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**DISTRICT II**

August 23, 2017

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

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2017AP198-CRNM State of Wisconsin v. Deidra M. Dawley (L.C. #2015CF326)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

**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).**

Deidra M. Dawley appeals a judgment convicting her of homicide by intoxicated use of a vehicle. Her appointed appellate counsel, Jefren E. Olsen, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Dawley

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

was advised of her right to file a response but has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment, as we discern no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

While on probation, Dawley and her best friend spent a day drinking. Driving home, Dawley took a hill at a high rate of speed, lost control of her vehicle, and crashed into a tree, killing her passenger. First responders and officers noted the odor of alcohol about Dawley and found cold, open intoxicants in the car. She told them she was "too drunk" to remember what happened and refused to submit to a chemical test of her blood alcohol content. Blood drawn pursuant to a search warrant showed a BAC of 0.136.

Dawley entered a guilty plea to homicide by intoxicated use of a vehicle. Two other counts—homicide by use of a vehicle with a prohibited alcohol concentration and second-degree reckless homicide—were dismissed and read in at sentencing. The court sentenced her to six years' initial confinement and five years' extended supervision. This no-merit appeal follows.

The no-merit report first addresses the potential issue of whether a meritorious challenge could be mounted to Dawley's guilty plea. To withdraw a plea post-sentencing, a defendant must establish that plea withdrawal is necessary to correct a manifest injustice, such as that the plea was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Dawley would not be able do so.

The circuit court conducted an adequate, if not elaborate, plea colloquy that for the most part satisfied the duties described in WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986). In conjunction with the plea questionnaire/waiver of rights form

Dawley signed, the court personally addressed her. It ascertained her level of education and comprehension and, by her affirmative responses, confirmed that she understood the nature/elements of the charge, the range of potential penalties, the constitutional rights she waived by her guilty plea, and the factual basis for the charge. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794.

As appellate counsel observes, however, the colloquy lacked in two respects. First, it did not inquire whether Dawley's plea was procured by threats or promises. Dawley did not allege at the plea hearing that she pled due to improper threats or promises or respond to the no-merit report with a similar complaint.[2] *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 829 n.2, 416 N.W.2d 627 (Ct. App. 1987). Further, her responses at the plea hearing, a letter she wrote to the PSI writer that was read into the record at sentencing, and her allocution satisfy us that she pled guilty of her own accord out of a desire to accept responsibility for the death of her best friend and to convey her remorse to the victim's family.

Second, the court failed to advise that it was not bound by the State's sentencing recommendation. *See* ***State v. Hampton***, 2004 WI 107, ¶42, 274 Wis. 2d 379, 683 N.W.2d 14. To succeed on this ground, however, Dawley would have to prove by clear and convincing evidence that a refusal to allow withdrawal of her plea would result in a manifest injustice—i.e., that there was "a serious flaw in the fundamental integrity of the plea." ***State v. Thomas***, 2000 WI 13, ¶16, 232 Wis. 2d 714, 605 N.W.2d 836 (citation omitted). Here, given that the circuit

[2] We recognize that a response to the no-merit report is not required. *See* ***State v. Tillman***, 2005 WI App 71, ¶¶17-18, 281 Wis. 2d 157, 696 N.W.2d 574 (defendant has "opportunity" to respond to no-merit report and is "allow[ed]" to respond to no-merit report).

court accepted the plea agreement and imposed a lesser sentence than the one the State advocated, Dawley received the benefit of the agreement. The court's failure to inform Dawley that it was not bound by the plea agreement thus did not subject her to a manifest injustice—the omission was an "insubstantial defect[]," and, therefore, harmless error. *See* ***State v. Johnson***, 2012 WI App 21, ¶¶12, 14, 339 Wis. 2d 421, 811 N.W.2d 441.

We also agree with counsel's analysis and conclusion that Dawley's sentence was not illegal, unduly harsh, or otherwise the result of an erroneous exercise of discretion. The court addressed the reckless, intentional nature of Dawley's offense, what it showed about her character, her need for rehabilitative control, and the need to protect the public from such reckless behavior. *See* ***State v. Gallion***, 2004 WI 42, ¶40 & n.10, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984); ***McClearly v. State***, 49 Wis. 2d 263, 280-81, 182 N.W.2d 512 (1971). The sentence imposed is not unduly harsh, as it is not so excessive and unusual or so disproportionate to the offense committed as to "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). No basis exists to disturb it.

Our review of the record discloses no other potential issues for appeal. Dawley's guilty plea waived the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights, arising from proceedings before entry of the plea. ***State v. Kraemer***, 156 Wis. 2d 761, 765, 457 N.W.2d 562 (Ct. App. 1990). Accordingly, this court accepts the no-merit report, affirms the conviction, and grant's appellate counsel's motion to be relieved of the obligation to represent Dawley further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Jefren E. Olsen is relieved from further representing Dawley in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

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*Diane M. Fremgen*
*Clerk of Court of Appeals*