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May 24, 2017

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

2016AP1948-CRNM State of Wisconsin v. Kerry Dean Severson (L.C. #2015CF114)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Kerry Dean Severson appeals from a judgment convicting him of ninth-offense operating while intoxicated (OWI) and from an order denying his motion for postconviction relief. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Severson filed a response and counsel filed a supplemental report. After reviewing the no-merit reports, the response, and the record, we

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

conclude there are no issues with arguable merit for appeal and therefore summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

Chippewa Falls Police Officer Ryan Douglas observed Severson, whom he recognized, driving a vehicle at about 1:30 on a Saturday afternoon. Aware of Severson's history of operating after revocation (OAR) and OWI convictions, Douglas asked dispatch to "run" Severson's name. Informed that Severson's license was revoked, Douglas stopped him. Severson failed field sobriety tests and his car was not equipped with an ignition interlock device (IID), contrary to a prior court order. Only after arresting him did Douglas learn that, while Severson's driving privileges were revoked, he did have a valid occupational license allowing him to drive at that time of day. Severson's blood alcohol content proved to be 0.13.

Severson moved to suppress evidence obtained after the stop on grounds of dispatcher negligence. Neither party called the dispatcher to testify at the suppression hearing. The court found that the initially incomplete information was due to dispatcher error, not police misconduct, and that there was no showing of systematic negligence or a likelihood that the error would be repeated. It therefore declined to apply the exclusionary rule and denied the motion.

Severson pled guilty to ninth-offense OWI. The charge of failing to install an IID was dismissed and read in. A charge of refusing to take a test for intoxication was dismissed on the prosecutor's motion. The court sentenced him to three years and six months of initial confinement and four years of extended supervision concurrent with the sentence he was serving when his extended supervision on his eighth OWI was revoked as a result of this offense.

Postconviction, Severson moved pro se for a sentence-credit revision, contending he was due 208 days. New trial-level counsel was appointed. She wrote to the prosecutor that she had

spoken with Severson who agreed to accept sixty-eight days' credit. Counsel and the prosecutor signed a stipulation to that effect.

Postconviction counsel moved for an order to vacate the order denying the suppression motion. The motion alleged that trial counsel ineffectively failed to call the dispatcher to testify and requested a new suppression motion hearing. The circuit court found that there was no evidence "that the dispatcher did this willfully or deliberately or has a habit of doing this or that the department has a habit of doing it," and denied the motion for a new hearing. This no-merit appeal followed.

The no-merit report considers whether: Severson's plea was not freely and voluntarily entered; the sentence was excessive; Severson was denied the effective assistance of counsel; denying the postconviction motion reflected an erroneous exercise of discretion; and Severson is entitled to additional sentence credit. Severson replies at length to each issue. We are satisfied that counsel has correctly analyzed each one.

A defendant seeking to withdraw a guilty plea after sentencing bears "the heavy burden of establishing, by clear and convincing evidence, that withdrawal of the plea is necessary to correct a manifest injustice." ***State v. McCallum***, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). There is no manifest injustice to warrant withdrawing Severson's pleas. *See* ***State v. Duychak***, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court's colloquy, augmented by the plea questionnaire and waiver-of-rights forms, informed Severson of the constitutional rights he waived by pleading, the elements of the offenses, and the potential penalties. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30-32, 317 Wis. 2d 161, 765 N.W.2d 794. An adequate factual basis, as stated in the complaint, supported the conviction. Severson assured the

court that he had sufficient time to discuss his plea with counsel and affirmatively acknowledged that he understood it. He now asserts that he "partially agrees" that his plea was freely and voluntarily entered but "in hindsight believes a different outcome would have occurred if [an] evidentiary hearing was held."

We note two errors in the plea colloquy. First, the court did not expressly advise him that it was not bound by the plea agreement. *See* ***State v. Hampton***, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14. No meritorious issue could arise from this error, however, because Severson received the benefit of the plea agreement such that plea withdrawal is not necessary to correct or avert a manifest injustice. *See* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441. Second, the court truncated the required citizenship advisement.[2] Our review of the record satisfies us that the plea was knowingly, voluntarily and intelligently entered. *See* WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

The no-merit report next considers whether a challenge to the sentence would be meritorious. Sentencing lies within the sound discretion of the trial court, and a strong policy exists against appellate interference with that discretion. *See* ***State v. Haskins***, 139 Wis. 2d 257,

[2] That aspect of the colloquy was limited to asking Severson whether he is a citizen of the United States. Severson answered, "Yes, Your Honor, I am." The court responded, "Then happily we need not discuss deportation." This falls short of the legislative directive that "[b]efore the court accepts a plea of guilty or no contest, it *shall* … [a]ddress the defendant personally and advise the defendant as follows: 'If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law.'" WIS. STAT. § 971.08(1)(c) (emphasis added). Severson's response satisfies us, however, that he could make no meritorious argument that he was prejudiced. *See* § 971.08(2).

268, 407 N.W.2d 309 (Ct. App. 1987). The primary factors to be considered by the trial court in sentencing are the gravity of the offense, the character of the offender, and the need for the protection of the public. ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984).

Severson does not contend the sentence is per se excessive. He could not, having received the sentence to which he agreed. *See* ***State v. Magnuson***, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998). What he does argue is that, had his Fourth Amendment rights not been violated, there would have been no conviction and no sentence at all.

Reasonable suspicion is not required to run a person's license. Once dispatch informed Douglas, albeit erroneously, that Severson's license had been revoked, Douglas reasonably believed that Severson was driving illegally, providing reasonable suspicion for a stop. *See* ***State v. Newer***, 2007 WI App 236, ¶2, 306 Wis. 2d 193, 742 N.W.2d 923. The circuit court determined that there was no evidence that the dispatcher or Douglas acted with ill intent or gross negligence. Those findings are not clearly erroneous and there was no Fourth Amendment violation.

The report also considers whether Severson was denied the effective assistance of counsel. Severson contended his counsel should have insisted on the admission at the suppression motion hearing of a dash cam video and the audio recording of Douglas's communication with dispatch and that he also should have called the dispatcher as a witness to learn why she did not more promptly inform Douglas of Severson's valid occupational license.

To show ineffective assistance of counsel, a defendant must demonstrate that counsel's conduct was deficient and that he or she was prejudiced by the deficient performance. ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). To demonstrate deficient performance, a

defendant must show that counsel's errors were so serious that they denied him or her a trial whose result is fair and reliable. ***Id.*** at 640-41. The court denied Severson's motion without a ***Machner*** hearing.[3]

The circuit court rejected defense counsel's request to admit the recordings because information they contained added nothing to the facts to which the parties already had stipulated. Counsel cannot be faulted for the court's evidentiary ruling.

Severson alleges that he believes the dispatcher intentionally gave Douglas incomplete information to "avenge" a business relationship gone sour between Severson and the dispatcher's sister's employer. He contends the sister "direct[ly] threat[ened]" him that she could "make trouble for you with city police." Postconviction counsel retained a private investigator to explore Severson's claims but there is no evidence of record lending any support to the allegations.[4]

Severson's conspiracy theory is conclusory and, frankly, far-fetched. He has not demonstrated ineffectiveness because he has not shown with specificity what the dispatcher's testimony, had she been called as a witness, would have revealed and how it would have altered the outcome of the proceeding. *See* ***State v. Byrge***, 225 Wis. 2d 702, 724, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2010 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[4] The investigator's report is not in the record. We disregard the copy, which bears no file stamp, that counsel includes in the appendix. The appendix is not the record. ***United Rentals, Inc. v. City of Madison***, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322.

Further, the court properly exercised its discretion in denying Severson's postconviction motion for a new suppression hearing, *see* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433, because conclusory statements are insufficient to trigger the requirement for an evidentiary hearing, ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).

The no-merit report also addresses whether Severson is entitled to additional sentence credit. Severson believes he was entitled to 208 days' credit although the parties stipulated that he was due 68 days. Sixty-eight days is the period from March 7, 2015, the date of his arrest, until May 14, 2015, the date he was received at the Dodge Correctional Institution to recommence his prison sentence in Chippewa County case 11CF104 following the revocation of his extended supervision in that case. *See* ***State v. Presley***, 2006 Wl App 82, ¶14, 292 Wis. 2d 734, 715 N.W.2d 713. The connection between the instant case and the DOC hold in case 11CF104 was severed on May 14, 2015, when he was received at the prison to recommence serving his sentence on case 11CF104.

That he was on a cash bond in this case is irrelevant: even had he posted the bond or had the charge been dismissed, he could not have been released, as he was serving a sentence on case 11CF104. *See* ***State v. Beets***, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985). It also is irrelevant that he received a concurrent sentence. His sentences are concurrent only as of the time the new sentence was imposed.

Finally, Severson challenges several underlying facts and complains that he was denied the opportunity to have a second blood test. Severson's guilty plea waived all nonjurisdictional defects, including constitutional claims. ***State v. Multaler***, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437.

Our review of the record revealed no other arguably meritorious issues.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of further representing Severson in this matter.

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