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January 23, 2018

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

2016AP915-CRNM State of Wisconsin v. Richard L. Austin, Jr. (L.C. # 2014CF5315)

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

Richard Austin, Jr., appeals a judgment convicting him of a sixth offense of operating a motor vehicle under the influence of an intoxicant (OWI-6th). Assistant State Public Defender Kaitlin Lamb has filed a no-merit report seeking to withdraw as appellate counsel. 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 Austin's plea and the circuit court's exercise of its sentencing discretion. Austin 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. ***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.

Austin entered his plea pursuant to a negotiated plea agreement that was presented in open court. In exchange for Austin's plea, the State agreed to recommend eighteen months of initial confinement and twenty-four months of extended supervision, with conditions to include following any AODA recommended treatment, taking only prescribed medications, a three-year license revocation, a two-year period of ignition interlock, and a minimum fine of $600. Austin was free to argue at sentencing.

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

The circuit court conducted a standard plea colloquy, inquiring into Austin's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Austin's 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(1); ***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 Austin understood that it would not be bound by any sentencing recommendations. In addition, Austin provided the court with a signed plea questionnaire with an addendum and attached jury instructions. Austin indicated to the court that he had gone over the form with his attorney and understood the information explained on that form, and he is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint and provided to the circuit court at the plea hearing—namely, that Austin was pulled over after driving erratically, that he refused to perform sobriety tests but had dilated pupils and demonstrated difficulty standing, and that his blood alcohol tested at 0.028—provided a sufficient factual basis for the plea. Austin 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. Counsel has not related that Austin is alleging any other facts that would give rise to a manifest injustice. Therefore, there is no arguable basis to challenge Austin's plea, which 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 Austin's sentence 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 Austin was afforded an opportunity to address the circuit court, both personally and through counsel. The court proceeded to consider 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. Regarding the severity of the offense, the court noted that there were no victims and the alcohol level was minimal, with the bigger problem being mixing alcohol with pain medications Austin was taking for his back. With respect to Austin's character, the court gave Austin credit for making progress in counseling to deal with some of the root causes of his behaviors. The court identified the primary goal of the sentencing in this case as giving Austin one last opportunity to get his problems under control, with significant penalties if he were to fail.

The circuit court then imposed and stayed a sentence of two years of initial confinement and three years of extended supervision, subject to a three-year term of probation with one year of conditional jail time that could be served in Washington County. The court also imposed the minimum fine of $600, standard costs and conditions of supervision and a DNA surcharge, and it ordered a three-year suspension of Austin's driver's license and a two-year period of ignition interlock. The court determined that Austin was not eligible for the challenge incarceration program or the substance abuse program.

The components of the bifurcated sentence that was imposed and stayed, the term of probation, and the amount of conditional jail time were all within the applicable penalty ranges. *See* WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)4. (classifying OWI-6th 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); 973.09(2)(b)1. (setting term of probation for a felony at not less than one year and not more than the greater of three years or the initial period of confinement); 973.09(4) (allowing up to one year of jail as a condition of probation).

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." ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. That is particularly true when taking into account that Austin had been revoked and gone to prison on a term of probation imposed on his OWI-5th charge. Furthermore, the circuit court imposed a sentence in accordance with Austin's own recommendation for probation with conditional jail time. *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).

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

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant 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