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DISTRICT I

August 9, 2022

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Ashley T. Sifuentes
1953 S. 19th. St.
Milwaukee, WI 53215

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

2021AP112-CRNM State of Wisconsin v. Ashley T. Sifuentes (L.C. # 2018CF6106)

Before Brash, C.J., Dugan and White, 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).

Ashley T. Sifuentes appeals from a judgment, entered on her no contest plea, convicting her on one count of injury by intoxicated use of a vehicle. Appellate counsel, Mark A. Schoenfeldt, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Sifuentes was advised of her right to file a response, but she has not responded. Upon this court's independent review of the record, as mandated by

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

Anders, and counsel's report, we conclude there are no arguably meritorious issues that could be pursued on appeal. We, therefore, summarily affirm the judgment.

On November 4, 2018, Milwaukee police were dispatched to a traffic accident with injury on North Water Street. Based on the scene, it appeared that a Ford Explorer had been driving the wrong way on State Street and hit a Kia Forte. The passenger in the Forte had to be extracted with the Jaws of Life and suffered a broken tibia and fibula.

Sifuentes had been driving the Explorer. She admitted she had driven her vehicle the wrong way, explaining that she had observed other vehicles in front of her making the same turn. Police detected an odor of alcohol. Sifuentes agreed to field sobriety tests, and was unable to follow the stimulus in the horizontal gaze nystagmus test. A preliminary breath test showed an alcohol concentration of .089. A subsequent blood test returned at .101.

Sifuentes was charged with one count of injury by an intoxicated use of a motor vehicle by operating while under the influence and one count of injury by intoxicated use of a vehicle with a prohibited alcohol concentration. *See* WIS. STAT. § 940.25(1)(a), (b). She agreed to resolve her case with a plea. In exchange for Sifuentes's plea to injury by intoxicated use while under the influence and payment of restitution, the other count would be dismissed[2] and the State would recommend a sixty-month prison sentence to be imposed and stayed for three years of probation. The circuit court accepted a plea from Sifuentes; additional details regarding the plea process will be discussed herein. A presentence investigation report (PSI) was prepared. The

[2] All parties were aware that while the State was permitted to charge violations of both WIS. STAT. § 940.25(1)(a) and (b), as a matter of law there can only be a single conviction for purposes of sentencing and counting convictions. *See* WIS. STAT. § 940.25(1m)(a)-(b).

circuit court ultimately imposed and stayed a bifurcated four-year prison sentence in favor of three years of probation, with 100 days to be served upfront with Huber privileges and 100 days available at the probation agent's discretion.[3] Sifuentes appeals.

Appellate counsel first discusses whether Sifuentes's plea was "knowingly and voluntarily given." We observe that there was some confusion during the plea colloquy, which is not discussed in the no-merit report. The circuit court initially proceeded as though Sifuentes was entering a guilty plea; however, the "no contest" box had been marked on the plea questionnaire form, which defense counsel later explained was "for civil liability purposes." When the circuit court realized it was a no contest plea and not a guilty plea, it paused and explained to Sifuentes that the warnings already given to her applied to a no contest plea as well as a guilty plea, and it explained that the no contest plea would result in the court finding Sifuentes guilty. Sifuentes acknowledged her understanding, and the State agreed that it would accept a no contest plea.

In addition, Sifuentes's attorney had reviewed the elements of her offense with her by using WIS JI—CRIMINAL 1263. However, that is the instruction for injury by operation of a vehicle with a prohibited alcohol concentration; WIS JI—CRIMINAL 1262 is the instruction for injury by operation of a vehicle while under the influence, which is what Sifuentes was supposed to be pleading to. When the circuit court began to review the elements of the offense with Sifuentes and turned to the provided instructions, it pointed out the error to the parties.

[3] In April 2020, in the early days of the COVID-19 pandemic, Chief Judge Mary E. Triggiano entered an order modifying the terms of probation for certain individuals, including Sifuentes, who were in the process of serving conditional jail time. The order stayed any remaining up-front time, converted it to time to be used at probation agents' discretion, and ordered the defendants released from jail as soon as possible.

However, the State agreed that Sifuentes could plead to the prohibited alcohol concentration charge instead and it would dismiss the under the influence charge, explaining that "[i]t's the same charge, essentially." *See* WIS. STAT. § 940.25(1m). The circuit court then proceeded with the corrected information and completed the plea colloquy.

Our review of the record—including the plea questionnaire and waiver of rights form and addendum, attached jury instruction, and plea hearing transcript—and of counsel's no-merit report confirms that the circuit court complied with its obligations for taking guilty pleas (no contest pleas), pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. It noted two discrepancies between the parties' oral representations and the documentation and took appropriate steps to clarify the information and verify Sifuentes's understanding. We, therefore, agree with appellate counsel's conclusion that there is no arguable merit to claiming Sifuentes's plea was anything other than knowing, intelligent, and voluntary.

The next issue appellate counsel discusses is whether the "[t]he factual basis for the pled to charges was sufficient." As part of the plea colloquy process, a circuit court must ascertain whether a factual basis exists to support the plea. *See* ***Brown***, 293 Wis. 2d 594, ¶35. Here, Sifuentes agreed that the circuit court could rely on the criminal complaint to supply the factual basis. Our review of the record satisfies us that the no-merit report properly analyzes this issue as without arguable merit.

The third issue appellate counsel addresses is whether the trial court properly exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. We will sustain

the circuit court's exercise of discretion if the conclusion reached was one that a reasonable judge could reach, even if this court or another court might have imposed a different sentence. *See* ***State v. Odom***, 2006 WI App 145, ¶8, 294 Wis. 2d 844, 720 N.W.2d 695. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. We also note that the imposed and stayed four-year sentence is well within the twelve and one-half-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The three-year term of probation is also within the range permitted by law. *See* WIS. STAT. § 973.09(2)(b)1. Thus, this court is satisfied that the no-merit report properly analyzes this issue as without arguable merit.

Finally, appellate counsel addresses whether Sifuentes was denied the effective assistance of trial counsel. We agree with the analysis in the no-merit report that the record offers no support for an arguably meritorious ineffective assistance of counsel claim.[4]

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

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[4] We observe that the PSI indicated Sifuentes's offense involved a passenger under the age of 16; however, there is no such allegation within the criminal complaint. Further, while it appears from the record as a whole that Sifuentes may indeed have had a passenger, there is nothing in the record that establishes the passenger's age. Neither defense counsel, nor the State asked for a correction to the report. Nevertheless, there is no arguably meritorious issue—such as a claim of sentencing on incorrect information—as neither the State nor the circuit court made any mention of any passenger in Sifuentes's vehicle.

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved of further representation of Sifuentes 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