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DISTRICT III

April 3, 2018

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

2016AP986-CRNM State of Wisconsin v. Larry L. Backman (L. C. No. 2014CF56)

Before Stark, P.J., Hruz and Seidl, 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).

Counsel for Larry Backman has filed a no-merit report concluding no grounds exist to challenge Backman's conviction for operating a motor vehicle while intoxicated, as a tenth offense, contrary to WIS. STAT. § 346.63(1)(a) (2015-16).[1] Backman has filed responses that

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

challenge his conviction and sentence and also allege he was denied the effective assistance of trial counsel. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Backman with OWI, as a tenth or subsequent offense; operating with a prohibited blood alcohol concentration, as a tenth or subsequent offense; and possession of an illegally obtained prescription. The complaint alleged that a Marinette police officer stopped a vehicle at approximately 2:30 a.m. when "the vehicle went very noticeably left of center" while making a right hand turn. Backman was identified as the driver and lone occupant of the vehicle, and an informational check revealed Backman had nine prior drunk driving convictions. During his interaction with Backman, the officer smelled the odor of intoxicants on Backman's breath and observed that Backman's eyes were "red." During field sobriety tests, Backman exhibited clues of intoxication. A preliminary breath test showed a result of .04.[2] Backman was arrested and, during an inventory search of his car, an officer found four hydroxyzine pamoate pills for which Backman did not have a prescription.

In exchange for his no-contest plea to OWI, as a tenth offense, the State agreed to dismiss and read in the charge of possessing an illegal prescription. The charge of operating with a prohibited alcohol concentration was dismissed pursuant to statute. *See* WIS. STAT.

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[2] Pursuant to WIS. STAT. § 340.01(46m)(c), "prohibited alcohol concentration" is an alcohol concentration of more than .02 if the person has three or more prior convictions, suspensions, or revocations, as counted under WIS. STAT. § 343.307(1).

§ 346.63(1)(c). The State also agreed to recommend four years' initial confinement and four years' extended supervision, while the defense remained free to argue. The court imposed the maximum possible penalty of seven and one-half years' initial confinement followed by five years' extended supervision. In the exercise of its discretion, the circuit court deemed Backman ineligible for earned release via participation in the Substance Abuse Program, reasoning it needed to keep him in prison as long as possible based on his danger to the public.[3] *See* WIS. STAT. § 973.01(3g).

Backman filed a postconviction motion for sentence modification, asserting that assistance he gave to law enforcement constituted a new factor justifying either a reduction in his sentence or reconsideration of the sentencing court's decision to make him ineligible for the substance abuse program. Specifically, Backman provided information leading to the convictions of two individuals involved in dealing drugs. The circuit court denied the motion.

The no-merit report addresses whether Backman knowingly, intelligently, and voluntarily entered his no-contest plea; whether the circuit court properly exercised its sentencing discretion; and whether the circuit court properly denied Backman's postconviction motion for sentence modification. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit.

In his response to the no-merit report, Backman contends his sentence exceeds the maximum allowed by law because it was his ninth—not his tenth—OWI conviction. Citing

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[3] Backman, who was fifty-six years old at the time of his conviction, was statutorily ineligible for the challenge incarceration program by virtue of his age. *See* WIS. STAT. § 302.045(2)(b).

State v. Rachwal, 159 Wis. 2d 494, 465 N.W.2d 490 (1991), Backman contends that the "consolidation" of two earlier OWI cases counted as only one conviction. ***Rachwal***, however, is distinguishable on its facts. That case involved the consolidation of two cases pursuant to WIS. STAT. § 971.09, which governs "[p]lea[s] of guilty to offenses committed in several counties." Here, Backman was charged in Marinette County with his third OWI in March 1997 and his fourth OWI in April 1997. Although disposition of the two cases occurred at the same plea and sentencing hearing, Backman was convicted for each distinct offense. Backman's challenge to his sentence on this ground therefore lacks arguable merit.

Backman also challenges the effectiveness of his trial counsel. To establish ineffective assistance of counsel, Backman must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Backman must demonstrate "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty [or no contest] and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

Backman claims his trial counsel was ineffective by failing to investigate "the facts of [Backman]'s assistance to law enforcement." Specifically, Backman asserts that because he previously assisted law enforcement, he was "severely beaten," necessitating the use of pain relievers which led to an addiction that forced him to self-medicate with alcohol in order to find relief from his withdrawal symptoms. Backman asserts that this history of addiction would have

established an involuntary intoxication defense under WIS. STAT. § 939.42(1).[4] Backman further contends that his trial counsel's refusal to procure medical records in support of this defense theory left Backman with no choice but to enter a no-contest plea. Our supreme court, however, has held that alcohol and drug addiction do not provide a basis for a defense of involuntary intoxication. ***Loveday v. State***, 74 Wis. 2d 503, 512, 247 N.W.2d 116 (1976). Any claim that trial counsel was ineffective by failing to pursue this theory of defense would therefore lack arguable merit. Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[5] hearing.

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Ellen J. Krahn is relieved of her obligation to further represent Backman in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals

[4] Backman's response also references WIS. STAT. § 939.42(2), which provides that an intoxicated or drugged condition of the actor is a defense only if such condition "[n]egatives the existence of a state of mind essential to the crime." This statute is inapplicable because the crime of OWI does not contain a state of mind element to negate. *See* WIS. STAT. § 346.63(1)(a); WIS JI—CRIMINAL 2663 (2006).

[5] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).