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DISTRICT II

February 27, 2013

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

2012AP2138-CRNM State of Wisconsin v. Toby A. Stull (L.C. #2010CF124)

Before Brown, C.J., Reilly and Gundrum, JJ.

Toby A. Stull appeals from a judgment convicting him of fifth-offense operating while under the influence (OWI) of a drug, in violation of WIS. STAT. § 346.63(1)(a) (2011-12).[1] His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Stull received a copy of the report but did not exercise his right to file a response. Upon consideration of the no-merit report and our independent review of the

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

record as mandated by ***Anders***, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We affirm the judgment and relieve Attorney Eileen A. Hirsch of further representing Stull in this matter.

Stull performed poorly on field sobriety tests after being stopped for vehicle registration violations. A blood test revealed the presence of several prescription medications. Stull pled guilty to fifth-offense OWI. Two other counts—operating after revocation and misdemeanor bail jumping—were dismissed and read in. The trial court sentenced Stull to eighteen months' initial confinement and two years' extended supervision. This no-merit appeal followed.

The no-merit report addresses whether Stull's guilty plea was knowingly, voluntarily, and intelligently entered. The court engaged in a thorough colloquy satisfying the requirements of WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The court ascertained that Stull understood the elements of the crime, *see* ***Bangert***, 131 Wis. 2d at 268, properly used his signed plea questionnaire in conjunction with the substantive colloquy, *see* ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794, and used the criminal complaint to ascertain that the plea had a factual basis, ***State v. Black***, 2001 WI 31, ¶14, 242 Wis. 2d 126, 624 N.W.2d 363.. To support the repeater allegation, Stull admitted he had been convicted of four specific prior OWIs. No issue of merit could arise from the plea taking.

The no-merit report also considers whether the sentence was excessive. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678

N.W.2d 197. The court must address sentencing objectives that include the protection of the public, punishment and rehabilitation of the defendant, and deterrence, ***id.***, ¶40, and the primary sentencing factors—the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). The court must provide a "rational and explainable basis" for the sentence it imposes to allow this court to ensure that discretion in fact was exercised. ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76.

We agree with appellate counsel that no basis exists to disturb the sentence. The court took into account Stull's education, mental health issues, criminal history and failures on probation and deemed protection of the public to be the prime consideration. The weight to be given the various factors is within the court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). Stull faced six years' imprisonment and a $10,000 fine. A sentence less than the maximum presumptively is not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. The court fully explained its rationale for the sentence. We cannot say that the sentence imposed is so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Our review of the record discloses no other potential issues for appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Eileen A. Hirsch is relieved of further representing Stull in this matter.

Diane M. Fremgen
Clerk of Court of Appeals