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January 8, 2018

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

2016AP1654-CRNM State of Wisconsin v. David B. Roberts (L.C. # 2014CM703)
2016AP1655-CRNM State of Wisconsin v. David B. Roberts (L.C. # 2015CM914)
2016AP1656-CRNM State of Wisconsin v. David B. Roberts (L.C. # 2015CF503)

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

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).

David Roberts appeals judgments convicting him of one count of retail theft and one count of operating a motor vehicle with a prohibited blood alcohol concentration. *See*

WIS. STAT. §§ 943.50(1m)(b), 346.63(1)(b) (2013-14).[1] In addition, Roberts appeals a sentence entered after revocation of probation. Attorney Mark Schoenfeldt 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). Roberts was sent a copy of the report, and 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.

Roberts was convicted on July 31, 2014, after entering no-contest pleas to one count of misdemeanor bail jumping and two counts of retail theft, with the value of the merchandise not exceeding $500 on each count, in Brown County Circuit Court case No. 2014CM703. *See* WIS. STAT. §§ 946.49(1)(a) and 943.50(1m)(b). The court imposed two years of probation. On October 26, 2015, Roberts pled no contest to one count of operating a vehicle with a prohibited blood alcohol concentration, as a fourth offense in five years, and one count of retail theft, as a repeater. *See* WIS. STAT. §§ 346.63(1)(b), 943.50(1m)(b), 939.62(1)(a). On December 17, 2015, Roberts appeared in court for joint sentencing on both of the 2015 convictions, as well as for sentencing after revocation of probation in case No. 2014CM703. Roberts now appeals.

As to case No. 2014CM703, we note that an appeal from sentencing after revocation of probation does not bring before us the original judgment of conviction unless the appellant shows good cause to extend the time to appeal from that judgment under WIS. STAT. RULE 809.82(2). *See* ***State v. Drake***, 184 Wis. 2d 396, 399 & n.2, 515 N.W.2d 923 (Ct. App. 1994). No good cause appears in the record to extend Roberts' time to appeal from the original

[1] All further references in this order to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

judgment of conviction, and therefore only issues related to sentencing after revocation are before us as to case No. 2014CM703.

We see no arguable basis for Roberts to withdraw the no contest pleas he entered on October 26, 2015. 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.

Roberts entered his pleas pursuant to a negotiated plea agreement that was presented in open court. In exchange for Roberts' pleas of no contest, the State agreed to dismiss and read in other charges, to cap its sentencing recommendations to eighteen months of initial confinement and two years of extended supervision on the charge of operating a vehicle with a prohibited blood alcohol concentration, and twelve months of jail time on the charge of retail theft. The circuit court conducted a standard plea colloquy, inquiring into Roberts' ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring his understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, 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 Roberts understood that it would not be bound by any sentencing recommendations. In addition, Roberts provided the court with a signed plea questionnaire. Roberts indicated to the court that

he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

Defense counsel stipulated that the circuit court could rely on the facts in the criminal complaints as a sufficient factual basis for the pleas. Nothing in the record or the no-merit report gives rise to an arguably meritorious challenge to the factual basis for Roberts' pleas. Roberts admitted his status as a repeat offender in open court, and admitted that the conviction for operating a vehicle with a prohibited blood alcohol concentration was his fourth OWI offense in five years. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Roberts has not alleged any other facts that would give rise to a manifest injustice. Therefore, his pleas were valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Roberts' sentences would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record shows that Roberts was afforded an opportunity to comment on the presentence investigation report and to address the circuit court, both personally and through counsel. The court considered the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

In case No. 2014CM703, the circuit court imposed a sentence of nine months in jail on each of the three counts, to be served concurrent to each other but consecutive to any sentence

Roberts was now serving. On the operating a vehicle with a prohibited blood alcohol concentration charge, the court imposed a sentence of one and a half years of initial confinement and two years of extended supervision, to be served consecutive to the sentences imposed in case No. 2014CM703 and case No. 2015CM914. Finally, the court imposed a sentence of twelve months in jail on the charge of retail theft as a repeater, to be served consecutive to the sentences imposed in case No. 2014CM703 and case No. 2015CF503. The sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 943.50(1m)(b) and (4)(a) (classifying retail theft of merchandise valued less than $500 as a Class A misdemeanor); 946.49(1)(a) (classifying misdemeanor bail jumping as a Class A misdemeanor); 939.51(3)(a) (providing maximum imprisonment term of nine months for a Class A misdemeanor); 346.63(1)(b) and 346.65(2)(am)4m. (classifying operating a vehicle with a prohibited blood alcohol concentration, as a fourth offense within five years, as a Class H felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony); 939.62(1)(a) (increasing maximum term of imprisonment for offense otherwise punishable by less than one year to two years for habitual criminality). Under these circumstances, it cannot reasonably be argued that Roberts' sentences are so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments 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 judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mark Schoenfeldt is relieved of any further representation of David Roberts in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Diane M. Fremgen
Acting Clerk of Court of Appeals