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DISTRICT IV

March 2, 2017

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

2015AP1840-CRNM State of Wisconsin v. Kory J. Konopacki (L.C. # 2013CF45)

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

Kory Konopacki appeals a judgment convicting him of an eighth offense of operating a motor vehicle while under the influence of alcohol (OWI-8th), and an order granting in part and denying in part his postconviction motion for relief from a fine imposed as part of his sentence. Attorney Colleen Marion has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2015-16);[1] *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),

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

aff'd, 486 U.S. 429 (1988). The no-merit report addresses Konopacki's plea and sentence, including the fine. Konopacki was sent a copy of the report, but has not filed 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. ***State v. Bangert***, 131 Wis. 2d 246, 283-84, 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.

Konopacki entered his plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Konopacki's plea, the State agreed that the defense would be free to argue while the State recommended five years of initial incarceration and five years of extended supervision, with a fine of $1,800 plus costs, a DOT assessment and safety plan, 36 months' license revocation and 36 months' ignition interlock.

The circuit court first advised Konopacki of the rights he would be waiving by entering a plea, and then conducted a plea colloquy, inquiring into Konopacki's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Konopacki's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, 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. In

addition, Konopacki provided the court with a signed plea questionnaire. Konopacki 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 provided a sufficient factual basis for the plea. Konopacki admitted in open court that he had seven prior OWI convictions. Konopacki indicated that he had sufficient time to discuss his case with his attorney and was satisfied with his representation, and there is nothing in the record to suggest that counsel's performance was in any way deficient. Konopacki has not alleged any other facts that would give rise to a manifest injustice. Absent any basis to challenge Konopacki's plea, the plea was valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Konopacki's 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. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

The record shows that Konopacki was afforded an opportunity to comment on the PSI and to address the court, both personally and through counsel. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court noted that Konopacki endangered the public, as well as himself, by running

a red light while driving impaired. With respect to Konopacki's character, the court emphasized that the offense indicated more than a drinking problem—it indicated a thinking problem in that Konopacki was willing to get behind the wheel when he planned to go drinking. Additionally, the court expressed concern with Konopacki's poor conduct while in prison. The court identified the primary goal of the sentencing in this case as the protection of the public and concluded that a substantial prison term was necessary to keep Konopacki off the road and allow him to get treatment in a confined setting.

The court then sentenced Konopacki to four years of initial confinement and five years of extended supervision, to be served consecutive to a revocation sentence Konopacki was serving on a prior OWI case. The court also imposed a fine of $1,800 plus costs, ordered a DOT assessment and safety plan, and imposed 36 months of license revocation and 36 months ignition interlock. The court determined that Konopacki would be eligible for the Earned Release Program, but not the Challenge Incarceration Program.

The components of the bifurcated sentence were within the applicable penalty ranges. *See* WIS. STAT. §§ 346.63(1)(a) (2013-14) and 346.65(2)(am)6. (2013-14) (classifying OWI-8th as a Class G felony with a three-year mandatory minimum initial incarceration period); 973.01(2)(b)7. and (d)4. (2013-14) (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentence 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 it right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting another source).

After the judgment had been entered, Konopacki moved to vacate the fine, asserting that at the time of sentencing both the parties and the court had been under the mistaken belief that there was a mandatory fine that tripled due to Konopacki's BAC level. The State conceded the error, and suggested that the court conduct resentencing on that issue. The court proceeded to do so, reasoning that a fine was still appropriate because "the impact on the pocketbook of a defendant is often greater than the impact of … prison time," and that progressive penalties were appropriate for additional OWI offenses. Taking into account information in the PSI about Konopacki's job skills, the court determined that Konopacki would have the ability to pay a $600 fine. We agree with counsel that the court remedied its prior error and properly exercised its discretion in imposing the $600 fine.

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 and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals