OFFICE OF THE CLERK
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 I

February 5, 2013

To:

Hon. Glenn H. Yamahiro
Circuit Court Judge
Children's Court Center, # 2410
10201 W. Watertown Plank Road
Milwaukee, WI 53226-3532

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

J. Dennis Thornton
Attorney at Law
1442 N. Farwell Ave. Ste. 505
Milwaukee, WI 53202-2913

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Dusan Dragisich 124181
Chippewa Valley Correctional Treatment Facility
2909 E. Park Ave.
Chippewa Falls, WI 54729

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

2012AP450-CRNM State of Wisconsin v. Dusan Dragisich (L.C. #2010CF4265)

Before Curley, P.J., Fine and Kessler, JJ.

Dusan Dragisich appeals from a judgment of conviction, entered upon the circuit court's verdict, on one count of operating a motor vehicle while intoxicated (OWI) as an eighth offense. Appellate counsel, J. Dennis Thornton, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Dragisich was

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

advised of his right to file a response and has filed multiple responses.[2] Counsel submitted a supplemental no-merit report. Upon this court's independent review of the record as mandated by ***Anders***, counsel's reports, and Dragisich's responses, we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

A city of West Allis police officer observed a black pickup truck driving the wrong way down a posted one-way street. The officer activated his lights but the truck did not stop. Instead, it accelerated slightly and drifted across the center of the roadway for about a block. The officer then activated his siren, and the truck pulled over. The officer noticed an extremely strong odor of intoxicants on the driver, who was identified as Dragisich. The officer observed that Dragisich's eyes were red and glassy, that Dragisich had slurred speech, and that Dragisich appeared tired. Dragisich was also unable to successfully complete field sobriety tests. A blood draw would later reveal that Dragisich had a blood-alcohol concentration of .308%.

The criminal complaint charged Dragisich with OWI as an eighth offense.[3] Four of his prior offenses were based on convictions from Illinois. Dragisich moved to exclude those offenses from the count, which would have reduced the current OWI to a fourth offense. The circuit court denied the motion after a hearing. Dragisich then stipulated to a series of facts and waived his right to a jury trial. Based on the stipulated facts, the circuit court found Dragisich

[2] Dragisich provided one main response and five supplemental responses.

[3] The information, filed after the blood test results were provided, added a charge of operating a motor vehicle with a prohibited alcohol concentration (PAC). We do not discuss this extra offense further, because while WIS. STAT. § 346.63(1)(c) permits both OWI and PAC charges to be brought for the same offense, only a single conviction per incident or occurrence is permitted.

guilty of OWI as an eighth offense and sentenced him to four and one-half years' initial confinement and four and one-half years' extended supervision.

Counsel has identified eight potential issues. Dragisich, though he has submitted six responses, raises essentially one main issue—specifically, he renews his collateral challenges to his prior Illinois convictions.

The Complaint and Initial Appearance

Counsel's first two issues go to preliminary matters: whether the complaint sufficiently stated probable cause, and whether the complaint was timely issued and the initial appearance was timely held. Our review of the complaint satisfies us that it sufficiently states probable cause, and our review of the record satisfies us that the complaint and initial appearance were timely. There is no issue of arguable merit regarding the complaint or initial appearance.

Prior Illinois Convictions

The next issue, which both counsel and Dragisich address, is whether there is any arguable merit to a claim that the circuit court erred when it refused to exclude Dragisich's prior Illinois convictions from the total count. We conclude there is not.

Wisconsin has an "accelerated penalty structure" for OWI offenses, based on the number of certain prior convictions as described in WIS. STAT. § 343.307(1). *See* ***State v. Carter***, 2010 WI 132, ¶3, 330 Wis. 2d 1, 794 N.W.2d 213. Section 343.307(1) "sets forth the criteria used to

determine whether prior conduct may be used to calculate a defendant's prior drunk driving convictions."[4] *See* ***State v. Puchacz***, 2010 WI App 30, ¶11, 323 Wis. 2d 741, 780 N.W.2d 536.

Dragisich's Illinois convictions were entered on December 24, 1991; January 15, 1993; February 22, 1993; and April 21, 1993. In the present case, he attempted to challenge the convictions by claiming (1) he "does not recall being arrested" for those offenses; (2) he "did not receive any notice to appear in court or elsewhere" for any of the cases; (3) he was not properly identified as the defendant in those prior cases; and (4) the latter two convictions were based on bond forfeitures after Dragisich's nonappearance, which means that neither conviction is truly a conviction and that both were obtained in violation of Dragisich's right to counsel. As noted, the circuit court rejected these challenges.

