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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 IV

December 15, 2022

To:

Hon. John M. Wood
Circuit Court Judge
Electronic Notice

Jacki Gackstatter
Clerk of Circuit Court
Rock County Courthouse
Electronic Notice

Winn S. Collins
Electronic Notice

Patricia Sommer
Electronic Notice

David Lee Dutcher 296905
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:

2021AP1557-CRNM State of Wisconsin v. David Lee Dutcher (L.C. # 2019CF443)

Before Kloppenburg, Fitzpatrick, and Graham, 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).

Attorney Patricia Sommer, appointed counsel for David Lee Dutcher, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20)¹; *Anders v. California*, 386 U.S. 738, 744 (1967). Dutcher was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit

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

report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Dutcher was charged with operating a motor vehicle while intoxicated (OWI) as a seventh offense, and two counts of misdemeanor bail jumping. Pursuant to a plea agreement, Dutcher pled guilty to OWI as a seventh offense; the remaining counts plus the charges in the two other pending cases were dismissed and read-in for sentencing purposes; and the parties jointly recommended a sentence of four years of initial confinement and four years of extended supervision, concurrent with a sentence Dutcher was currently serving, and a \$700 fine, plus costs. The circuit court followed the joint sentencing recommendation. The court granted Dutcher 104 days of sentence credit, on counsel's stipulation. The court found Dutcher ineligible for the Challenge Incarceration Program, but eligible for the Substance Abuse Program.

The no-merit report addresses whether there would be arguable merit to a challenge to the validity of Dutcher's plea. See *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906 (post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary). We were unable to determine from the record and the no-merit report whether it would be wholly frivolous to argue that the circuit court failed to comply with its plea colloquy duties by failing to establish that Dutcher understood the elements of operating while intoxicated. See *State v. Brandt*, 226 Wis. 2d 610, 619, 594 N.W.2d 759 (1999) (explaining that the circuit court's colloquy duties include that the court "determine that the plea is made voluntarily with understanding of the nature of the charge," and that "a defendant's understanding of the nature of the charge must 'include an awareness of the essential elements of the crime'" (quoted sources

omitted)); *State v. Bangert*, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986) (if a postconviction motion for plea withdrawal identifies a defect in the plea hearing and alleges that the defendant did not understand the information that should have been provided, the defendant is entitled to an evidentiary hearing). We requested further input from counsel as to whether there would be arguable merit to a postconviction motion for plea withdrawal. Counsel then informed us that counsel consulted with Dutcher, and that Dutcher does not wish to pursue the issue we identified. Our review of the record indicates that the circuit court otherwise complied with its mandatory duties at the plea hearing. See *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal.

The no-merit report also addresses whether there would be arguable merit to a challenge to Dutcher's sentence. We agree with counsel that this issue lacks arguable merit. Because Dutcher received the sentence he affirmatively approved, he is barred from challenging the sentence on appeal. See *State v. Scherreiks*, 153 Wis. 2d 510, 517-18, 451 N.W.2d 759 (Ct. App. 1989). We discern no other basis to challenge the sentence imposed by the circuit court.

Finally, the no-merit report notes that counsel filed a motion for plea withdrawal on Dutcher's behalf but that Dutcher voluntarily withdrew the motion after a postconviction motion hearing. We agree that further proceedings based on the withdrawn postconviction motion would lack arguable merit.

Upon our independent review of the record, we have found no other basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Patricia Sommer is relieved of any further representation of David Lee Dutcher 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