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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 IV

April 1, 2013

To:

Hon. Stephen E. Ehlke
Circuit Court Judge
215 South Hamilton, Br. 15, Rm. 7107
Madison, WI 53703

Emily Thompson
Assistant District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Room 1000
215 South Hamilton
Madison, WI 53703

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

Donna L. Hintze
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Skyler T. Davis
542 Seminole Way
De Forest, WI 53532

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

2012AP2144-CRNM State of Wisconsin v. Skyler T. Davis (L.C. #2011CT1073)

Before Kloppenburg, J.[1]

Skyler Davis appeals a judgment convicting him of a third offense of operating a motor vehicle while intoxicated. Attorney Donna Hintze has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967) and ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

suppression motion and the validity of Davis's plea and sentence. Davis was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 and n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The State agreed to dismiss a fine enhancer, an additional charge, and to make a joint recommendation for probation in exchange for the plea. The circuit court conducted a brief plea colloquy exploring the defendant's understanding of the nature of the charge, the penalty range and other direct consequences of the plea, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 266-72; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. In addition, the record includes a signed plea questionnaire. Davis indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

The facts set forth in the complaint provided a sufficient factual basis for the plea and Davis admitted his status as a third-time offender in open court. There is nothing in the record to suggest that counsel's performance was in any way deficient, and Davis has not alleged any other facts that would give rise to a manifest injustice. Therefore, Davis's plea was valid and

operated to waive all nonjurisdictional defects and defenses, aside from his suppression motion. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

The suppression motion challenged whether there was probable cause for the traffic stop. The arresting officer testified that he pulled over Davis's motorcycle for excessively loud revving of its engine, in violation of a local ordinance. Davis contended that the officer's proffered explanation for the traffic stop was pretextual. However, the circuit court found that the officer's testimony was credible and supported by the squad car video. We agree with counsel's assessment that, because credibility determinations are not reviewable by this court, there is no arguable basis to challenge the circuit court's ultimate determination that there was probable cause for the traffic stop.

A challenge to the defendant's sentence would also lack arguable merit because the circuit court adopted the joint probation recommendation of the parties. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals