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April 28, 2017

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

2016AP1766-CRNM State of Wisconsin v. Zackory J. Kerr (L.C. # 2015CF238)

Before Higginbotham, Sherman and Blanchard, JJ.

Attorney Vickie Zick, appointed counsel for Zackory Kerr, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to: (1) a constitutional challenge to the operating with a restricted controlled substance statute, WIS. STAT. § 346.63(1)(am); (2) any challenge to the circuit court's decisions

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

on Kerr's suppression motions; (3) any challenge to the validity of Kerr's plea; or (4) any challenge to the sentence imposed by the circuit court. Kerr has responded to the no-merit report, arguing that § 346.63(1)(am) is unconstitutional, that Kerr was denied his constitutional right to a speedy trial, and that Kerr's plea was not knowingly and voluntarily entered because he did not know his plea would waive nonjurisdictional issues for appellate review. Attorney Zick has filed a supplemental no-merit report, concluding that Kerr entered a valid no-contest plea that waived any argument that Kerr was denied his right to a speedy trial, and that Kerr's trial counsel was not ineffective by waiving Kerr's speedy trial demand. Upon independently reviewing the entire record, as well as the no-merit report, responses and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Kerr was charged with operating a motor vehicle with a prohibited alcohol concentration (PAC), sixth offense, operating a motor vehicle while intoxicated (OWI), sixth offense, operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood, sixth offense, and disorderly conduct. Pursuant to a plea agreement, Kerr pled no contest to operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood. The PAC and OWI charges were dismissed outright, and the disorderly conduct charge was dismissed and read-in for sentencing purposes. The parties jointly recommended that the court withhold sentence and place Kerr on probation, with the parties free to argue as to length and conditions of probation. The court withheld sentence and placed Kerr on probation for eighteen months, with six months of conditional jail time.

The no-merit report and response both address whether there would be arguable merit to a constitutional challenge to WIS. STAT. § 346.63(1)(am). The no-merit report concludes that it

would be wholly frivolous to argue that § 346.63(1)(am) is unconstitutional on grounds that it allows convictions for operating with a detectable amount of a controlled substance without any required showing of impairment. The no-merit report points out that this court and the supreme court have already rejected constitutional challenges to § 346.63(1)(am). *See **State v. Luedtke***, 2015 WI 42, ¶¶74-78, 362 Wis. 2d 1, 863 N.W.2d 592 (rejecting constitutional challenge asserting that § 346.63(1)(am) violates a defendant's substantive due process rights because it establishes a strict liability offense of drugged driving); ***State v. Gardner***, 2006 WI App 92, ¶¶15-21, 292 Wis. 2d 682, 715 N.W.2d 720 (rejecting constitutional challenge to statute prohibiting driving with restricted controlled substance in one's blood, where driving causes great bodily injury to another, on grounds that the statute does not require causal connection between the controlled substance in the blood and the injury); ***State v. Smet***, 2005 WI App 263, ¶¶6-8, 12-29, 288 Wis. 2d 525, 709 N.W.2d 474 (rejecting argument that § 346.63(1)(am) violated defendant's "rights to due process and fundamental fairness" by allowing conviction without proof of impairment).

Kerr argues in his no-merit response that ***Luedtke***, ***Gardner***, and ***Smet*** were wrongly decided. He contends that, prior to the legislature's enactment of WIS. STAT. § 346.63(1)(am), Wisconsin courts recognized that the purpose of WIS. STAT. § 346.63 was to remove impaired drivers from the highways. In support, Kerr cites ***State v. Banks***, 105 Wis. 2d 32, 48, 313 N.W.2d 67 (1981) (construing drunk driving statutes "consistent with the recognized nationwide and state legislative objective of removing drunken drivers from the highways"), and ***Scales v. State***, 64 Wis. 2d 485, 493-94, 219 N.W.2d 286 (1974) (holding that implied consent law "was intended to facilitate the taking of tests for intoxication and not to inhibit the ability of the state to remove drunken drivers from the highway"). Kerr argues that the ***Luedtke***, ***Gardner***, and

Smet courts erred by upholding § 346.63(1)(am) as constitutional on the basis that it bears a rational relationship to the legitimate government purpose of achieving public safety. According to Kerr, the purpose of the statute remains to keep impaired drivers off the roads. However, as the no-merit report sets forth, that constitutional challenge to the statute has already been rejected by this court and the supreme court. We agree with no-merit counsel that it would be wholly frivolous to raise the same constitutional challenge here.

