and the State entered into a negotiated plea agreement that was placed on the record and included a joint recommendation for sentencing, which the circuit court followed. The circuit court asked Awe whether he had reviewed the plea questionnaire with counsel and understood its contents, and Awe responded in the affirmative. Although the court did not review each of the constitutional rights Awe was surrendering in entering his plea, the court did inquire whether Awe understood both the rights contained in the plea questionnaire and the fact that by entering his plea Awe was waiving those rights. Awe also responded to this inquiry in the affirmative. The court made certain that Awe understood that he was giving up the right to have the state prove the OWI charge beyond a reasonable doubt. The court also advised Awe of the potential immigration consequences of his plea. Finally, the court inquired whether there was anything Awe did not understand about what was happening at the plea hearing, and Awe replied in the negative. Awe also indicated that he had had adequate time to discuss the plea with his attorney. Following its colloquy with Awe, the court concluded that Awe's plea was

free, knowing, and voluntary, that Awe had knowingly waived his rights, and that there was a factual basis in the record to support Awe's plea.[2] The court accepted Awe's plea and adjudged him guilty.

We are satisfied that the plea colloquy was adequate and that Awe's plea 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.

We also agree that any challenge to the circuit court's sentence would lack arguable merit. Our review of the circuit court's sentence begins with the "presumption that the [circuit] court acted reasonably," leaving the defendant with the burden to demonstrate "some unreasonable or unjustifiable basis in the record" in order for us to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here the State and the defense jointly recommended that the court impose the minimum jail time permitted for the offense (forty-five days), along with a fine and costs of $1,494, a twenty-four month revocation of Awe's operating privileges, and a twenty-four month ignition interlock requirement. The circuit court adopted the recommendation without deviation. We agree with appellate counsel that as a result of the joint nature of the sentencing recommendation, Awe would be estopped from challenging the sentencing under ***State v. Magnuson***, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998).

[2] Although the circuit court did not advise Awe of the potential maximum sentence he faced or explain that the court would be free to sentence Awe to the maximum despite the joint recommendation for sentencing, an attachment to the plea questionnaire set forth the potential maximums, and the plea questionnaire advised Awe that the court was not bound by the plea agreement. The court sentenced Awe in accordance with the joint recommendation and granted Awe's requested stay of sentence pending appeal.

Further, a sentence well within the applicable statutory maximums is presumed not to be unduly harsh, and after reviewing the record independently, as well as according the circuit court's analysis and decision due deference, we conclude that the sentence the circuit court 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.

Finally, we have reviewed appellate counsel's supplemental report that addresses the $25 agency reimbursement fee that appears in the judgment of conviction, but which was not addressed on the record at the plea hearing and sentencing proceeding. Counsel indicates that he has been in contact with the Sauk County traffic and criminal court clerk who advised him that the $25 fee assessed is to reimburse the local police for the funds they expended to pay for the blood test conducted. Counsel advises that WIS. STAT. § 973.06(1)(j) requires reimbursement in this case and indicates that there is no arguably meritorious argument that the fee is not permitted in this case. We accept counsel's explanation.

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 Attorney Tristan Breedlove is relieved of any further representation of Oluwagbenga Awe in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals