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April 18, 2017

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

2016AP276-CRNM State of Wisconsin v. Jon E. Fox (L.C. # 2012CF213)

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

Jon Fox appeals a judgment convicting him, after a no contest plea, of one count of operating while intoxicated, as a seventh offense. *See* WIS. STAT. §§ 346.63(1)(b),

346.65(2)(am)6. and (2)(g)(1) (2011-12).[1] Attorney Jennifer Cunha has filed a no-merit report seeking to withdraw as appellate counsel. 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 the validity of the plea and sentence, as well as the effectiveness of Fox's trial counsel. Fox 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, 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.

Fox entered a no contest plea on the first day of his trial, after the jury had been selected and sworn in, but before the State commenced presenting its case. The terms of the plea agreement were presented in open court, outside the presence of the jury. In exchange for Fox's plea, the State agreed to recommend three years of initial confinement and three years of extended supervision, and to recommend to the court that Fox be eligible for the earned release program. The circuit court conducted a standard plea colloquy: it inquired into Fox's ability to

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

understand the proceedings and the voluntariness of his plea decision and further explored his understanding of the nature of the charges, 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 Fox understood that it would not be bound by any sentencing recommendations.

Fox provided the circuit court with a signed plea questionnaire. Fox indicated to the court during the colloquy that he understood the information explained on that form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Fox's counsel stipulated that the criminal complaint, along with facts adduced at a prior evidentiary hearing, provided a sufficient factual basis for the plea. Fox admitted in open court to six prior OWI convictions. He also stated on the record that he was satisfied with his trial counsel's representation.

Counsel points out in the no-merit report that, when informing the circuit court about plea negotiations with Fox, counsel for the State advised the court that the State had made an offer that could result in Fox being punished less severely than if he stood trial and was convicted. It is well settled that a defendant may not receive a harsher sentence solely because he availed himself of the constitutional right to a jury trial. ***Drinkwater v. State***, 73 Wis. 2d 674, 678, 245 N.W.2d 664 (1976). However, the no-merit report concludes that the prosecutor's remarks did not rise to the level of threatening Fox that he would suffer a more severe penalty if he elected to proceed to trial. We agree. The record reflects that the prosecutor stated that he had the authority to recommend up to the maximum sentence, depending on the facts and circumstances that arose at trial. This statement is consistent with the law, and there is nothing in the record or the no-merit report indicating that the prosecutor made any coercive or threatening statements to

induce Fox to enter his plea. Upon our independent review of the record and counsel's no-merit report, we conclude that there would be no arguable merit to a claim that Fox's plea was not knowing, intelligent, and voluntary. *See* ***State v. Brown***, 2006 WI 100, ¶19, 293 Wis. 2d 594, 716 N.W.2d 906.

We also agree with counsel's assessment that there would be no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. In imposing sentence, the court considered Fox's character, criminal history and history of substance abuse, the serious nature of the offense, the need to protect the public, and Fox's need for rehabilitation. The court followed the sentencing recommendation indicated in the plea agreement and imposed a sentence of three years of initial confinement and three years of extended supervision. The court also determined Fox to be eligible for the earned release program. The sentence was well within the maximum penalty range. *See* WIS. STAT. § 346.63(1)(b) and 346.65(2)(am)6. (providing that OWI as a 7th, 8th, or 9th offense is a Class G felony); § 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). The court's imposition of a requirement that Fox's vehicle be equipped with an ignition interlock device for the duration of his extended supervision was also permissible by statute. *See* WIS. STAT. § 343.301(1g)(b). Under these circumstances, it cannot reasonably be argued that Fox'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).

Finally, nothing in the record or the no-merit report discloses an arguable basis for challenging the effectiveness of Fox's trial counsel. To establish a claim of ineffective assistance, a defendant must show that counsel's performance was deficient and that it prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove

prejudice, Fox must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

The no-merit report discusses whether counsel was ineffective for failing to make a timely request for a substitution of judge. Even if we assume that counsel was deficient in this respect, nothing in the record or the no-merit report suggests that Judge Mark Goodman was biased toward Fox, or that substitution was warranted for any other reason. Accordingly, Fox cannot establish the prejudice necessary to support an arguably meritorious claim that his counsel was ineffective for failing to make a timely request for judicial substitution. Similarly, we agree with counsel that there would be no arguable merit to arguing that Fox's trial counsel was ineffective for failing to question the potential jurors more rigorously. Again, even if we assume that counsel's performance was deficient during jury selection, Fox cannot demonstrate prejudice. There is no indication in the record or the no-merit report that the jury contained any incompetent or objectionable members. Moreover, the jury was never called upon to hear Fox's case, due to his entry of a no contest plea shortly after jury selection.

Any argument that Fox's trial counsel was ineffective for failing to object to the untimeliness of the preliminary examination would also be without merit. A defendant who claims error occurred at the preliminary examination may obtain relief only before trial. ***State v. Webb***, 160 Wis. 2d 622, 636, 467 N.W.2d 108 (1991). In addition, defects at the preliminary examination do not affect the personal or subject matter jurisdiction of the circuit court. ***Id.*** at 634. Fox's no contest plea constituted a waiver of any defect in the timing of the preliminary examination. Therefore, he cannot demonstrate that he suffered any prejudice from his counsel's

failure to object to the timing of the preliminary examination. Nothing in the record or the no-merit report suggests any other basis for challenging trial counsel's performance.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. 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 Jennifer Cunha is relieved of any further representation of Jon Fox in this matter pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals