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DISTRICT I

April 18, 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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Michelle Ann D'Antonio 641489
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1908-CRNM State of Wisconsin v. Michelle Ann D'Antonio
(L.C. # 2019CF2749)

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).

Michelle Ann D'Antonio appeals from a judgment, entered on her guilty plea, convicting her on one count of operating while intoxicated (OWI) as a sixth offense.[1] Appellate counsel,

[1] The no-merit notice of appeal states that appeal is taken "from a judgment of conviction … and an order determining postconviction relief[.]" However, D'Antonio's postconviction motion, which sought to amend the judgment of conviction to conform to the sentencing transcript, was successful. Because the circuit court granted the relief requested, the postconviction order is not reviewable in D'Antonio's appeal. *See* WIS. STAT. RULE 809.10(4) (2021-22) ("An appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings *adverse to the appellant*[.]"); *see also* ***Tierney v. Lacenski***, 114 Wis. 2d 298, 302, 338 N.W.2d 522 (Ct. App. 1983) (party "must be adversely affected in some appreciable manner" to have standing to appeal).

(continued)

David Malkus, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. D'Antonio 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 ***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 amended judgment.

South Milwaukee police were dispatched to a report of a vehicle accident in a Walmart parking lot. When they arrived, they found D'Antonio slumped over in the driver's seat of the striking vehicle, breathing but unresponsive. Police were able to rouse D'Antonio and observed her to have bloodshot and glassy eyes, difficulty standing, and difficulty answering questions. She denied having anything to drink or taking medication. Officers determined they could not safely perform field sobriety tests and asked D'Antonio if she would consent to a preliminary breath test or a blood draw. She refused. Police obtained a warrant and obtained a blood sample, which reflected a blood-alcohol concentration of .387.

D'Antonio was charged with OWI as a fifth or sixth offense as well as operating with a prohibited alcohol concentration (PAC) as a fifth or sixth offense, both with the "general alcohol concentration enhancer."[2] D'Antonio agreed to resolve the case with a guilty plea to the OWI charge, in exchange for which the State would recommend a sentence of twenty months of initial confinement and twenty months of extended supervision. After the first plea hearing was

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

[2] WISCONSIN STAT. § 346.65(2)(g) doubles, triples, or quadruples the minimum and maximum applicable fines based upon the person's blood-alcohol concentration; D'Antonio's fine was quadrupled.

adjourned, the circuit court ultimately accepted D'Antonio's plea and sentenced her to one year of initial confinement and four years of extended supervision.

As part of the sentence, the circuit court ordered an ignition interlock device be installed on any vehicle owned, titled, or operated by D'Antonio for a period of two years. The original judgment of conviction, however, ordered that the device be installed for three years. D'Antonio filed a postconviction motion seeking to conform the judgment to the circuit court's oral pronouncement. The circuit court granted the motion and an amended judgment was entered. D'Antonio appeals.

The no-merit report discusses two potential issues, the first of which is whether there is any arguable merit to challenging the validity of D'Antonio's plea. Our review of the record—including the plea questionnaire and waiver of rights form and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, 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.

In particular, we note that the circuit court reviewed not only the mandatory minimum term of incarceration that D'Antonio faced, but also the mandatory minimum enhanced fine and the minimum terms for an ignition interlock device and driver's license revocation. We also observe that the first plea hearing was adjourned when D'Antonio expressed concern over whether one of her prior offenses, an "implied consent" from Massachusetts, was countable as a prior offense; that was resolved between the parties before the second plea hearing.

At the second plea hearing, when the circuit court explained to D'Antonio that one element the State would have to prove was that she was operating "on a highway," D'Antonio

questioned the element because she was not on a "highway" but, rather, in a parking lot. The circuit court asked defense counsel "to shed some light on that[.]" Counsel replied, "It was in a parking lot. There were other cars. The parking lot was open to the public, *which I do believe is what defines a highway*. It wasn't a private parking lot or anything that prevented anyone from getting access, it was open to the public." (Emphasis added.)

Operating a motor vehicle while intoxicated is prohibited by WIS. STAT. § 346.63. Chapter 346 "applies exclusively upon highways except as otherwise expressly provided[.]" WIS. STAT. § 346.02(1). A "highway" includes "all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel." *See* WIS. STAT. § 340.01(22); *see also* 346.01(1m). A highway "does not include public parking lots." *See* ***County of Grant v. Vogt***, 2014 WI 76, ¶46, 356 Wis. 2d 343, 850 N.W.2d 266 (citing 65 Wis. Op. Att'y Gen. 45 (1976). Counsel's explanation, that the parking lot is a highway, was therefore incorrect.

However, WIS. STAT. § 346.61 has "otherwise expressly provided" that § 346.63 applies to "all premises held out to the public for use of their motor vehicles[.]" The test for whether premises are held out to the public "is whether, on any given day, potentially any resident of the community with a driver's license and access to a motor vehicle could use the parking lot in an authorized manner." ***City of La Crosse v. Richling***, 178 Wis. 2d 856, 860, 505 N.W.2d 448 (Ct. App. 1993); *cf.* ***City of Kenosha v. Phillips***, 142 Wis. 2d 549, 551-52, 419 N.W.2d 236 (1988) (holding that an OWI charge could not lie because a parking lot, which had signs posted that it was for employees only and violators would be towed, was not "held out to the public" for use).

D'Antonio was satisfied with counsel's explanation and continued with her plea. Although counsel's explanation was not entirely accurate, it was substantively correct in its explanation that the OWI statute applies to D'Antonio in this case because the parking lot in question was held out for public use without restriction. Consequently, we are satisfied that D'Antonio had a proper understanding of the charges against her and that there was a sufficient factual basis for the plea. On the entirety of the record, there is no arguable merit to a claim that D'Antonio's plea was invalid, or anything other than knowing, intelligent, and voluntary.

The other issue addressed in the no-merit report is whether the circuit 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. Our review of the record confirms that the court appropriately considered relevant sentencing objectives and factors. The five-year sentence is well within the ten-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). Thus, this court is satisfied that the no-merit report properly analyzes this issue as without arguable merit.

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.

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of further representation of D'Antonio 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