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DISTRICT I

February 28, 2023

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
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David Malkus
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Kenneth June Cook
Boland Hall - 2145 Spring St.
WI Veterans Home at Union Grove
Union Grove, WI 53182

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

2020AP1645-CRNM State of Wisconsin v. Kenneth June Cook (L.C. # 2017CF4026)

Before Brash, C.J., Donald, P.J., and White, J.

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).

Kenneth June Cook appeals from his judgment of conviction, entered after he pled guilty to operating while intoxicated (OWI) as a seventh offense. His appellate counsel filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Cook was advised of his right to file a response, but did not do so. Upon this court's

[1] The no-merit report was filed by Attorney Leon W. Todd. On January 7, 2021, Attorney David Malkus was substituted as counsel for Cook and now represents Cook in this appeal.

All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, in August 2017, officers from the Marquette University Police Department observed a BMW parked on the side of 19th Street in Milwaukee; it was running with loud music playing, but no one was inside the vehicle. The officers then saw Cook approximately thirty feet away, urinating on a fence. They confirmed Cook's identity and discovered he had six prior OWI convictions, and was subject to a .02 blood alcohol content restriction.

The officers observed that Cook had glassy, bloodshot eyes and slurred speech, and smelled of alcohol. They also saw an open can of beer in Cook's vehicle. The officers advised Cook to leave his car parked on the street and call for a ride. They further warned Cook that a surveillance camera in the area would show whether Cook got a ride from someone else or drove himself home.

A short time later, a communications officer who was watching the surveillance video feed observed a Nissan Altima pull up behind Cook's BMW. That officer saw the driver of the Altima get into the driver's seat of the BMW, and Cook get into the driver's seat of the Altima. Both vehicles then drove away.

The communications officer alerted the officers who had first made contact with Cook, who then performed a traffic stop of Cook as he was driving the Altima. Cook performed poorly on field sobriety tests that were given, and provided a preliminary breath test which registered .04. He was arrested and charged with OWI as a seventh, eighth, or ninth offense.

Cook filed a motion to suppress, arguing that the officers did not have reasonable suspicion for the traffic stop of Cook when he was driving the Altima. At a hearing on that motion, the trial court heard testimony from one of the arresting officers, and the court deemed the officer's testimony credible. The court determined that based on the totality of the circumstances, which included the officers' initial contact with Cook, the traffic stop was valid.

Cook subsequently chose to resolve this matter with a plea. The State agreed to recommend a sentence of three years of initial confinement—which was the mandatory minimum term of initial confinement for this charge—followed by two years of extended supervision. *See* WIS. STAT. § 346.65(2)(am)6. (2017-18). The trial court followed that recommendation. This no-merit appeal follows.

Appellate counsel address three issues in the no-merit report: whether the trial court erred in denying Cook's motion to suppress; whether there is a basis for Cook to withdraw his guilty plea because it was not knowingly, voluntarily, and intelligently entered, or because it was not supported by a factual basis; and whether the trial court erroneously exercised its discretion in sentencing Cook.

We first consider whether Cook could pursue a meritorious argument that the trial court erroneously denied his motion to suppress after determining that there was reasonable suspicion for the stop. "An investigatory stop is constitutional if the police have reasonable suspicion that a crime has been committed, is being committed, or is about to be committed." ***State v. Young***, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729. "When determining if the standard of reasonable suspicion was met, those facts known to the officer at the time of the stop must be taken together with any rational inferences, and considered under the totality of the

circumstances." ***State v. Washington***, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305.

