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DISTRICT IV

March 12, 2020

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Lloyd Johnson Jr.
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You are hereby notified that the Court has entered the following opinion and order:

2018AP1411-CRNM State of Wisconsin v. Lloyd Johnson, Jr. (L.C. # 2010CF2368)
2018AP1412-CRNM State of Wisconsin v. Lloyd Johnson, Jr. (L.C. # 2015CF290)

Before Blanchard, Graham and Nashold, 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 Patricia Sommer, appointed counsel for Lloyd Johnson, Jr., has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32[1] and ***Anders v.***

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

California, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Johnson's plea, the court's denial of Johnson's suppression motion, sentencing, or to a claim of a double jeopardy violation. Johnson was sent a copy of the report and has filed a response. Counsel has filed a supplemental no-merit report. Upon independently reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

Johnson was charged with operating while intoxicated (OWI) as a seventh, eighth, or ninth offense, operating with a prohibited alcohol concentration as a seventh, eighth, or ninth offense, possession of cocaine, and resisting an officer. Pursuant to a plea agreement, Johnson pled guilty to OWI as a seventh offense and no contest to possession of cocaine. Johnson successfully sought plea withdrawal. Johnson was then charged in a separate case with eight counts of felony bail jumping for failure to appear at hearings in his OWI case. Pursuant to a plea agreement, Johnson pled guilty to OWI as a seventh offense, possession of cocaine, and two counts of bail jumping; the remaining counts were dismissed and read in for sentencing; and the parties jointly recommended four years of initial confinement and five years of extended supervision on the OWI count, one year of concurrent jail time on the possession of cocaine count, and a total of six months of consecutive jail time on the bail jumping counts. The circuit court followed the joint sentencing recommendation.

The no-merit report addresses whether there would be arguable merit to a challenge to Johnson's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d

906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaires that Johnson signed, satisfied the court's mandatory duties to personally address Johnson and determine information such as Johnson's understanding of the nature of the charges 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. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Johnson's plea would lack arguable merit.

The no-merit report also considers whether there would be arguable merit to a challenge to the circuit court's denial of Johnson's motion to suppress blood test results. Johnson argued that the warrantless blood draw at a hospital following his arrest was unconstitutional under the subsequent decision by the United States Supreme Court in ***Missouri v. McNeely***, 569 U.S. 141 (2013) (no per se exception to the warrant requirement for blood draws in intoxicated driver cases). The circuit court denied the motion to suppress, finding that the good faith exception to the exclusionary rule applied because police had relied on the law as it existed at the time of the search. We agree with counsel that a challenge to the circuit court's decision would lack arguable merit. Johnson was arrested in 2010. At that time, controlling Wisconsin case law held that the natural dissipation of alcohol in the bloodstream created a per se exigency allowing for a warrantless blood draw. *See* ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993). While ***McNeely*** abrogated ***Bohling*** by rejecting the categorical exigency exception to the warrant requirement, our supreme court has held that the good faith exception to the exclusionary rule applies when, as here, police acted in objectively reasonable reliance on "clear and settled" Wisconsin precedent. *See* ***State v. Foster***, 2014 WI 131, ¶30, 360 Wis. 2d 12, 856 N.W.2d 847.

The no-merit report also addresses whether there would be arguable merit to a challenge to Johnson's sentence. We agree with counsel that this issue lacks arguable merit. Because Johnson received the sentence he affirmatively approved, he is barred from challenging the sentence on appeal. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 517-18, 451 N.W.2d 759 (Ct. App. 1989). We discern no other basis to challenge the sentence imposed by the circuit court.

Finally, the no-merit report addresses whether there would be arguable merit to a claim of a double jeopardy violation based on the reinstatement of all of the charges in the information after Johnson was granted plea withdrawal. Johnson asserts in his no-merit response that he was unfairly sentenced twice for the same offense. We agree with counsel that this issue lacks arguable merit.[2] Johnson successfully pursued a postconviction motion to withdraw his OWI plea, which had been entered as part of a plea agreement that resolved all of the charges in the information. "Wisconsin case law clearly holds that a defendant's repudiation of a portion of the plea agreement constitutes a repudiation of the entire plea agreement. Ordinarily, the remedy for such repudiation requires reinstatement of the original charges against the accused." ***State v. Lange***, 2003 WI App 2, ¶32, 259 Wis. 2d 774, 656 N.W.2d 480 (2002) (citations omitted). "[A] defendant who succeeds in getting his first conviction set aside cannot argue successfully that the double jeopardy provisions bar a second prosecution." ***Day v. State***, 76 Wis. 2d 588, 591, 251 N.W.2d 811 (1977). Moreover, the record indicates that Johnson was awarded 948 days of

[2] Counsel asserts that this issue lacks arguable merit because Johnson's judgment of conviction reflects only a conviction and sentence for OWI. This discussion of the issue is insufficient. The record contains two judgments of conviction, one for the felony OWI as a seventh offense and one for the misdemeanor possession of cocaine. Additionally, the circuit court orally adjudged Johnson guilty of both OWI and possession of cocaine, and imposed sentence on both counts. *See* ***State v. Perry***, 136 Wis. 2d 92, 114-15, 401 N.W.2d 748 (1987) (circuit court's unambiguous oral pronouncement controls). We determine that this issue lacks arguable merit for the other reasons set forth in this opinion.

sentence credit, which included the time that Johnson had already served for the OWI and cocaine possession convictions.

Johnson also argues in his no-merit response that he was in jail in Illinois on various dates between March and September 2011, and that he was therefore wrongfully charged with bail jumping for failing to appear at Wisconsin court hearings. However, Johnson was convicted of two counts of bail jumping, for failing to appear at hearings on October 20, 2010, and February 17, 2011. Nothing in Johnson's submissions indicates that Johnson's guilty plea to those two counts of bail jumping lacked a factual basis. We agree with counsel's assessment in the supplemental no-merit report that further proceedings on this issue would lack arguable merit.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments 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 judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Patricia Sommer is relieved of any further representation of Lloyd Johnson, Jr., 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