Kerr also argues that WIS. STAT. § 346.63(1)(am) is unconstitutional as applied to him because it falsely labels him as a drunk driver, harming his reputation with the stigma of being a drunk driver, and subjects him to the alcohol-related conditions of his probation and other driving restrictions. *See* ***Weber v. City of Cedarburg***, 129 Wis. 2d 57, 73, 384 N.W.2d 333 (1986) (while "injury to reputation alone is not protected by the Constitution," loss of reputation plus attendant loss may violate due process). We conclude that an as-applied constitutional challenge would be wholly frivolous. First, an as-applied constitutional challenge was waived by Kerr's no-contest plea. *See* ***State v. Trochinski***, 2002 WI 56, ¶ 34 n.15, 253 Wis. 2d 38, 644 N.W.2d 891. Moreover, even if we were to disregard wavier, it would be frivolous for Kerr to argue that the conviction in this case harmed his reputation by stigmatizing him as a drunk driver, when Kerr already had five prior OWI-related convictions. Additionally, the only loss Kerr asserts beyond the harm to his reputation is being subjected to the conditions of his probation, driving restrictions, and an inability to obtain automobile insurance. We discern no arguable merit to a claim that the harm to Kerr's reputation from a sixth offense under the OWI statute and the resulting conditions of probation and driving and insurance restrictions amounts to a due process violation.

The no-merit report also addresses the circuit court's decisions denying Kerr's suppression motions. Kerr moved to suppress the evidence obtained following his arrest on grounds that police lacked probable cause for the arrest. The court held a motion hearing, and the arresting officer testified to the following. The officer stopped the vehicle Kerr was driving at 2:43 a.m. because one of the vehicle's headlights was not working and the vehicle did not have a visible rear registration. The officer made contact with Kerr and the two passengers in the vehicle, and detected an odor of intoxicants. The officer learned that Kerr had five prior OWI convictions and was restricted to a .02 alcohol level for driving. Kerr initially stated that he had not had any alcohol that evening, and the officer had Kerr exit the vehicle so that he could verify that the odor of intoxicants was not coming from Kerr personally. The officer then observed that Kerr's eyes were glossy and bloodshot, and smelled the odor of intoxicants on Kerr. Kerr then admitted to having one alcoholic drink about four hours before driving. The officer had Kerr perform field sobriety tests, and observed indicia of intoxication. The circuit court relied on the officer's testimony to find probable cause for the arrest. We agree with counsel's assessment that a challenge to the circuit court's decision would lack arguable merit. *See* ***State v. Riddle***, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995) ("'Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime.'") (quoted source omitted).

Kerr also moved to suppress evidence obtained pursuant to a warrant for a blood draw. Kerr argued that the arresting officer's affidavit was insufficient to support the warrant because the circuit court judge did not sign the affidavit after the arresting officer gave sworn testimony over the telephone. After a hearing, the circuit court concluded that the arresting officer's

telephonic sworn testimony was sufficient to establish probable cause for the blood-draw warrant. *See* ***Bast v. State***, 87 Wis. 2d 689, 692–93, 275 N.W.2d 682 (1979) (issuance of search warrant is reviewed for "whether the magistrate was apprised of sufficient facts to excite an honest belief in a reasonable mind that the object sought is linked with the commission of a crime"). The court determined that the lack of signature on the affidavit was irrelevant because the issuing magistrate relied on the officer's sworn testimony over the telephone. We agree with counsel's assessment that there would be no arguable merit to a challenge to the court's decision. *See* WIS. STAT. §§ 968.12(2) ("A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3)(d), showing probable cause therefor"); (3)(a) ("A search warrant may be based upon sworn oral testimony communicated to the judge by telephone, radio or other means of electronic communication, under the procedure prescribed in this subsection."); (3)(d) (setting forth procedure for recording and certification of telephonic testimony used to obtain warrant).

The no-merit report also addresses whether there would be arguable merit to a challenge to the validity of Kerr's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Kerr and determine information such as Kerr's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. We agree with counsel that there is no basis for a non-frivolous motion for plea withdrawal.

Kerr argues in his no-merit response, however, that he was denied his constitutional right to a speedy trial and that his counsel was not authorized to waive Kerr's statutory speedy trial demand on Kerr's behalf. Kerr submitted a pro se demand for a speedy trial on November 12, 2015, demanding trial within ninety days. However, Kerr's attorney filed a suppression motion on Kerr's behalf on January 15, 2016. The circuit court held a hearing on January 26, 2016, and noted that the suppression motion was pending and that there had been discussions to resolve the matter. The court scheduled a motion hearing for February 2, 2016. Defense counsel agreed, and stated that the defense was waiving the speedy trial demand. At the conclusion of the February 2 hearing, the court denied the motion and set a telephone scheduling conference for February 17, 2017, stating that the court would set the trial date during the conference. Kerr then entered his no-contest plea at a hearing held April 4, 2016.

No-merit counsel asserts in a supplemental no-merit report that Kerr waived his right to a speedy trial by pleading no contest. *See* ***State v. Asmus***, 2010 WI App 48, ¶¶3-5, 324 Wis. 2d 427, 782 N.W.2d 435 (valid no-contest plea waives all nonjurisdictional defects and defenses). Counsel points out that, at the plea hearing, Kerr stated that he understood that his plea would waive his constitutional right to a trial. Counsel also concludes that Kerr's trial counsel validly waived Kerr's statutory speedy trial demand, *see* ***New York v. Hill***, 528 U.S. 110, 114-15 (2000), and that counsel was not ineffective by waiving Kerr's speedy trial demand to pursue a suppression motion on Kerr's behalf, *see* ***State v. Van Straten***, 140 Wis. 2d 306, 320, 409 N.W.2d 448 (1987) (claim of ineffective assistance of counsel must establish that counsel's conduct was deficient and that the defendant was prejudiced by the deficient performance).

We conclude that it would be wholly frivolous to argue that Kerr was denied his speedy trial right or that counsel was ineffective by waiving Kerr's speedy trial demand. As an initial

matter, we agree with no-merit counsel that Kerr waived any speedy trial argument by entering a no-contest plea. *See* ***Asmus***, 324 Wis. 2d 427, ¶¶3-5. We also agree with no-merit counsel that it would be wholly frivolous to argue that Kerr is entitled to withdraw his plea based on a claim that trial counsel was ineffective by waiving Kerr's speedy trial demand. Defense counsel waived Kerr's speedy trial demand in order to pursue a suppression motion on Kerr's behalf, and we discern no basis to argue that counsel was ineffective by pursuing a suppression motion rather than insisting on a speedy trial. *See* ***Van Straten***, 140 Wis. 2d at 320.

Moreover, we discern no arguable merit to a claim that Kerr was denied his constitutional right to a speedy trial. Kerr was charged by criminal complaint on July 6, 2015, and entered a plea on April 4, 2016, a period of nine months. The trial was delayed beyond the scheduled trial date due to the defendant's suppression motion. Nothing before us indicates that any delay was attributable to deliberate attempts to delay by the State or that there was any prejudice to Kerr due to the delay. *See* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972) (four factors are considered to determine whether a defendant was denied the right to a speedy trial: (1) length of delay; (2) reason for delay; (3) defendant's assertion of speedy trial right; and (4) prejudice to the defendant). Because the delay was attributable to the defense's suppressions motion and Kerr was not prejudiced by the delay, we discern no arguable merit to a claim that Kerr's speedy trial right was violated.

Kerr also contends that his plea was not knowing and voluntary because he was not aware that his plea would waive all non-jurisdictional defects and defenses on appeal. Kerr asserts that, at the time he entered his plea, he did not know that he would be waiving his right to raise any constitutional issues on appeal. However, as set forth above, the claims that Kerr has identified—a constitutional challenge to WIS. STAT. § 346.63(1)(am) and a claimed violation of

Kerr's speedy trial right—lack arguable merit. It would be wholly frivolous for Kerr to argue that he would not have entered his plea had he known that he would be waiving meritless arguments for review.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to Kerr's sentence. The parties jointly recommended a withheld sentence and a period of probation. The State recommended three years of probation, with 240 days of conditional jail time, a $600 fine plus costs and fees, and driver's license revocation and ignition interlock device (IID) for thirty-six months, plus alcohol-related conditions. The defense joined the recommendation, except for a request for eighteen months of probation and twelve months of IID. The court followed the parties' joint recommendation, plus Kerr's request for eighteen months of probation and twelve months of IID, and imposed the minimum conditional jail time of 180 days. Because Kerr received the sentence he approved, he is barred from challenging the sentence on appeal. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 517-18, 451 N.W.2d 759 (Ct. App. 1989). We discern no other basis to challenge the sentence imposed by the circuit court.

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.

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

IT IS FURTHER ORDERED that Attorney Vickie Zick is relieved of any further representation of Zackory Kerr in this matter. *See* 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