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**DISTRICT II**

March 16, 2022

*To*:

Hon. Phillip A. Koss
Circuit Court Judge
Electronic Notice

Kristina Secord
Clerk of Circuit Court
Walworth County Courthouse
Electronic Notice

John Blimling
Electronic Notice

Zeke Wiedenfeld
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Kyle T. Helgeland
N277 Thunderbird Dr.
Genoa City, WI 53128

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

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2021AP567-CR State of Wisconsin v. Kyle T. Helgeland (L.C. #2017CF289)

Before Gundrum, P.J., Neubauer and Kornblum, 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).**

Kyle T. Helgeland, pro se, appeals from an order of the circuit court denying his motion to commute his sentence. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We summarily affirm.

On June 26, 2017, the State charged Helgeland with operating a motor vehicle while intoxicated (OWI) as a sixth offense. An amended information added one charge of operating

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

with a prohibited alcohol concentration as a sixth offense. According to the charging documents, on June 23, 2017, Lake Geneva police encountered Helgeland after he was involved in a hit-and-run accident. The officers observed that Helgeland smelled of intoxicants, had bloodshot and glassy eyes, slurred speech, and impaired balance. Helgeland told police that he "needed a ride because he had 'drank too much alcohol.'" Helgeland refused to submit to a preliminary breath test or perform standard field sobriety tests. An eventual blood test revealed Helgeland's blood alcohol concentration to be .289. The charging documents also stated that Helgeland had previously been convicted of five operating while intoxicated offenses, one of which occurred in Illinois on November 30, 2012.

Helgeland pled guilty to one count of OWI as a sixth offense. As relevant to this appeal, the presentence investigation report (PSI) discussed Helgeland's prior convictions, including the Illinois OWI conviction which stemming from a reckless driving offense. According to the PSI, the Illinois offense was Helgeland's fourth. The PSI stated that "[a]lcohol was suspected, but the defendant refused to take a test and therefore it was counted as 'failure to take a test to detect alcohol' and factored in to the number of times he received an OWI. The defendant was sentenced to 1 year special condition discharge and 60 days in jail." The circuit court sentenced Helgeland to forty-two months of initial confinement followed by five years of extended supervision.

Helgeland, pro se, filed a postconviction motion to "vacate, set aside or correct [his] sentence," arguing that that the Illinois conviction should not have counted as a prior OWI offense because Illinois law "does not count a reckless driving conviction as a 'prior offense' for purposes of OWI sentence enhancement." The postconviction court denied the motion without a hearing, stating that the "[Illinois] offense included an Implied Consent violation, a countable

violation for purposes of the matter at hand." Helgeland moved for reconsideration, arguing that the postconviction court failed to consider ***State v. Jackson***, 2014 WI App 50, 354 Wis. 2d 99, 851 N.W.2d 465, in which this court held that an Illinois reckless driving conviction was not a countable conviction under Wisconsin's OWI statute. The postconviction court denied the motion.

Helgeland, pro se, then filed the "Motion to Commute [his] Sentence" that underlies this appeal. Helgeland again argued that ***Jackson*** prohibited the circuit court from considering the Illinois conviction when sentencing him. The postconviction court denied the motion. This appeal follows.

On appeal, Helgeland again contends that the circuit court erroneously considered his Illinois conviction when rendering his sentence. As discussed, Helgeland has raised this exact issue three times with the postconviction court. The postconviction court rejected each motion raising this issue, finding that the Illinois conviction was not a conviction for reckless driving, but an implied consent violation. Helgeland's implied consent violation to be a countable offense. Accordingly, the issue is procedurally barred. As this court explained in ***State v. Witkowski***, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991), "[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue."

Moreover, Helgeland's legal argument is simply wrong. WISCONSIN STAT. § 343.307(1)(d), as relevant here, provides that a court "shall count" "[c]onvictions under the law of another jurisdiction that prohibits a person from refusing chemical testing," i.e., an implied consent violation. *See* WIS. STAT. § 343.305(10). Therefore, while Helgeland is correct that the

Illinois *reckless driving* statute does not include the characteristics of a countable offense under WIS. STAT. § 343.307, Helgeland's *implied consent* violation−stemming from the same conduct−is a countable offense.

Finally, to the extent Helgeland challenges his actual sentence, we note that the penalty for a fifth violation of the OWI statute is the same as the penalty for a sixth offense, as both are class G felonies. *See* WIS. STAT. § 346.65(2)(am)5. Helgeland's sentence is within the statutory maximum possible for either a fifth or sixth-offense OWI. *See* WIS. STAT. § 973.01(2)(b)7., (2)(d)4. Thus, regardless of whether Helgeland was sentenced for a fifth or sixth OWI offense, he would not be entitled to relief under WIS. STAT. § 973.13.

For the foregoing reasons, we affirm the order denying Helgeland's motion to commute his sentence.

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

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*