"'[T]he U.S. Constitution requires a trial court to consider an offender's allegations that the prior conviction is invalid only when the challenge to the prior conviction is based on the denial of the defendant's constitutional right to a lawyer.'" ***State v. Ernst***, 2005 WI 107, ¶22, 283 Wis. 2d 300, 699 N.W.2d 92 (quoting ***State v. Hahn***, 2000 WI 118, ¶17, 238 Wis. 2d 889, 618 N.W.2d 528). Thus, Dragisich's claims that he does not recall being arrested, that he did not

[4] Attached to one of Dragisich's responses is an unsigned letter from the Lake County, Illinois, clerk of circuit court. This letter references five traffic cases from 1992 and states, in part, "The above cases were sent before the court on April 30, 2012. The prosecutor had been notified of this Court date and was present in court. The Court ruled that it lacked jurisdiction due to the age of the cases." It is not clear why the matters were presented to the court but, to the extent that Dragisich appears to believe that the cases should no longer count because of their age, he is mistaken. WISCONSIN STAT. § 346.65(2)(am)6. places no time limitation on the prior convictions. *Cf.* WIS. STAT. § 346.65(2)(am)2. (ten-year period).

receive notice to appear, and that he was not properly identified are irrelevant,[5] and it only remains to be discussed whether the February 1993 and April 1993 "bond forfeitures" are convictions that can be counted and whether they were obtained in violation of Dragisich's right to counsel.

There is no legitimate dispute that the underlying charges in Illinois were for OWI. However, Dragisich argued that because the judgments were entered because of his failure to appear—essentially, default judgments—those convictions cannot be counted because they are not true convictions. But this claim is contrary to both Wisconsin and Illinois law. Under WIS. STAT. § 340.01(9r), a "conviction" includes "an unvacated forfeiture of property deposited to secure the person's appearance in court[.]" In Illinois, "the term 'conviction' encompasses convictions that resulted from bond forfeitures or default orders." *See* ***Illinois v. Smith***, 802 N.E.2d 876, 881 (Ill. App. Ct. 2004). Thus, there is no arguable merit to a claim that the

[5] As to Dragisich's first two Illinois convictions, he conceded that he likely would have been in court, as his attorney's investigation suggested that the original disposition for those two cases was "court supervision." A disposition of court supervision allows the prior convictions to be counted. *See* ***State v. List***, 2004 WI App 230, ¶10, 277 Wis. 2d 836, 691 N.W.2d 366.

Dragisich's claim that he was not properly identified appears to stem from spelling variations on his last name, like omission of the letter "H" from his Illinois driving abstract. Identity of names is *prima facie* evidence of identity of persons. *See* ***Block v. State***, 41 Wis. 2d 205, 208, 163 N.W.2d 196 (1968). A trier of fact is also permitted to consider additional facts, like "commonness of the name in the locality, the place of the commission of the crime, the character of the crime or crimes, and such other factors which would be acceptable to a reasonable man as aids in determining identity." ***Id.*** at 209.

Though the circuit court did not, and did not need to, expressly address the identity question, we observe that: (1) Dragisich and Dragisic are the same name except for the missing H; (2) the underlying OWI crimes are similar; (3) the date of birth provided is the same; (4) Dragisich lived in Illinois for a time; (5) Dragisich had a commercial driver's license from Illinois for a time; and (6) the State provided the Illinois booking photo of "Dusan Dragisic" and invited the circuit court to compare it to the defendant.

February and April 1993 convictions, which resulted from Dragisich's nonappearance and the bond forfeiture, should have been excluded from counting.

As to whether the convictions were obtained in violation of Dragisich's right to counsel, when a defendant makes a collateral challenge to conviction on the grounds that it was obtained in violation of the right to counsel, he "must make a *prima facie* showing" that the right was actually violated. *See* ***Ernst***, 283 Wis. 2d 300, ¶25 (emphasis added). A valid collateral attack requires the defendant "to point to facts that demonstrate that he or she 'did not know or understand the information which should have been provided' in the previous proceeding and, thus, did not knowingly, intelligently, and voluntarily waive his or her right to counsel." ***Id.*** (citations omitted). "Any claim of a violation on a collateral attack that does not detail such facts will fail." ***Id.***

Here, the circuit court concluded that Dragisich's motion failed to make the necessary *prima facie* case. We agree; at best, the motion asserts that the latter two convictions "may" have been obtained in violation of his right to counsel.[6] Dragisich's responses are likewise conclusory, merely asserting that his right to counsel was violated. In addition, the record

[6] We also do not think there is a meritorious claim that a defendant has been deprived of the right to counsel when the defendant fails to appear. *See, e.g.*, ***State v. Cummings***, 199 Wis. 2d 721, 753, 546 N.W.2d 406 (1996) (defendant's actions may lead to a finding that counsel has been waived by operation of law). Indeed, as the circuit court noted, Dragisich necessarily had to be aware of the cases against him, given that he posted cash bond.

indicates that, according to trial counsel's research, Dragisich actually did have an attorney for multiple appearances in the case that resulted in the April 1993 conviction. Accordingly, we conclude there is no arguable merit to a claim that the circuit court erred in denying the motion to exclude the four prior Illinois convictions.

Jury Waiver

Counsel next addresses whether Dragisich properly waived his right to a jury trial. *See* WIS. STAT. § 972.02. We agree with counsel's assessment that, in addition to securing a written jury waiver, the circuit court concluded a proper and sufficient waiver colloquy. *See* ***State v. Anderson***, 2002 WI 7, ¶24, 249 Wis. 2d 586, 638 N.W.2d 301. There is no arguable merit to a challenge to the waiver of the jury trial.

Sufficiency of the Evidence

Counsel also discusses whether sufficient evidence supports the circuit court's findings of guilt. We view the evidence in the light most favorable to the verdict. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The verdict will be overturned only if, viewing the evidence most favorable to the State and the conviction, it is inherently or patently incredible, or so lacking in probative value that no fact-finder could have found guilt beyond a reasonable doubt. *See* ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982).

Here, Dragisich had stipulated to the following facts:[7] he was driving the wrong way down a one-way street; he had drifted over the center line; there was a strong odor of intoxicants; his eyes were red and glassy and his speech slurred; his eyelids were droopy and he appeared lethargic; he exhibited all six clues on the horizontal gaze nystagmus test; he had problems with the walk-and-turn test; he said the one-leg stand test would not work for him, but he attempted it anyhow; and his blood-alcohol result was .308%. These stipulated facts are sufficient evidence from which the circuit court could conclude that Dragisich was operating his motor vehicle while intoxicated.

In addition, the State introduced a certified copy of Dragisich's driver record from the Wisconsin Department of Transportation, which lists seven prior convictions of the kind counted under WIS. STAT. § 343.307(1). This record is sufficient evidence from which the circuit court could conclude that the current offense was Dragisich's eighth. *See* ***State v. Van Riper***, 2003 WI App 237, ¶¶16-19, 267 Wis. 2d 759, 672 N.W.2d 156. There is no arguable merit to a challenge to the sufficiency of the evidence.

Sentencing Discretion

The next issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197.

[7] The circuit court also conducted a sufficient colloquy with Dragisich regarding waiver of his right to testify.

At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Here, the circuit court identified protection of the public as one objective but also appears to have identified punishment and possibly deterrence and rehabilitation for Dragisich as objectives. The circuit court noted that Dragisich had a serious addiction problem and had not been able to maintain sobriety during the pendency of this case. Dragisich also had a history of violent behavior and other criminal conduct beyond his prior OWIs. The circuit court considered mitigating circumstances, like the fact that Dragisich had taken responsibility by entering the stipulation of facts, and that it was a "blessing" that no one had gotten hurt, but also noted that the amount of alcohol in Dragisich's system was an aggravating factor.

The maximum possible sentence Dragisich could have received was ten years' imprisonment and a $100,000 fine.[8] The mandatory minimum term of initial confinement was three years, *see* WIS. STAT. § 346.65(2)(am)6., and the sentence totaling nine years' imprisonment and no fine is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. Further, the sentence 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). There would be no arguable merit to a challenge to the sentencing court's discretion.[9]

Ineffective Assistance of Counsel

The final issue raised is whether there is any arguable merit to a claim of ineffective assistance of trial counsel. We agree with appellate counsel's assessment that the record does not support any such claim.[10]

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[8] The normal fine of $25,000 was quadrupled because of Dragisich's blood-alcohol level. *See* WIS. STAT. § 346.65(2)(g)3.

[9] We observe that the circuit court ordered Dragisich to provide a DNA sample if he had not previously submitted one and pay the attendant surcharge "as part of the punishment here." *See* WIS. STAT. §§ 973.047(1f) (requiring sample) & 973.046(1g) (permitting surcharge). The circuit court also ordered the surcharge waived if Dragisich had previously provided a DNA sample.

Dragisich had filed a *pro se* motion to vacate the surcharge, which the circuit court declined to address while he was represented by counsel. *See* ***State v. Redmond***, 203 Wis. 2d 13, 19, 552 N.W.2d 115 (Ct. App. 1996) (statutes do not permit hybrid representation). The issue was not revisited by current counsel. However, there is no issue of arguable merit to the circuit court's imposition of the surcharge: our review of the sentencing transcript as a whole satisfies us that ordering payment of the surcharge if not previously paid was imposed to effectuate the punishment objective of the circuit court's sentence. There is no basis in the record for us to conclude that imposition of the surcharge was unreasonable. *See* ***State v. Ziller***, 2011 WI App 164, ¶12, 338 Wis. 2d 151, 807 N.W.2d 241.

[10] Dragisich appears to believe that it was ineffective for his first trial attorney to fail to seek to reopen his Illinois cases. We cannot agree because the record before us does not indicate that counsel was licensed to practice in Illinois, nor do we have any indication that reopening prior judgments in another state was within the scope of counsel's representation.

Our independent review of the record reveals no other potential issues of arguable merit.[11]

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 J. Dennis Thornton is relieved of further representation of Dragisich in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[11] Dragisich evidently believes that it was error for the circuit court to refuse to reduce his bail so that he could go to Illinois to attempt to reopen his old cases in person. Aside from the fact that the letter from Lake County suggests reopening the cases is not possible, there is no arguable merit to a claim the circuit court erroneously exercised its discretion in refusing to reduce bail. The decision was based, at least in part, on the State's undisputed assertion that Dragisich had indicated he would flee the state if he were able to make bail.