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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

September 1, 2021

To:

Hon. Peter L. Grimm
Circuit Court Judge
Electronic Notice

Eric Toney
District Attorney
Electronic Notice

Ramona Geib
Clerk of Circuit Court
Fond du Lac County
Electronic Notice

Winn S. Collins
Electronic Notice

Susan E. Alesia
Assistant State Public Defender
Electronic Notice

Michel L. Wortman, #44819
New Lisbon Correctional Inst.
P.O. Box 2000
New Lisbon, WI 53950-2000

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

2020AP34-CRNM State of Wisconsin v. Michel L. Wortman (L.C. #2017CF344)

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

Michael L. Wortman appeals from a judgment of conviction for one count of operating a motor vehicle while under the influence of an intoxicant (OWI) as a tenth or subsequent offense, contrary to WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)7. (2019-20).¹ Wortman's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v.*

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

California, 386 U.S. 738 (1967). Wortman has filed a response in which he claims entitlement to additional sentence credit. Upon consideration of the no-merit report and Wortman's response, and following an independent review of the record as mandated by *Anders* and RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal and we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21(1).

An amended Information charged Wortman with tenth-offense OWI as well as operating a motor vehicle with a prohibited alcohol concentration as a tenth offense (PAC) and operating after revocation (OAR). The criminal complaint identified a citizen informant and alleged that both the informant and officer Eric Halbach had witnessed Wortman operating a motor vehicle. Upon making contact with Wortman, officers detected indicia of intoxication and administered a preliminary breath test (PBT) that showed Wortman's alcohol level in a prohibited range.

Following his arraignment and waiver of the preliminary hearing, Wortman filed a motion to suppress evidence, asserting that (1) he was seized without reasonable suspicion; (2) regardless, the seizure was the functional equivalent of an arrest, for which officers lacked probable cause; and (3) he had been subjected to custodial interrogation without being given *Miranda* warnings.² After a two-day evidentiary hearing, the circuit court determined that the seizure was lawful and that suppression was not warranted.

² *See Miranda v. Arizona*, 384 U.S. 436 (1966).

Following the denial of his suppression motion, Wortman entered a no contest plea³ to tenth-offense OWI pursuant to an agreement with the State. The PAC and OAR charges were dismissed and read in. The State agreed to recommend five years of initial confinement and take no position on extended supervision or Wortman's eligibility for the substance abuse program. After conducting a plea colloquy and accepting Wortman's plea, the court immediately proceeded to sentencing, imposing a twelve-year sentence consisting of seven years' initial confinement and five years' extended supervision, consecutive to any other sentence.

At the time of his arrest in the present case, Wortman was on extended supervision in Fond du Lac County case No. 2012CF90 and on probation in Dodge County case No. 2016CT79. Following his arrest, he was placed on a hold and ultimately revoked in both cases. The circuit court in the present case granted seven days' sentence credit for the time Wortman was held in custody between his release from reconfinement on June 4, 2019, and his sentencing on the tenth-offense OWI charge on June 10.⁴ Wortman's pro se motions seeking additional sentence credit in the present case from the date of his arrest were denied.

³ Counsel notes Wortman did not affirmatively state that he was changing his plea to guilty. However, Wortman's intent to change his plea is amply demonstrated by the record. At the plea hearing, Wortman responded in the negative to the circuit court's question about whether his guilty plea was coerced, and he affirmed that he was entering his guilty plea freely and voluntarily. Additionally, the plea agreement recited by his attorney on the record at the plea hearing required Wortman to plead either guilty or no contest. Both the "guilty" and "no contest" boxes were checked on the plea questionnaire and waiver of rights form, and the judgment of conviction indicates a no contest plea. Under the circumstances, we construe Wortman's plea to be one of no contest and we perceive no issue of arguable merit regarding the nature of Wortman's plea.

⁴ The Wisconsin Department of Corrections (DOC) subsequently requested that the circuit court review the sentence credit, asserting Wortman was entitled to only six days' credit. The court declined to modify the judgment. To the extent the court erred by refusing to modify sentence credit at the DOC's behest, the error benefited Wortman and does not create an arguably meritorious issue as to him.

The record discloses no arguably meritorious basis for challenging the validity of Wortman's plea. Wortman completed a plea questionnaire and waiver of rights form that, together with the circuit court's thorough colloquy, advised Wortman of the nature of the charge against him, the elements of the offense, the maximum potential punishment of fifteen years' imprisonment, the mandatory minimum penalty, and the constitutional rights he waived by pleading guilty. The court inquired as to Wortman's education and ability to read and understand the form, and Wortman personally affirmed that his medical conditions did not affect his ability to understand the proceedings. The court advised Wortman that it was not bound by the plea agreement's sentencing recommendation, and Wortman confirmed that his plea would not have deportation consequences and that the complaint set forth an adequate factual basis for the plea. The record shows that the plea was knowingly, voluntarily, and intelligently entered. See WIS. STAT. § 971.08(1); see also *State v. Hampton*, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14; *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986).

The general rule is that a valid no contest plea waives all nonjurisdictional defects and defenses, including constitutional claims. *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886. However, notwithstanding the plea, a defendant may seek appellate review of an order denying his or her motion to suppress evidence or motion challenging the admissibility of his or her statements. WIS. STAT. § 971.31(10). We agree with counsel that the record discloses no arguably meritorious issue arising from the circumstances of the stop, which was prompted by a 911 call from Wortman's passenger who advised dispatch that she was present in a vehicle with a driver who was drunk. The caller, who was pretending to talk to her mother, provided her location and identified the vehicle as a "white GMC Jimmy." An officer observed the suspected

vehicle drive by him and park in a gas station, and he parked behind it. The passenger exited, pointed at Wortman (who was driving), and said, “It’s him, right there.”

The officer made contact with Wortman and noted he had red, glassy eyes and smelled of alcohol. He had Wortman exit the vehicle and remain near it while he interviewed the passenger. Another officer arrived and recognized Wortman, as he had been the arresting officer for Wortman’s ninth-offense OWI. Accordingly, he knew Wortman was subject to a .02 limit. Wortman stated he had one drink and consented to performing field sobriety testing, which showed indicia of impairment. Officers then administered the PBT and placed Wortman under arrest. Based on the facts presented at the evidentiary hearing, we conclude there is no arguable basis for challenging the validity of the stop, *see State v. Rutzinski*, 2001 WI 22, ¶¶13-15, 17-38, 241 Wis. 2d 729, 623 N.W.2d 516, or the admissibility of the statements Wortman made prior to his arrest, *see State v. Lonkoski*, 2013 WI 30, ¶¶27-28, 346 Wis. 2d 523, 828 N.W.2d 552.

The record discloses no issue of arguable merit regarding the circuit court’s exercise of sentencing discretion. *See State v. Gallion*, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. The court considered the nature of the offense, Wortman’s character, and the need to protect the public, with the court stating that the last factor’s importance was “sky high.” The court added that nothing—not even Wortman’s poor health—had prevented him from continuing to drive while intoxicated, and the consequences for other motorists could be fatal. As aggravating factors, the court noted Wortman had a passenger in his vehicle and was traveling on a busy highway. The twelve-year sentence was within the maximum provided by law, *see WIS. STAT. § 939.50(2)(e)*, and was not so excessive or disproportionate to the offense to warrant relief under *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In his response to the no-merit report, Wortman contends that he is entitled to sentence credit in the present case from the date of his arrest—June 20, 2017—to the date of his sentencing—June 10, 2019. We agree with counsel that Wortman is not entitled to additional sentence credit. The revocation order dated December 1, 2017, imposed a period of reconfinement in the earlier cases, thereby severing any connection between Wortman’s custody and the current offense until his period of reconfinement ended on June 4, 2019. See *State v. Beets*, 124 Wis. 2d 372, 378, 369 N.W.2d 382 (1985). Wortman received credit in the present case for his confinement between June 4 and June 10, 2019. The revocation order shows that Wortman received credit on his sentence in case No. 2016CT79 for the days he spent in custody between his arrest in the present case and the date of the revocation order. Because his sentence in the present case was ordered to be served consecutively to any other sentence, Wortman is not entitled to dual credit. See *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). Our independent review of the record discloses no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Susan E. Alesia is relieved of her obligation to further represent Michael L. Wortman in this matter. 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