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 I

July 24, 2017

To:

Hon. Paul J. Rifelj
Circuit Court Judge, Room 414
Milwaukee County Courthouse
901 N. 9th Street
Milwaukee, WI 53233-1425

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Erin K. Deeley
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

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

Brandon E. Jones
5827 W. Carmen Ave.
Milwaukee, WI 53218

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

2017AP494-CRNM State of Wisconsin v. Brandon E. Jones (L.C. # 2015CT1781)

Before Dugan, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brandon E. Jones appeals from a judgment of conviction, entered upon his guilty plea, on one count of operating a motor vehicle while intoxicated as a second offense with a minor child

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

under age sixteen in the vehicle. Appellate counsel, Erin K. Deeley, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Jones was advised of his right to file a response, but has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Milwaukee County Sheriff's Deputy Shawn Bacich responded to a dispatch about a purple Pontiac driving on the grass in the playground area of a park after hours. He observed the reported vehicle driving, without its headlights illuminated, at an "unsafe rate of speed." Bacich made contact with the driver, Jones, and noted Jones's bloodshot and glassy eyes, slurred speech, and strong odor of intoxicants. Jones admitted drinking and agreed to perform field sobriety tests, during which he exhibited all of the clues in the horizontal gaze nystagmus, walk and turn, and one-leg stand tests. A preliminary breath test revealed a blood-alcohol concentration of .144. A subsequent blood draw, which appears to have been conducted pursuant to a search warrant, revealed a concentration of .164. One of Jones's passengers was a four-year-old child.

Jones was charged with one count of operating a motor vehicle while intoxicated as a second offense with a minor child under age sixteen in the vehicle, one count of operating a motor vehicle with a prohibited alcohol concentration as a second offense with a minor child under age sixteen in the vehicle, and one count of operating after revocation. Jones eventually agreed to enter a guilty plea to the operating while intoxicated charge. In exchange, the State would recommend a particular sentence, the prohibited alcohol concentration offense would be dismissed, and the operating after revocation charge would be dismissed and read in.

The circuit court accepted Jones's guilty plea. For the sentence, the circuit court imposed six months in the House of Correction, stayed in favor of eighteen months' probation with thirty days in jail as a condition, along with fifty-three days of sentence credit. The jail sentence, probation term, and amount of condition time imposed were all less than the State had requested pursuant to the plea agreement. The circuit court also imposed a twenty-four month driver's license revocation, twenty-four months with an ignition interlock device, and a $700 fine—all of which the circuit court believed to be mandatory minimums.[2] Jones appeals.

The first potential issue counsel addresses in the no-merit report is whether there is any arguable basis for challenging Jones's plea as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Jones completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that his attorney had explained the elements of his offense. The form correctly acknowledged the maximum penalties and the mandatory minimums that Jones faced, as well as explaining the constitutional rights he was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 262. Jones also signed an addendum, in which he acknowledged additional rights being given up by his plea.[3]

[2] Jones later filed a postconviction motion regarding the ignition interlock device because the mandatory minimum was actually twelve months, not twenty-four. *See* WIS. STAT. § 343.301(2m) (2013-14); *see also* WIS. STAT. § 343.301(2m)(a) (2015-16) (eff. Oct. 2, 2016) & 2015 Wis. Act 389, §§ 6, 8-9. The circuit court granted the motion and amended the ignition interlock device period to twelve months.

[3] The addendum acknowledged Jones was giving up the right to challenge the "constitutionality of any police action." We note that Jones had filed a *pro se* motion seeking a "motion to suppress evidence" and a "motion for dismissal … for illegal seizure." There are no further details explaining these challenges, but we are satisfied that the record reveals no basis for pursuing either motion.

The circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08 and ***Bangert***, which was largely compliant with the various requirements for a plea colloquy, *see* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, with one notable exception: the circuit court did not personally address Jones and provide the immigration warning required by WIS. STAT. § 971.08(1)(c). However, in order to obtain relief because of such an omission, a defendant must show that the plea is likely to result in deportation, exclusion from admission, or denial of naturalization. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749; ***State v. Douangmala***, 2002 WI 62, ¶¶3-4, 253 Wis. 2d 173, 646 N.W.2d 1. There is nothing in this record to suggest that Jones is not a citizen of the United States.[4]

Aside from this omission, which nevertheless does not support a challenge to the plea, the plea questionnaire and waiver of rights form, the addendum, and the circuit court's colloquy appropriately advised Jones of the elements of his offenses and the potential penalties he faced, and complied with the remaining requirements of ***Bangert*** and its progeny for ensuring that a plea is knowing, intelligent, and voluntary.[5] There would be no arguable merit to a challenge to the plea's validity.

[4] In the no-merit report, counsel notes that the plea colloquy form contains the deportation warning. While a plea questionnaire may be used by the circuit court in aid of its discharge of the mandatory plea colloquy duties, we remind counsel and the circuit court that the form is not intended to be a substitute for a substantive, personal circuit court colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794.

[5] We do note that, although the operating after revocation charge was dismissed and read in, the circuit court did not review the nature of read-in offenses with Jones, as recommended but not required by ***State v. Straszkowski***, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835. However, it does not appear that the circuit court relied on the read-in offense at sentencing, restitution was not ordered on that offense, and the State remains barred from future prosecution of the offense. *See* ***id.***, ¶97 (explaining the information circuit courts should provide about read-in offenses). Thus, there would be no arguable merit to a challenge to the plea for failure to discuss the nature and uses of read-in offenses.

The other potential issue appellate counsel discusses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The record reveals a proper exercise of the circuit court's discretion. It commented that Jones's personality did not seem to present an issue and he had no other criminal offenses. It observed that Jones appeared to have treatment needs that could be addressed on probation but, because he had not yet started participating in any counseling, the circuit court believed it would be appropriate to add conditions to Jones's probation as a safety mechanism. The circuit court did not consider Jones's blood-alcohol level to be "extremely aggravating," but commented that the act of driving while intoxicated was dangerous and it was "unacceptable" to put a small child in an essentially helpless position.

The maximum possible sentence Jones could have received was a $2200 fine and one year in jail and the maximum possible probation term was two years. The six-month jail sentence, imposed and stayed for eighteen months' probation, and the $700 fine are well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622

N.W.2d 449, and are not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The driver's license revocation period and the amended ignition interlock device period are both the minimums required by law. There would be no arguable merit to a challenge to the sentencing court's discretion.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Erin K. Deeley is relieved of further representation of Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals