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November 29, 2016

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

2015AP2221-CRNM State of Wisconsin v. Daniel Black
(L.C. # 2014CT489)

Before Brash, J.[1]

Daniel Black appeals from a judgment of conviction, entered upon his guilty plea, for one count of operating while intoxicated ("OWI"), third offense, in violation of WIS. STAT. § 346.63(1)(a). Appellate counsel, Leon W. Todd, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which Black has responded. This court has independently reviewed the record as mandated by ***Anders***, the no-merit report,

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

and Black's response, and concludes that there is no issue of arguable merit that could be pursued on appeal. The judgment is summarily affirmed.

Background

On March 5, 2014, the State filed a criminal complaint charging Black with one count of OWI as a third offense, contrary to WIS. STAT. § 346.63(1)(a), and one count of operating a motor vehicle with a prohibited alcohol concentration as a third offense, contrary to WIS. STAT. § 346.63(1)(b).

According to the complaint, on February 1, 2014, police observed Black disregard a stoplight while driving near the 600 block of West Greenfield Avenue in the city of Milwaukee. Upon conducting a traffic stop, police detected an odor of intoxicants on Black's breath. They also observed that Black had glassy eyes and slurred speech. Black verbally refused to perform any field sobriety tests and was subsequently taken to St. Francis Hospital where a sample of his blood was drawn for chemical analysis. The analysis revealed that Black's blood contained 0.099% weight of alcohol. The complaint further alleged that Black had been convicted of OWI offenses on two prior occasions in Illinois.

On June 3, 2014, the State filed an amended criminal complaint, which charged Black with an additional count of operating a motor vehicle with a restricted controlled substance (THC) in his blood as a third offense, contrary to WIS. STAT. § 346.63(1)(am).

Black ultimately pled guilty to the OWI charge as a third offense. Pursuant to the parties' plea agreement, the State agreed to dismiss the remaining counts. The State also agreed to

recommend five months in the House of Corrections and the minimum fine, as well as minimum license revocation and ignition interlock periods.

The circuit court accepted Black's plea and sentenced him to five months in the House of Corrections. The court also imposed a $600 fine, ordered a two-year revocation of Black's driving privileges, and ordered that his vehicle be equipped with an ignition interlock device for two years.

In his no-merit report, counsel addresses two potential issues for appeal: whether the circuit court properly accepted Black's guilty plea and whether it appropriately exercised its sentencing discretion. For reasons explained below, there would be no arguable merit to pursuing these issues on appeal. Additionally, this court will address some of the various issues raised by Black in his response.

Discussion

A. Guilty Plea

This court begins with Black's guilty plea to the OWI charge as a third offense. There is no arguable basis to allege that Black's plea was not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form and an addendum, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), and the circuit court conducted a thorough plea colloquy addressing Black's understanding of the plea agreement and the charge to which he was pleading guilty, the penalties he faced, and the

constitutional rights he was waiving by entering his plea, *see* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

As counsel points out, at the plea hearing, the prosecutor advised the court that pursuant to the plea agreement, the State would be recommending five months in the House of Correction. However, the plea questionnaire and waiver of rights form incorrectly provided that the State would recommend four months in the House of Correction with proof of treatment and five months without it. When asked, both Black and his attorney advised the court that the prosecutor had correctly stated that the agreement required the State to recommend five months in the House of Correction. The prosecutor later explained that the State originally made a bifurcated offer but then revoked it, which left only the offer for a recommendation of a straight five months, to which Black agreed.[2] Consequently, despite the fact that the plea questionnaire was incorrect, the record reflects that the parties understood the terms of the plea agreement.

An argument could be made that the circuit court failed to comply with the procedural mandate of WIS. STAT. § 971.08(1)(c), which requires the court, before accepting a guilty plea, to:

> Address the defendant personally and advise the defendant as follows: "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law."

[2] At the sentencing hearing, both parties mistakenly agreed that the plea questionnaire correctly stated the terms of the plea agreement. This misstatement was, however, to Black's benefit insofar as the plea questionnaire indicated that the State would recommend four months in the House of Correction with proof of treatment. In actuality, as stated above, the State intended to recommend a straight five months at Black's sentencing.

See ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1 (explaining that § 971.08(1)(c) "'not only commands what the court must personally say to the defendant, but the language is bracketed by quotation marks, an unusual and significant legislative signal that the statute should be followed to the letter'") (citation omitted). The circuit court did not give the deportation warning. However, to be entitled to plea withdrawal on this basis, Black would have to show "that the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the record that Black can make such a showing.

Beyond the missing deportation warning, the circuit court's colloquy in conjunction with the plea questionnaire and waiver of rights form and addendum complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There would be no arguable merit to a challenge to the plea's validity and the record discloses no other basis to seek plea withdrawal.

B. Sentencing

The circuit court considered proceeding to sentencing immediately following the plea hearing. However, after listening to Black's remarks, which indicated that he had made significant progress and had a promising job opportunity, the circuit court accepted his plea but withheld judgment to allow Black to show his treatment progress.

In the interim, a bench warrant was issued for Black's arrest based on a tampering violation. When Black made his appearance on the bench warrant, the circuit court entered judgment on Black's plea and scheduled his case for sentencing.

The circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***State v. Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d 535, 678 N.W.2d 197. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. In terms of the aggravated nature of the crime, the circuit court explained that Black's was on the low end insofar as there was not an accident or an injury. Notwithstanding, the circuit court made clear that the public needs to be protected when it comes to OWI cases.

The circuit court noted that after Black was charged, he started off strong as it related to complying with the conditions of his bail; however, things subsequently took a turn for the worse. The circuit court reflected on the various violation reports documenting that Black tested positive for alcohol and marijuana and had missed appointments with his supervising agency. Additional violation reports documented that he tampered with his SCRAM (Secure Continuous Remote Alcohol Monitoring) unit. The circuit court expressed frustration that Black was not taking his case seriously.

The circuit court sentenced Black to five months in the House of Correction, straight time, imposed a $600 fine, revoked Black's license for two years, and ordered an ignition interlock for two years. An OWI third offense requires that a court impose a fine of not less than $600 nor more than $2000 and a period of imprisonment of not less than forty-five days nor more than one year in the county jail. *See* WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)3. It also requires that a court revoke the defendant's driving privileges for not less than two years nor more than three years. *See* WIS. STAT. § 343.30(1q)(b)4. Additionally, the court is required to order that the defendant's vehicle be equipped with an ignition interlock device for not less than one year nor more than three years. *See* WIS. STAT. § 343.301(2m)(a).

Accordingly, not only would there be no merit to challenge the circuit court's compliance with ***Gallion***, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

C. Black's Response

In his response to the no-merit report, Black raises numerous issues. Some of his claims relate to the sufficiency of the complaint and the amended complaint. Other claims relate to the various violation reports that were generated while this case was proceeding. Additionally, Black argues that his trial attorney breached confidentiality and claims that the circuit court erred when it granted her motion to withdraw.

Black, however, forfeited his right to appeal these issues when he pled guilty. Under the "guilty-plea-waiver rule," a defendant "waives all nonjurisdictional defects, including constitutional claims" by knowingly pleading guilty or no contest. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. The addendum to the plea questionnaire and waiver of

rights form, which Black signed, additionally made clear that among other things, by pleading guilty, Black was giving up his right to challenge the sufficiency of the complaint.

WISCONSIN STAT. § 971.31(10) carves out an exception to the guilty-plea-waiver rule and permits appellate review of an order denying a motion to suppress evidence. However, that exception is not in play in this case because Black did not file a suppression motion, so there is no order denying such a motion. Black does not accuse his trial attorney of ineffective assistance for failing to file a suppression motion. He also does not claim he entered his plea due to ineffective assistance.

An independent review of the record reveals no other potential issues of arguable merit. This court has reviewed and considered the plethora of issues raised by Black in his response. To the extent they are not specifically addressed, this court has concluded that they lack sufficient merit or importance to warrant individual attention.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Leon W. Todd is relieved of further representation of Black in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals