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 II

March 10, 2021

To:

Hon. Todd K. Martens
Circuit Court Judge
P.O. Box 1986
West Bend, WI 53095

Theresa Russell
Clerk of Circuit Court
Washington County Courthouse
P.O. Box 1986
West Bend, WI 53095-1986

Mark Bensen
District Attorney
Washington County
P.O. Box 1986
West Bend, WI 53095-1986

Becky Nicole Van Dam
Mayer Law Office, LLC
120 N. Main St., Ste. 360
West Bend, WI 53095

Craig William Abel 553840
New Lisbon Correctional Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

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

2019AP1697-CRNM State of Wisconsin v. Craig William Abel (L.C. # 2018CF246)

Before Neubauer, C.J., Gundrum and Davis, 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).

Craig William Abel appeals a judgment of conviction for operating a motor vehicle while intoxicated, as a sixth offense, and for resisting an officer, as a repeater. Attorney Becky Van Dam, appointed counsel for Abel, has filed a no-merit report seeking to withdraw as

appellate counsel pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Abel was sent a copy of the report and has not filed a response. The report addresses whether the circuit court erred in denying Abel's motion to suppress; whether Abel's guilty pleas were knowing, intelligent, and voluntary; and whether there is any basis to challenge Abel's sentence. At this court's request, counsel also filed a response providing further input on potential issues we discuss below.[2] We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Upon consideration of the no-merit report, counsel's additional response, and an independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Abel was charged with five offenses: operating a motor vehicle while intoxicated, as a sixth offense; operating a motor vehicle with a prohibited alcohol concentration, as a sixth offense; obstructing an officer, as a repeater; disorderly conduct, as a repeater; and resisting an officer, as a repeater.

According to the complaint allegations, the charges against Abel arose out of a hit-and-run accident. Police were dispatched to the scene and found a parked vehicle nearby showing damage consistent with the accident. The vehicle was registered to Abel. The police located a man near the scene who appeared to be intoxicated and turned out to be Abel, although Abel initially gave a false name claiming to be somebody else. The police arrested Abel for obstruction and transported him to the police station, where they requested that he perform field

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

[2] Counsel filed the response on February 19, 2021.

sobriety tests. Abel agreed and performed poorly on the tests, exhibiting multiple signs of intoxication. He also engaged in a variety of disorderly, obstructive, and resistive behaviors that we need not recite for purposes here. When Abel would not consent to a chemical test of his blood, the police obtained a warrant for a blood draw. Lab testing showed that Abel had a blood alcohol content of .142.

Abel moved to suppress evidence of the field sobriety tests along with any statements he made to law enforcement officers after his arrest. He contended that this evidence must be suppressed because the police did not provide him with ***Miranda*** warnings. Abel also contended that his blood test results must be suppressed because his performance on the field sobriety tests was used to obtain the warrant for his blood.

After holding an evidentiary hearing, the circuit court denied Abel's suppression motion. Based on testimony by a police officer, the court found that the police did not ask Abel any questions beyond those that were part of administering standardized field sobriety tests. The court concluded that the administration of standardized field sobriety tests is nontestimonial and, therefore, the right against self-incrimination did not apply. The court also concluded that clarifying questions that Abel asked police about performing the tests were similarly nontestimonial as a routine part of the tests. The court stated that it would revisit the suppression issue if Abel's case went to trial and the State attempted to introduce other statements by Abel.

Abel entered into a plea agreement under which he agreed to plead guilty to the operating while intoxicated count and the resisting count. The State agreed that the remaining three counts would be dismissed and read in. Consistent with the plea agreement, the circuit court accepted

Abel's guilty pleas to the operating while intoxicated count and the resisting count, and the court dismissed the remaining counts.

On the operating while intoxicated count, the circuit court imposed a nine-year prison term consisting of four years of initial confinement and five years of extended supervision, consecutive to any sentence that Abel was currently serving. The court also imposed a fine that we discuss below. On the resisting count, the court sentenced Abel to nine months of incarceration, concurrent with Abel's prison sentence on the operating while intoxicated count.

The no-merit report first addresses whether there is any arguable merit to challenging the circuit court's denial of Abel's suppression motion. We agree with counsel that there is no arguable merit to this issue. First, as the circuit court concluded, the administration of standardized field sobriety tests and a subject's performance on the tests are nontestimonial and, as a result, not subject to Fifth Amendment protections. *See* ***State v. Schmidt***, 2012 WI App 137, ¶¶7-9, 345 Wis. 2d 326, 825 N.W.2d 521; ***State v. Babbitt***, 188 Wis. 2d 349, 361-62, 525 N.W.2d 102 (Ct. App. 1994). Second, when he sought suppression, Abel did not identify any incriminating statement that he made that was used to obtain the warrant for his blood draw, or otherwise used to obtain his conviction. Third, as already noted, the circuit court indicated a willingness to revisit the suppression issue if Abel later brought additional statements to the court's attention.

The no-merit report next addresses whether Abel's guilty pleas were knowing, intelligent, and voluntary. We agree with counsel that there is no arguable merit to this issue. With three inconsequential exceptions that we discuss below, the plea colloquy sufficiently complied with the requirements of WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d

594, 716 N.W.2d 906, relating to the nature of the charges, the rights Abel was waiving, and other matters.

The first exception to the circuit court's compliance with WIS. STAT. § 971.08 and ***Brown*** is that the circuit court did not personally establish that Abel understood that the court was not bound by the parties' plea agreement. However, because the court accepted the agreement, there is no arguable merit to pursuing plea withdrawal on this basis. *See* ***State v. Johnson***, 2012 WI App 21, ¶¶12-13, 339 Wis. 2d 421, 811 N.W.2d 441 (explaining that the circuit court's failure to advise the defendant that the court was not bound by the plea agreement did not affect the validity of the defendant's plea when the defendant received the benefit of the agreement).

The second exception is that, when the circuit court advised Abel that there was a nine-month maximum term for the resisting count, the court omitted the two-year penalty enhancer for the repeater allegation. However, Abel does not claim he was unaware of the enhancer,[3] and the circuit court did not rely on the enhancer when it imposed sentence. Instead, the court imposed the nine-month maximum that the court advised Abel he could receive. In these circumstances, we see no arguable merit to pursuing relief based on the circuit court's failure to advise Abel of the penalty enhancer on the resisting count. *See* ***State v. Taylor***, 2013 WI 34, ¶39, 347 Wis. 2d 30, 829 N.W.2d 482 (concluding that there was no basis for a postconviction hearing based on the circuit court failure to advise the defendant of an enhanced penalty when the defendant was aware of the enhanced penalty and was "verbally informed by the court at the plea hearing of the sentence that he actually received").

[3] The penalty enhancer was referenced in a first and second amended complaint, the information, and the plea questionnaire and waiver of rights form that Abel signed.

The third and final exception is that the circuit court did not provide Abel with the immigration warnings required by WIS. STAT. § 971.08(1)(c). However, in the response that no-merit counsel filed at this court's request, counsel confirms that she consulted with Abel on this potential issue and that Abel is a United States citizen. Accordingly, the lack of immigration warnings is harmless error and would not provide a basis for plea withdrawal. *See* ***State v. Reyes Fuerte***, 2017 WI 104, ¶32, 378 Wis. 2d 504, 904 N.W.2d 773.

The no-merit report next addresses whether there is any arguable basis for Abel to challenge his sentencing. We agree with counsel that there is not. The sentence was within the maximum allowed, and the circuit court discussed the required sentencing factors along with other relevant factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not consider any improper factors.

We address a potential issue relating to the fine that the circuit court imposed. Abel's conviction for operating while intoxicated as a sixth offense carried a minimum fine of $600 and a maximum fine of $25,000. *See* WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)5., and 939.50(1)(g) and (3)(g) (2015-16). The sentencing transcript shows that the circuit court imposed $3212 in total as a "fine," but the record leaves unclear whether this amount includes mandatory costs and fees or reflects an exercise of the court's discretion to impose more than the minimum fine. In the response that no-merit counsel provided at this court's request, counsel explains that the total amount was based on sentencing guidelines and includes mandatory court costs and surcharges. Counsel further explains that Abel does not wish to pursue any issue relating to the fine. Accordingly, we see no basis for further postconviction or appellate proceedings based on the $3212 "fine" amount.

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

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

IT IS FURTHER ORDERED that Attorney Becky Nicole Van Dam is relieved of any further representation of Craig William Abel 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