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DISTRICT III

February 7, 2023

To:

Hon. Melissa R. Mogen
Circuit Court Judge
Electronic Notice

Jacqueline O. Baasch
Clerk of Circuit Court
Burnett County Courthouse
Electronic Notice

Winn S. Collins
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Russell E. Towle 456971
Kettle Moraine Correctional Inst.
P.O. Box 282
Plymouth, WI 53073-0282

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

2021AP488-CRNM State of Wisconsin v. Russell E. Towle (L. C. No. 2018CF188)

Before Stark, Hruz and Gill, 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).

Russell Towle appeals from a judgment convicting him of a tenth or subsequent offense of operating a motor vehicle under the influence of an intoxicant (OWI-tenth). Attorney Melissa Petersen has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20).¹ The no-merit report sets forth the procedural history of the case, addresses the validity of Towle's plea and sentence, and discusses whether there was any basis

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

for a suppression motion. Towle has filed a response to the no-merit report alleging that his trial counsel failed to obtain a squad car video, that his trial counsel would “not allow” him to go to trial, and the circuit court improperly denied a motion to withdraw made by Towle’s third attorney. Petersen has filed a supplement to her no-merit report addressing Towle’s claims. Having independently reviewed the entire record as mandated by *Anders v. California*, 386 U.S. 738, 744 (1967), we conclude that appellate counsel will be allowed to withdraw and the judgment shall be summarily affirmed.

According to the amended complaint, after emergency medical service (EMS) technicians responded to a report that Towle was slumped over the steering wheel of his parked car, Towle drove off with EMS equipment still dangling from his car and led law enforcement on a high-speed chase. Towle ultimately ran his car into a tree and fled on foot before law enforcement officers apprehended him. The officers observed evidence of intoxication, recovered several items of contraband during a search incident to arrest, and obtained a blood sample, pursuant to a search warrant. As a result, the State charged Towle with attempting to flee an officer, OWI-tenth, criminal damage to property, possession of THC, possession of drug paraphernalia, operating a motor vehicle after operating privileges were revoked, a tenth or subsequent offense of operating a motor vehicle with a prohibited blood alcohol concentration, and failure to install an ignition interlock device.

The Office of the State Public Defender appointed two attorneys for Towle before Towle retained a third attorney, Mark Biller. Biller moved to withdraw at Towle’s request approximately two months before the scheduled trial date. The circuit court denied the motion, finding that it was prompted not by a breakdown of the relationship between Towle and Biller but, rather, by the fact that Towle “just doesn’t like the [current] plea offer” being offered to him

The court further determined that Towle sought “to delay this matter” and “disrupt the order of this process,” and the court warned Towle that he would forfeit his right to counsel if he discharged another attorney.

Towle eventually pled guilty to the OWI-tenth count. In exchange, the State agreed to the dismissal of the remaining counts as read-in offenses, with the parties free to argue at sentencing. The circuit court accepted Towle’s plea after conducting a plea colloquy and reviewing Towle’s signed plea questionnaire with an attached jury instruction.

The circuit court subsequently held a sentencing hearing at which the State recommended the maximum sentence of ten years’ initial confinement followed by five years’ extended supervision, plus substantial restitution. Towle sought the statutory minimum sentence of four years’ initial confinement with an unspecified amount of extended supervision and he asserted an inability to pay the requested amount of restitution. After hearing from the parties, the court discussed proper sentencing factors, including the gravity of the OWI and the read-in offenses; Towle’s alcoholism, extensive criminal history, and minimization of his conduct; and the need to protect the public from drunk drivers. The court then sentenced Towle to seven years’ initial confinement followed by five years’ extended supervision and it imposed statutory costs and fines. At a separate hearing, the court determined that Towle caused \$29,291.48 in damage to the EMS equipment and that Towle had the ability to pay \$500 per month in restitution, given his approximately \$900 monthly income from tribal payments and lack of expenses while in prison.

Upon reviewing the record, we agree with counsel’s description, analysis, and conclusions that the plea colloquy was adequate, that the circuit court properly exercised its sentencing discretion, and that the record shows no grounds for a suppression motion. We

therefore will not discuss those issues further. We will briefly address why the claims Towle raises in his response to the no-merit report also lack arguable merit.

First, Towle's contention that his trial counsel should have obtained the squad car video fails because there is no evidence that any squad car video exists. In addition to ascertaining that there was no reference to any squad car video in the law enforcement file, trial counsel spoke directly to the deputies involved in the incident and learned that there were no dashboard cameras in their squad cars.

Second, Towle's assertion that Biller would "not allow" him to go to trial is conclusory and insufficient to warrant a postconviction hearing because Towle does not identify any improper statements or actions that Biller took to prevent Towle from going to trial. It was Biller's responsibility to recommend that Towle accept a plea agreement if Biller believed that doing so was in Towle's best interest, and it was Towle's decision whether or not to follow that advice. Moreover, the plea colloquy and plea questionnaire demonstrate that Towle knowingly and voluntarily chose to enter a plea, which substantially reduced his sentence exposure.

Third, the record does not support Towle's claim that the circuit court should have granted Biller's motion to withdraw as counsel. There are three factors to consider in evaluating whether a circuit court properly denied a motion for the withdrawal and substitution of counsel:

- (1) the adequacy of the court's inquiry into a defendant's complaint;
- (2) the timeliness of the motion; and
- (3) whether the alleged conflict between a defendant and his [or her] attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

State v. Wanta, 224 Wis. 2d 679, 702-03, 592 N.W.2d 645 (Ct. App. 1999) (citation omitted).

Here, the circuit court inquired into the reasons for the withdrawal request and found that Towle had no valid complaint as to Biller's representation or the adequacy of the communication between Towle and Biller. The court also properly noted that the scheduled trial date was approaching and would be unreasonably delayed if Biller were allowed to withdraw. In addition, Towle's pattern of discharging multiple attorneys in his past cases supported the court's conclusion that the motion was brought for the purpose of delay and would frustrate the orderly progression of the case if granted.

Our independent review of the record discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders*. Accordingly, counsel shall be allowed to withdraw, and the judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Melissa Petersen is relieved of any further representation of Russell Towle in this matter pursuant to 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