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DISTRICT IV

February 23, 2017

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

2015AP1597-CRNM State of Wisconsin v. Ronald J. Nockerts (L.C. # 2013CF413)

Before Lundsten, Sherman and Blanchard, JJ.

Ronald Nockerts appeals a judgment convicting him of a seventh offense of operating a motor vehicle while under the influence of an intoxicant (OWI-7th). He also appeals an order denying his postconviction motion. Attorney William Schmaal filed a no-merit report seeking to withdraw as appellate counsel. Attorney Jefren Olsen subsequently replaced Schmaal, and has not withdrawn the no-merit report. *See* WIS. STAT. RULE 809.32 (2015-16);[1] *see also* ***Anders v.***

[1] All further references to the Wisconsin Statutes are to the 2015-16 version, unless otherwise noted.

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 Nockerts' plea and sentence, and whether prior counsel provided ineffective assistance by failing to raise a collateral challenge to two of Nockerts' prior OWI convictions. Nockerts was sent a copy of the report, but did not file 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 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. *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). There is no indication of any such defect here.

Nockerts entered his no contest plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Nockerts' plea, the State agreed to dismiss and read in a felony bail jumping charge and charges in another case and to dismiss outright two civil forfeiture cases as well as a parallel seventh offense of operating a motor vehicle with a prohibited alcohol concentration charge, and to make a joint sentence recommendation of three years of initial confinement and five years of extended supervision, in addition to a three-year revocation of his driver's license, three years ignition interlock device, imposition of costs, and AODA assessment and treatment.

The circuit court conducted a standard plea colloquy, inquiring into Nockerts' ability to understand the proceedings and the voluntariness of his plea decision, and further exploring Nockerts' understanding of the nature of the charge, the penalty ranges and other direct consequences of the plea, 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 that Nockerts understood that the court would not be bound by any sentencing recommendations. In addition, Nockerts provided the court with a signed plea questionnaire. Nockerts 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, which both Nockerts and counsel acknowledged were undisputed, provided a sufficient factual basis for the plea for the current OWI offense. Nockerts also acknowledged six prior OWI convictions during the plea hearing. After his conviction, Nockerts filed a postconviction motion alleging that counsel should have collaterally challenged two of his prior convictions on the ground that he was not represented by counsel. However, prior counsel testified that he did investigate and discuss with Nockerts the possibility of collateral attacks, but that Nockerts advised counsel not to pursue the issue. Nockerts acknowledged that counsel proceeded according to "a mutual agreement on how things would go during this case," but claimed that he did not understand counsel's explanation of how a collateral attack would work. Nockerts also acknowledged that he had no affirmative recollection of whether or not he had knowingly and intelligently waived his right to counsel in the prior proceedings. We agree with the circuit court that, absent any such specific recollection

from Nockerts, counsel had no factual basis to make a collateral challenge and, therefore, did not provide ineffective assistance.

Nockerts has not alleged any other facts that would give rise to a manifest injustice. Therefore, Nockerts' plea was valid and operated to waive all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Nockerts' 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. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, Nockerts has no basis to challenge the circuit court's exercise of its sentencing discretion because the court followed the joint recommendations of the parties. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved). We also note that the components of the bifurcated sentence that was imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)6. (classifying OWI-7th as a Class G felony with a three-year mandatory minimum initial incarceration period); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony) (all 2011-12 Stats.).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction or the order denying postconviction relief. *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 and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jefren Olsen is relieved of any further representation of Ronald Nockerts in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals