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DISTRICT IV

April 22, 2013

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

2011AP2686-CRNM State of Wisconsin v. Martin M. Wozniak (L.C. #2010CF1103)

Before Lundsten, P.J., Sherman and Kloppenburg, JJ.

Martin Wozniak appeals a judgment convicting him of a sixth offense of operating a motor vehicle while intoxicated (OWI-6th). Attorney Jefren Olsen has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2011-12);[1] *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

[1] All further references in this order to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

report addresses the validity of Wozniak's plea and sentence. Wozniak 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, the conviction was based upon the entry of a no-contest plea, and 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 additional charges of operating after revocation and with a prohibited blood alcohol content, as well as a sentence enhancer, in exchange for the plea. The circuit court conducted a 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. The court also inquired into the defendant's ability to understand the proceedings and the voluntariness of the plea decision. In addition, the record includes a signed plea questionnaire. Wozniak 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 the defendant admitted at the hearing provided a sufficient factual basis for the plea. We see nothing in the record to suggest that counsel's performance was in any way

deficient, and Wozniak has not alleged any other facts that would give rise to a manifest injustice. Therefore, we conclude that Wozniak's plea was valid and operated to waive all nonjurisdictional defects and defenses. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

A challenge to the defendant's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that the defendant was afforded an opportunity to comment on the PSI and address the court. The court proceeded to consider the standard sentencing factors and explained their application to this case. ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court acknowledged that Wozniak had not gotten into an accident or hurt anyone. However, with respect to the defendant's character, the court characterized Wozniak as a "chronic offender," with an extensive criminal history beyond the OWI cases. The court concluded that a prison term was necessary to protect the public.

The court then sentenced Wozniak to two years of initial confinement and three years of extended supervision. It also awarded forty-three days of sentence credit; imposed a fine of $1,449 and other standard costs and conditions of supervision; and determined that the defendant was not eligible for the challenge incarceration program, the earned release program, or a risk reduction sentence.

The sentence imposed was within the applicable penalty range. *See* WIS. STAT. §§ 346.65(2)(am)5. (classifying OWI-6th as a Class H felony); 939.50(3)(h) (providing maximum imprisonment term of six years for Class H felonies); and 973.01 (explaining bifurcated sentence structure. The sentence was not "so excessive and unusual and so disproportionate to the offense committed" as to be unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

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