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January 17, 2018

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

2016AP1095-CRNM State of Wisconsin v. Bruce W. Southall (L.C. # 2013CF2110)

Before Lundsten, P.J., Sherman and Blanchard, 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).

Bruce Southall appeals a judgment convicting him of a fifth offense of operating a motor vehicle while under the influence of an intoxicant (OWI-5th). Attorney Andrew Hinkel has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-

16);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of Southall's plea and sentence. Southall was sent a copy of the report, but 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.

First, we see no arguable basis for plea withdrawal. 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. *See* ***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.

Southall entered a no contest plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Southall's plea, the State agreed to dismiss other charges of bail jumping and operating with a prohibited alcohol concentration, and to make a joint sentencing recommendation.

The circuit court conducted a plea colloquy, inquiring into Southall's ability to understand the proceedings, the voluntariness of his plea decision, and his understanding of the consequences of the plea. *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 relied upon the plea

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

questionnaire to assure itself that Southall understood the constitutional rights being waived. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Southall indicated to the court that he understood the information explained on that form, and is not now claiming otherwise.

The facts set forth in the complaint and supplemented at the plea hearing—namely, that Southall had failed sobriety tests after being pulled over for suspicious driving behavior, and that testing subsequently revealed his blood alcohol percentage to be 0.147—provided a sufficient factual basis for the plea. Southall admitted his status as a repeat offender in open court. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Southall has not alleged any other facts that would give rise to a manifest injustice. Therefore, Southall's plea was valid and operated to waive all nonjurisdictional defects and defenses. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to Southall's sentence would also lack arguable merit. The record shows that Southall was afforded an opportunity to address the court before sentencing, both personally and through counsel. The court then adopted the parties' joint recommendation and sentenced Southall to 18 months of initial confinement and 24 months of extended supervision. The court also awarded four days of sentence credit as stipulated by the parties, revoked Southall's driving privileges for 36 months, imposed standard costs and conditions of supervision, and determined that Southall was eligible for the challenge incarceration program and substance abuse program.

The components of the bifurcated sentence were within the applicable penalty ranges. *See* WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)5. (classifying OWI-5th 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) (2011-12). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here was not "'so excessive and unusual and 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted). Furthermore, the court imposed a sentence in accordance with Southall's own recommendation. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved).

We do note that the judgment of conviction fails to conform to the circuit court's pronouncement of sentence in one respect. The judgment imposes a DNA surcharge when the court explicitly waived it. Therefore, the judgment should be amended to correct the clerical error. With this amendment, there is no issue as to whether the imposition of a DNA surcharge would have constituted an ex post facto violation based on Southall's prior felony convictions.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. 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 judgment of conviction shall be amended to remove the DNA surcharge.

IT IS FURTHER ORDERED that, as amended, the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Andrew Hinkel is relieved of any further representation of Bruce Southall 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