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August 12, 2020

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

2019AP364-CRNM State of Wisconsin v. Kevin J. Schneider (L.C. #2017CF537)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Kevin J. Schneider appeals from a judgment convicting him of operating a motor vehicle with a restricted controlled substance (6th offense) contrary to WIS. STAT. § 346.63(1)(am)

(2017-18).¹ Schneider's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Schneider received a copy of the report and filed a response. Counsel then filed a RULE 809.32(1)(f) supplemental no-merit report addressing issues raised in Schneider's response. Upon consideration of the no-merit reports, Schneider's response and an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

After accepting Schneider's no contest plea, the circuit court sentenced him to a seven-year term (four years of initial confinement and three years of extended supervision) consecutive to a previously imposed sentence after revocation of his extended supervision. The circuit court determined that sentence credit was not due because Schneider received credit on his revocation sentence.

The no-merit report addresses the following possible appellate issues:² (1) whether Schneider's no contest plea was knowingly, voluntarily and intelligently entered; and (2) whether the circuit court misused its sentencing discretion. After reviewing the record, we

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

² Counsel's no-merit report discusses possible appellate issues arising from matters predating the entry of Schneider's no contest plea. However, as counsel correctly observes, these issues were waived by Schneider's no contest plea. *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53 (a no contest plea waives all nonjurisdictional defects and defenses). Therefore, we do not address them in this opinion because there would be no arguable merit to an appeal raising waived issues. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need to be addressed).

conclude that counsel's no-merit and supplemental no-merit reports properly analyze these issues and correctly determine that these issues lack arguable merit.

We conclude that the thorough plea colloquy complied with *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794.

In his response, Schneider argues that the circuit court did not establish his understanding of the crime and the range of punishments he faced. Schneider further argues that the circuit court did not advise him that the court's sentence could exceed that recommended by the State and the presentence investigation report (PSI) author. The plea colloquy record does not support these claims. During the colloquy, the circuit court reviewed the maximum penalties Schneider faced as a result of his no contest plea, the court reviewed the elements of the crime with him, and Schneider admitted that he committed the charged offense and his prior convictions.³ The circuit court clearly advised Schneider that it was not bound by any sentencing recommendation and could impose the maximum penalty, and Schneider stated that he understood this warning. The record does not support Schneider's claim that he has a basis for plea withdrawal due to a defective plea colloquy. *State v. Howell*, 2007 WI 75, ¶27, 301 Wis. 2d 350, 734 N.W.2d 48 (plea withdrawal via a *Bangert*⁴ motion alleging a defective plea colloquy).

We conclude that the circuit court engaged in a proper exercise of sentencing discretion after considering various sentencing factors. *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d

³ For this reason we reject Schneider's contention in his response to counsel's no-merit report that there was no proof of his prior convictions.

⁴ *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

535, 678 N.W.2d 197 (we review the sentence for a misuse of discretion); *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76 (sentencing objectives and factors discussed).

In his response, Schneider argues that the circuit court misused its sentencing discretion because the court did not accept the PSI author's sentencing recommendation. As we stated in connection with the plea colloquy, the circuit court was not required to adhere to any sentencing recommendation. This issue lacks arguable merit for appeal.

The no-merit reports and Schneider's response address sentence credit. We agree with appellate counsel that sentence credit was properly denied. The record shows the following. Schneider came into custody in mid-September 2017 after he was arrested for the conduct in the case before us and placed on an extended supervision hold for a prior conviction. Thereafter, Schneider's extended supervision was revoked, he was sentenced in the revocation case on January 26, 2018, and he received sentence credit in the revocation case for his time in custody. On June 29, 2018, the circuit court imposed a consecutive seven-year sentence in the case before us. At sentencing, Schneider's counsel agreed with the circuit court that because Schneider had received sentence credit in the revocation case, no sentence credit was due in this case.

Schneider's sentence credit claim fails because he received sentence credit on his January 26, 2018 revocation sentence, and the imposition of the revocation sentence severed the connection to the case on appeal for sentence credit purposes. *State v. Beets*, 124 Wis. 2d 372,

379-81, 369 N.W.2d 382 (1985). Therefore, sentence credit for Schneider's post-January 26, 2018 custody is not available in the case before us.⁵

In his response, Schneider challenges the statute under which he was convicted, WIS. STAT. § 346.63(1)(am). Section 346.63(1)(am) states:

No person may drive or operate a motor vehicle while:

(am) The person has a detectable amount of a restricted controlled substance in his or her blood.

Schneider argues that this statute is unfair and unconstitutional because it does not designate the specific amount of a banned restricted controlled substance that constitutes the offense.⁶ In *State v. Luedtke*, 2015 WI 42, ¶¶64, 77, 362 Wis. 2d 1, 863 N.W.2d 592, the court held that WIS. STAT. § 346.63(1)(am) is a constitutional, strict liability offense. To the extent Schneider suggests that § 346.63(1)(am) is void for vagueness, we are not persuaded that such a claim has arguable merit because that claim was rejected in a persuasive opinion in *State v. Harrison*, No. 2017AP1811, unpublished slip op. ¶¶15-27 (WI App Feb. 26, 2019). WIS. STAT. RULE 809.23(3)(b) (citation of unpublished opinion for persuasive value).

⁵ In May 2020, Schneider filed a pro se motion seeking sentence credit in this case for in-custody time from his September 2017 arrest to his June 2018 sentencing in this case. The circuit court denied the motion in orders entered on May 8 and 20, 2020. Schneider moves this court pro se to supplement the record on appeal with the sentence modification motion and the orders. The motion to supplement the record is denied for the following reasons: (1) the pro se sentence credit motion post-dated the notice of appeal in this case and is outside the scope of this WIS. STAT. RULE 809.32 appeal with counsel; and (2) the denial of sentence credit is subject to a different appeal procedure. WIS. STAT. § 973.155(6).

⁶ Schneider admitted in the circuit court that he had a detectable level of a restricted controlled substance (delta-9 tetrahydrocannabinol) in his blood in violation of WIS. STAT. § 346.63(1)(am).

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any arguably meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and relieve Attorney Erica L. Bauer of further representation of Schneider in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved of further representation of Kevin J. Schneider in this matter.

IT IS FURTHER ORDERED that the motion to supplement the record on appeal is denied.

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

Sheila T. Reiff
Clerk of Court of Appeals