OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

March 7, 2017

To:

Hon. Marc A. Hammer
Circuit Court Judge
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Jeffrey Mann
Mann Law Office, LLC
404 N. Main St., Ste. 102
Oshkosh, WI 54901-4954

Jon A. Behnke 521853
Brown County Jail
3030 Curry Lane
Green Bay, WI 54301

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

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

2016AP64-CRNM State of Wisconsin v. Jon A. Behnke (L. C. No. 2015CM475)

Before Hruz, J.[1]

Counsel for Jon Behnke has filed a no-merit report concluding no grounds exist to challenge Behnke's conviction for possession of tetrahydrocannabinols (THC) on or near certain places, contrary to WIS. STAT. §§ 961.41(3g)(e) and 961.495. Behnke was informed of his right to file a response to the no-merit report and has not responded. Upon an independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), this court concludes there

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

is no arguable merit to any issue that could be raised on appeal. Therefore, the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

The State charged Behnke with possessing THC within 1,000 feet of a school. In exchange for his no-contest plea to the crime charged, the State agreed to join in defense counsel's recommendation for ninety days in jail concurrent to any sentence Behnke was then serving. The circuit court ultimately imposed the maximum six-month sentence, consecutive to any sentence Behnke was serving.

The record discloses no arguable basis for withdrawing Behnke's no-contest plea. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Behnke completed, informed Behnke of the elements of the offense, the potential punishment that could be imposed, and the constitutional rights he waived by entering a no-contest plea. The court confirmed Behnke understood that the court was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also confirmed that although Behnke did not have a high school degree, he could read, write and understand the words on the plea form. Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Behnke committed the crime charged.

At the plea hearing, the circuit court failed to personally advise Behnke of the potential deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Noting that a potential issue arises if Behnke can show that his plea is likely to result in his "deportation, exclusion from admission to this country or denial of naturalization," *see* WIS. STAT. § 971.08(2); *see also* ***State v. Douangmala***, 2002 WI 62, 253 Wis. 2d 173, 646 N.W.2d 1, we

ordered counsel to file either: (1) a motion for plea withdrawal in the circuit court; or (2) a supplemental no-merit report addressing why there is no arguable merit to this possible issue. Counsel has now notified this court that Behnke was born in Wisconsin and is, therefore, a citizen of the United States and not subject to deportation. Any challenge to the plea on this basis would therefore lack arguable merit. The record shows the plea was knowingly, voluntarily, and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record discloses no arguable basis for challenging the effectiveness of Behnke's trial counsel. To establish ineffective assistance of counsel, Behnke must show both that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Behnke must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Any claim of ineffective assistance must first be raised in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Here, Behnke may argue counsel was ineffective by mistakenly attaching the jury instruction for "delivery" rather than "possession" of THC within 1,000 feet of certain places to the plea form. During the plea colloquy, however, Behnke agreed the State could prove that he "possessed" THC within 1,000 feet of a school, as charged in the complaint. In light of the plea colloquy, any claim that Behnke was prejudiced by trial counsel's deficiency in this regard would lack arguable merit. Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for appellate counsel to request a ***Machner*** hearing.

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Behnke's character, including his criminal history; the need to protect the public; and the mitigating factors Behnke raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that Behnke's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The no-merit report addresses whether the circuit court erred by amending the judgment of conviction to remove all but two days of credit that was awarded at the sentencing hearing. At the time of the underlying offense, Behnke was serving a term of extended supervision from a prior conviction. His extended supervision was revoked and he was reconfined with sixty-three days of jail credit, consisting of the time Behnke spent in custody from his April 2, 2015 arrest in the underlying matter "until received at the institution" on June 3, 2015. Behnke's subsequent sentence in this case was imposed consecutive to any sentence he was already serving. After his conviction, the Department of Corrections notified the court that sixty-three days of sentence credit awarded in the present case had been included in the sentence credit earlier awarded in the other case. Because dual credit is not permitted when sentences are consecutive, *see* ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988), the circuit court amended the judgment of conviction to remove the dual sentence credit awarded in this case. There is no arguable merit to a claim that the circuit court erred by amending the judgment to remove what would have been impermissible dual credit.

This court's independent review of the record discloses no other potential issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that attorney Jeffrey A. Mann is relieved of his obligation to further represent Behnke in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals