OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

Amended June 11, 2019
May 20, 2019

To:

Hon. Duane M. Jorgenson
Circuit Court Judge
626 Main St.
Darlington, WI 53530

Trisha Rowe
Clerk of Circuit Court
Lafayette County Courthouse
626 Main St.
Darlington, WI 53530

Jenna L. Gill
District Attorney
P.O. Box 203
Darlington, WI 53530-0203

Leonard D. Kachinsky
Kachinsky Law Offices
832 Neff Ct.
Neenah, WI 54956-0310

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Chad Michael Ernzen 658391
New Lisbon Correctional Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2018AP1040-CRNM State of Wisconsin v. Chad Michael Ernzen (L.C. # 2016CF8)

Before Lundsten, P.J., Sherman 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).

Attorney Len Kachinsky, appointed counsel for Chad Ernzen, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

arguable merit to a challenge to Ernzen's plea or sentencing. Ernzen was sent a copy of the report, and has filed a response.[2] Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel that there are no issues of arguable merit. We affirm.

In March 2016, Ernzen was charged with one count of homicide by use of a motor vehicle with a detectable amount of a restricted controlled substance in his blood and one count of second-degree reckless homicide. Pursuant to a plea agreement, Ernzen pled guilty to homicide by use of a motor vehicle with a detectable amount of a restricted controlled substance in his blood; the State moved to dismiss the reckless homicide count and the counts in two other cases; and the parties jointly recommended a sentence of eight years of initial confinement and four years of extended supervision. The court sentenced Ernzen to ten years of initial confinement and seven years of extended supervision.

The no-merit report addresses whether there would be arguable merit to a challenge to Ernzen's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel, a plea that was not knowing, intelligent, and voluntary, or lack of a factual basis to support the plea. ***State v. Krieger***, 163 Wis. 2d 241, 250-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991).

The no-merit report addresses whether there would be arguable merit to a claim of ineffective assistance of counsel for failing to pursue a motion to suppress the blood draw

[2] The response was untimely. Nonetheless, we have reviewed the response and address it in this decision.

evidence obtained after Ernzen was transported to the hospital following the car accident. *See* ***State v. Multaler***, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437 (a guilty plea generally waives all non-jurisdictional defects and defenses, including non-litigated claims that evidence should have been suppressed due to constitutional violations); ***Krieger***, 163 Wis. 2d at 250-51 & n.6 (ineffective assistance of counsel is a manifest injustice entitling the defendant to plea withdrawal). By prior order, this court determined that the discussion of this issue in the no-merit report was insufficient. We noted that it was unclear from the no-merit report and the record whether the blood draw was obtained at the direction of law enforcement or in the course of Ernzen's medical treatment. We therefore directed counsel to file a supplemental no-merit report addressing this issue. Counsel has filed a supplemental no-merit report with supporting material indicating that Ernzen's blood was not drawn at the direction of law enforcement but rather in the course of medical treatment. Police then obtained a search warrant for the blood. We conclude that a suppression motion would have lacked arguable merit, and that trial counsel was therefore not ineffective on this basis.

Ernzen asserts in his no-merit response that the blood test results could not be used against him because there were two days between the blood draw and police taking possession of the blood. Ernzen assert that "anything could have happened" to the blood samples during that time. It appears that Ernzen is asserting that his trial counsel should have moved to suppress the blood evidence on this basis. *See* ***Multaler***, 252 Wis. 2d 54, ¶54; ***Krieger***, 163 Wis. 2d at 250-51 & n.6. However, we discern no arguable merit to a claim of ineffective assistance of counsel on this issue. Ernzen has provided no factual basis to support an assertion that the blood samples were improperly handled, and nothing in the record, no-merit reports or supporting material supports that assertion.

Ernzen also asserts that he has maintained all along that he was not using drugs at the time of the accident, and that he has a witness who will state that Ernzen was with her before the accident and that he was not using drugs at that time. However, Ernzen has only asserted facts that Ernzen would have known at the time he entered his plea. Nothing in the no-merit response provides any basis for a non-frivolous argument for plea withdrawal.

The no-merit report also addresses the sufficiency of the plea colloquy. The circuit court conducted a plea colloquy that, together with the plea questionnaire that Ernzen signed, satisfied the court's mandatory duties to personally address Ernzen and determine information such as Ernzen's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. The criminal complaint provided a factual basis for the plea. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Ernzen's plea would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Ernzen's sentence. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Ernzen's character and criminal history, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d

535, 678 N.W.2d 197. We discern no basis to challenge the sentence imposed by the circuit court.

At sentencing, the circuit court stated that it was imposing costs as a condition of extended supervision, including $1410.20 in extradition costs. The court also stated that Ernzen was to pay restitution as that amount may be determined. However, the Department of Corrections then submitted a restitution form seeking $1410.20 in extradition costs to the Lafayette County Sheriff's Department as restitution. The judgment of conviction directs Ernzen to pay $1410.20 to the Lafayette County Sheriff's Department as restitution.

Restitution to the county cannot be ordered where the county was not an "actual victim of [] crimes." *See* ***State v. Schmaling***, 198 Wis. 2d 756, 761, 543 N.W.2d 555 (Ct. App. 1995). Rather, "the fees and disbursements of the agent appointed to return a defendant from another state or country" may be imposed as costs against the defendant. *See* WIS. STAT. § 973.06(1)(a). We could not say there was no arguable merit to challenge the inclusion of extradition costs as part of restitution. We therefore directed no-merit counsel to file a supplemental no-merit report addressing why it would be wholly frivolous to challenge the restitution imposed.

No-merit counsel has filed a supplemental no-merit report with an attached circuit court order amending the judgment of conviction to move the extradition costs from the "restitution" portion of the judgment to the "costs" portion of the judgment. An amended judgment of conviction attached to the supplemental no-merit report reflects the same. With this amendment, any challenge to the sentence imposed would lack arguable merit.

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.

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

IT IS FURTHER ORDERED that Attorney Len Kachinsky is relieved of any further representation of Chad Ernzen 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