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DISTRICT III

December 17, 2019

To:

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

2018AP732 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).

Larry Backman, pro se, appeals an order denying his motions to "vacate and amend" a judgment of conviction, and to modify his sentence. Backman argues he was improperly convicted of operating a motor vehicle while intoxicated ("OWI"), as a tenth offense, when he should have been convicted of only a ninth-offense OWI. Backman relatedly argues that his counsel was ineffective by failing to pursue this argument, and that he is entitled to resentencing for a ninth-offense OWI. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. We reject Backman's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21 (2017-18).[1]

In May 2014, the State charged Backman with OWI and operating a motor vehicle with a prohibited alcohol concentration, both as tenth offenses, and with possession of an illegally obtained prescription. In exchange for his no-contest plea to OWI, as a tenth offense, the State agreed to ask the circuit court 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. § 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 at sentencing. At the plea hearing, Backman admitted to having nine prior OWI convictions. Upon Backman's conviction for tenth-offense OWI, the court ultimately imposed the maximum possible penalty of seven and one-half years' initial confinement followed by five years' extended supervision.

Backman subsequently filed a pro se motion to vacate and amend the judgment, claiming that he should have been convicted of, and sentenced for, OWI, as a ninth offense; that he was denied the effective assistance of counsel; and that a new factor justified sentence modification. The circuit court denied Backman's motion after a hearing, and this appeal follows.[2]

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

[2] Although Backman's notice of appeal purported to appeal the denial of his motion for sentence modification, Backman's appellate brief raises no argument regarding sentence modification based on a new factor. We therefore deem this challenge abandoned. ***A.O. Smith Corp. v. Allstate Ins. Co.***, 222 Wis. 2d 475, 491, 588 N.W. 2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned.").

Backman was charged with a third OWI in March 1997 and a fourth OWI in April 1997—both in Marinette County—and the convictions for both offenses were entered on May 29, 1997. It appears that, rather than entering judgments reflecting a third offense and a fourth offense, the Marinette County circuit court erroneously entered judgments that both reflected convictions for OWI as a third offense. Backman thus asserts that without a judgment of conviction for fourth-offense OWI, his fifth through tenth OWI convictions were misnumbered when charged. Backman, however, provides no authority to establish that both of his "third" offenses are not countable prior convictions.[3]

Although Backman asserts that the doctrine of issue preclusion barred the State from counting both of the OWI "third" offenses for OWI purposes, we are not persuaded. Issue preclusion addresses the effect of a prior judgment on the ability to relitigate an identical issue of law or fact in a subsequent action. ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶17, 281 Wis. 2d 448, 699 N.W.2d 54. For issue preclusion to apply to limit subsequent litigation, "the question of fact or law that is sought to be precluded actually must have been litigated in a previous action and be necessary to the judgment." ***Id.*** Issue preclusion does not apply in the present matter because Backman has not shown that the issue of the number of his prior offenses was actually litigated at the time he was convicted of two third-offense OWIs, or anytime before his tenth

[3] Backman raised a variation of the same argument in a response to the no-merit report that was filed by his appointed counsel pursuant to WIS. STAT. RULE 809.32. There, Backman argued that his sentence exceeded the maximum allowed by law because his conviction in this case was his ninth, not his tenth, OWI conviction. Backman argued that the "consolidation" of his two 1997 OWI cases resulted in only one conviction that can be counted. We noted that although disposition of the two cases occurred at the same plea and sentencing hearing, Backman was convicted for each distinct offense. We therefore concluded that Backman's challenge to his sentence lacked arguable merit, and we ultimately accepted the no-merit report and affirmed the judgment of conviction in an opinion and order that was released the day after entry of the order that is presently on appeal. *See* ***State v. Backman***, No. 2016AP986-CRNM, unpublished op. and order (WI App Apr. 3, 2018).

OWI conviction. Even were Backman able to establish that the number of past convictions had been litigated, he could not show that the issue was decided in his favor, as both of his 1997 convictions have been counted to enhance his fifth through tenth OWI offenses.[4]

To the extent Backman asserts his counsel was ineffective by failing to assert that Backman had only eight, rather than nine, countable convictions, he must show both 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). Backman's counsel did not perform deficiently in failing to assert that the State was precluded from charging Backman with OWI as a tenth offense. As discussed above, issue preclusion does not apply here and Backman had nine prior countable convictions. Counsel is not deficient for failing to pursue a meritless claim. *See* ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16. Because Backman was properly charged and convicted for OWI as a tenth offense, his claim that he is entitled to resentencing for a ninth offense OWI likewise fails.

[4] Citing ***State v. Duerst***, No. 2004AP1046-CR, unpublished slip op. (WI App Feb. 17, 2005), an authored one-judge opinion, Backman argues it is "fundamentally unfair" to count his two OWI third offenses as an OWI third offense and OWI fourth offense. Because ***Duerst*** was issued before July 1, 2009, it may not be cited, even for persuasive value. WIS. STAT. RULE 809.23(3)(b). In any event, ***Duerst*** is distinguishable on its facts. There, what was a third OWI was amended to a second OWI as part of a plea agreement. ***Duerst***, No. 2004AP1046-CR, ¶2. When the State later charged Duerst with a fourth, rather than a third, OWI, the circuit court granted Duerst's motion to dismiss the charges as barred by issue preclusion and violative of Duerst's due process rights, and we affirmed. ***Id.***, ¶¶1, 4. In the (continued)

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals

present matter, Backman's two OWI third convictions appear to be the result of inadvertence. There is no indication the parties agreed to the entry of two OWI third judgments as part of a plea agreement.