The totality of the circumstances here include those from the officers' initial encounter with Cook, where he was urinating in public, smelled of intoxicants, and had an open beer in his vehicle. They also include the communications officer's observations from the video surveillance feed of Cook driving away in his friend's vehicle after being advised to call for a ride. Based on these facts, we agree with appellate counsel that there is no arguable merit to a claim that the trial court erred in denying Cook's motion to suppress. *See* ***id.***

The next issue addressed by appellate counsel is whether there is an arguably meritorious claim for plea withdrawal. There is a constitutional requirement that a guilty plea be "affirmatively shown" to be knowing, voluntary, and intelligent. ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). To ensure that this requirement is met, the trial court must engage the defendant in a personal colloquy, during which the court must fulfill certain duties to ascertain the defendant's understanding of the charge against him or her, and the constitutional rights that are waived upon entering a plea. ***State v. Brown***, 2006 WI 100, ¶¶28-29, 35, 293 Wis. 2d 594, 716 N.W.2d 906. If these duties are not fulfilled, the defendant may move to withdraw his or her plea. ***Id.***, ¶36.

The record reflects that the trial court stated that it would accept the facts in the criminal complaint as a factual basis for Cook's plea; the State stipulated, and the defense did not object. We therefore agree with appellate counsel that there is no issue of arguable merit regarding the factual basis for the plea.

However, in the no-merit report appellate counsel identifies areas where the trial court did not fully perform its required duties during the plea colloquy. Specifically, the court confirmed with Cook's counsel that he had reviewed the elements of the charge with Cook, but did not verify the specific elements that were reviewed. *See* ***id.***, ¶35. Furthermore, the court did not verify that there had been no promises or threats made to induce Cook to enter his plea. *See* ***id.***[2]

Nevertheless, Cook completed a plea questionnaire and waiver of rights form, in which he acknowledged that the elements of the charge had been explained by his attorney, and stated that there were no promises or threats made to him to induce the plea. Although not a substitute for a colloquy, the plea questionnaire and waiver of rights form "lessen[s] the extent and degree of the colloquy otherwise required between the trial court and the defendant[.]" ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation omitted).

Furthermore, appellate counsel points out that in order to demonstrate an arguable basis for seeking plea withdrawal due to these errors and omissions, Cook would have to allege that he did *not* in fact understand the information that should have been provided at the plea hearing. *See* ***Bangert***, 131 Wis. 2d at 274. Appellate counsel represents that, for reasons outside the

[2] Appellate counsel further notes that the trial court's description of the penalty relating to the term for the revocation of Cook's driver's license was "somewhat unclear"; however, the minimum revocation term and the interlock requirement were also discussed earlier in the proceedings, as well as being included in the plea questionnaire and waiver of rights form. Additionally, appellate counsel points out that the trial court's warning regarding deportation deviated from the requirements of WIS. STAT. § 971.08(1)(c). However, minor deviations from the statutory language do not undermine the validity of the plea. *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173. Furthermore, before a defendant could seek plea withdrawal based on the failure to comply with § 971.08(1)(c), the defendant must show "that the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization[.]" Sec. 971.08(2). There is nothing in the record to suggest that Cook could make such a showing.

record, he is not able to make any such allegation. Therefore, in the absence of an objection from Cook, we accept this representation by counsel, and agree that there are no issues of arguable merit relating to Cook's plea.

The last issue addressed in the no-merit report is whether there could be arguable merit to a claim that the trial court erroneously exercised its sentencing discretion. The record reflects that the court considered relevant sentencing objectives and factors. *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. Specifically, the trial court discussed the dangers to others posed by intoxicated drivers. It further noted that Cook had been warned by the officers not to drive and was given the chance to make alternative arrangements for a ride home, but he failed to take advantage of that opportunity.

Furthermore, the five-year sentence imposed by the trial court, which included the mandatory three-year minimum term of initial confinement, is well within the maximum sentence of twelve years and six months authorized by law, *see* WIS. STAT. §§ 346.65(2)(am)6., 939.50(3)(f) (2017-18), and thus is not unduly harsh or unconscionable, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Therefore, this court agrees with appellate counsel that there would be no arguable merit to a claim that the trial court erroneously exercised its sentencing discretion.

Our independent review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Cook further in this appeal.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of further representation of Cook 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