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September 30, 2016

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

2016AP342-CRNM State of Wisconsin v. Ryan E. Barse (L.C. # 2014CF31)

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

Ryan Barse appeals a judgment convicting him of operating a motor vehicle with a prohibited alcohol concentration as a fourth offense within five years, in violation of WIS. STAT. §§ 346.63(1)(b) and 346.65(2)(am)4m. (2011-12).[1] Assistant State Public Defender Katie York[2]

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

[2] Assistant State Public Defender Colleen Marion has replaced Assistant State Public Defender Katie York as counsel and filed the supplemental no-merit report.

has filed a no-merit report seeking to withdraw as appellate counsel. *See* 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 report addresses a suppression motion and the validity of Barse's plea and sentencing. On our independent review of the record, we observed that the circuit court did not order a specific number of months during which Barse would be required to operate only a motor vehicle equipped with an ignition interlock device despite the judgment of conviction imposing a 24-month restriction. We requested that counsel investigate the issue and submit a supplemental no-merit report informing us whether it is an issue that Barse desires to pursue or if the issue is meritless. Counsel advises us that Barse does not wish to pursue the issue. Further, counsel requested that Barse be permitted additional time in which to file a response to the no-merit report, which we granted. Counsel's supplemental no-merit report, Barse's response, and the no-merit report lead us to conclude that there are no arguably meritorious appellate issues.

Barse was charged with fourth offense operating with a prohibited alcohol concentration following an episode in which a citizen witness called law enforcement to alert them that the witness had assisted Barse in moving a disabled vehicle from the roadway to a parking lot, and that the witness thought Barse may be intoxicated. The primary issue turned on whether the witness had actually seen Barse operating the vehicle or whether the witness came upon the scene when Barse was standing near the vehicle after it became disabled. The Wood County deputy's affidavit in support of the search warrant for a blood draw averred that the witness had actually seen Barse operate the vehicle. The affiant contradicted himself on this point at the preliminary hearing and then again at the suppression hearing. The affidavit, which was a form

created by the Wood County Sheriff's Department, also contained a paragraph that misstated the defendant's name and the number of prior OWI convictions.

Barse brought a ***Franks/Mann***[3] suppression challenge, alleging that the deputy's affidavit in support of the search warrant obtained for purposes of drawing Barse's blood, following Barse's refusal to permit field sobriety testing, intentionally or recklessly included false information that, once redacted, would result in an affidavit that could not support probable cause to search. Barse also alleged that the deputy intentionally or recklessly omitted critical information that, if added to the affidavit, would similarly preclude a finding of probable cause. Barse maintained that the fact the deputy did not find car keys on Barse's person should have been included in the affidavit. The circuit court agreed that the deputy had recklessly or intentionally included false information, specifically the witness's statements with regard to whether the witness had seen Barse *operating* the vehicle in question, but concluded that excising the false information would have no effect on probable cause since the vehicle's owner informed law enforcement that he had lent the car to Barse for purposes of picking someone up from a motel and expected Barse back shortly. The court also concluded that the deputy was not required to note in his affidavit that he had not found keys on Barse's person when searching Barse because the deputy was not required to inform the warrant-issuing court of the evidence that the deputy did not find. Finally, the court concluded that the error in the paragraph that misstated Barse's name was merely a "scrivener's error[]," and that the "discrepancy" in the number of Barse's prior convictions was "moot." We agree with appellate counsel that the

[3] ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978); ***State v. Mann***, 123 Wis. 2d 375, 386, 367 N.W.2d 209 (1985).

circuit court's determinations and denial of the suppression motion raise no issues of arguable merit on appeal, as we agree that the court made the proper redactions and inclusions, and that the affidavit, as such, states probable cause to search. Barse's response to the no-merit report does not raise issues that affect our determination that counsel's assessment regarding the suppression issue is correct.

Having reviewed the plea colloquy, we also agree with appellate counsel that the circuit court complied with its duties to ensure that Barse's no contest plea was knowingly, voluntarily, and intelligently entered. In order to invalidate the plea, Barse would be required to show that the plea colloquy was in some manner defective or show that a 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). We find no such defects here.

The negotiated plea agreement and completed plea questionnaire were put in the record. The circuit court engaged Barse in a colloquy, inquiring as to Barse's education, mental health history, recent consumption of alcohol, and his understanding of the many constitutional rights he was giving up, as well as the elements of the offense and the factual basis for the charge, along with the potential maximum sentence the court could impose irrespective of the plea agreement Barse entered into with the State. The court confirmed with Barse that no promises other than the plea agreement had been made to induce his plea, and provided him the requisite statutory warnings regarding deportation, firearms, and voting. Finally, the court inquired of trial counsel whether she believed Barse was knowingly and voluntarily entering his plea and whether she stipulated that the number of Barse's prior convictions was three, to which she

responded in the affirmative. Barse's response to the no-merit report raises no specific issues or allegations that implicate the validity of the plea. We are satisfied that the plea colloquy meets our standard for completeness and that Barse'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.

Finally, we also agree with appellate counsel's assessment that there is no arguable meritorious issue on appeal with regard to sentencing. As noted, Barse's conviction was his fourth in five years. As a result, Barse was subject to a mandatory minimum sentence of six months in the county jail and a fine not less than $600 pursuant to WIS. STAT. § 346.65(2)(am)4m. (2011-12), as well as a mandatory minimum period of revocation, which counsel and the circuit court duly noted. The State and Barse jointly recommended that the court impose these minimums as its sentence, which the court deemed appropriate and imposed.[4]

Our review of the circuit court's sentence begins with the "presumption that the [] court acted reasonably," leaving the defendant with the burden to demonstrate "some unreasonable or unjustifiable basis in the record" for the sentence. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). 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 court imposed here, which was the minimum sentence it could statutorily impose with the exception of the ignition interlock restriction that has been discussed, was not "'so excessive and

[4] As noted in our order for a supplemental no-merit report, Barse did not receive the minimum possible ignition interlock restriction, and the 24 months the court imposed was not discussed on the record. However, Barse has advised counsel that he does not wish to challenge the restriction imposed.

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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

In sentencing Barse in accordance with the parties' joint recommendation, the circuit court noted its concern about Barse's repeated convictions for operating while intoxicated and the need for deterrence. The court also inquired into efforts Barse was making to prevent drinking. The court referred to the 114 days Barse had already spent in jail, for which he received sentence credit, and indicated its hope that jail time would deter Barse from future offenses. We are satisfied that the circuit court appropriately performed its sentencing duties in accordance with ***State v. Gallion***, 2004 WI 42, ¶¶38-46, 270 Wis. 2d 535, 678 N.W.2d 197.

Counsel also notes that she is unaware of any inaccurate information used at sentencing and is not aware of any "new factor" which could serve as a basis for sentence modification. Barse does not raise any potential sentencing issues in his response. We agree with counsel that there are no arguably meritorious issues related to sentencing.

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, 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 Assistant State Public Defender Colleen Marion is relieved of any further representation of Ryan Barse in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals