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May 22, 2013

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

2012AP141-CRNM State of Wisconsin v. Ricky Jones (L.C. # 2011CF511)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Ricky Jones appeals from a judgment of conviction for operating while intoxicated (OWI) as a fourth offense within five years, a Class H felony, contrary to WIS. STAT. §§ 346.63(1)(a), 346.65 (2)(am)4m., and 939.50(3)(h) (2011-12).[1] Upon Jones's guilty plea, the trial court imposed and stayed a six-year bifurcated sentence in favor of a three-year term of

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

probation with various conditions, including six months of conditional jail time. Jones's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). Jones received a copy of the report and filed a response. Appellate counsel then filed a supplemental no-merit report. Upon consideration of the original and supplemental no-merit reports, Jones's response, and an independent review of the record, 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.

The offense underlying this appeal arises from an arrest in December 2010, which occurred while Jones was out on bail in other cases, including another fourth offense OWI, Milwaukee County Case No. 2010CT1465. Due to an intervening change in the law, the criminal complaint in the present case charged Jones with OWI as a fourth offense within five years, a Class H felony.[2]

Trial counsel filed a motion collaterally attacking a prior Indiana OWI conviction. The State conceded that the prior Indiana conviction could not be used to enhance either of Jones's pending OWI charges, and in anticipation of a negotiated global plea agreement, filed an amended complaint in 2010CT1465 charging OWI as a third offense. The charging documents in the present case were not amended because upon conviction for third offense OWI in 2010CT1465, the present case would properly remain a fourth offense within five years.

[2] WISCONSIN STAT. § 365.65 (2)(am)4m. was created by 2009 Wis. Act 100, §42, and became effective July 1, 2010.

On August 10, 2011, Jones resolved five pending files. In pertinent part, he pled to and was convicted and sentenced in connection with the OWI third offense to jail time with credit for time served. After Jones was convicted and sentenced on the third offense OWI, the trial court proceeded to sentence Jones in connection with the present offense, OWI fourth within a five-year period.

In September of 2011, postconviction counsel was appointed through the State Public Defender's office. Before and after counsel's appointment, Jones filed a number of pro se motions in both this court and the trial court. The trial court declined to decide several of Jones's pro se motions because he was represented by counsel. On December 13, 2011, appointed counsel filed a postconviction motion asking the trial court to amend the judgment to clarify that Jones was entitled to receive good time toward his conditional jail time pursuant to WIS. STAT. § 973.09(1)(d) (where a defendant is placed on probation and ordered to serve a mandatory minimum jail sentence as a condition of probation, he or she is entitled to receive good time under § 302.43). The trial court entered an order denying the motion and Jones filed a pro se notice of appeal.

In a February 3, 2012 order, this court stepped in to clarify whether Jones wished to proceed pro se or with appointed counsel. We placed the case on hold pending a response from counsel. Appointed counsel filed a response indicating that together with Jones four potential issues were identified, but that counsel believed only two of the four were arguably meritorious. Counsel asserted that Jones wanted him to continue as his attorney and asked that the hold be lifted. Counsel suggested that he would proceed with a merit appeal on two of the issues, and would file a no-merit report in connection with the other issues.

By order entered February 24, 2013, we lifted the hold and ordered the appeal to proceed. We also informed counsel that WIS. STAT. RULE 809.32 does not authorize a "partial no-merit" appeal. Counsel was told that a no-merit report would be improper if there were any arguably meritorious issues identified.

Six weeks later, appointed counsel filed a motion requesting an extension of time to file the appellant's brief and an order permitting counsel to withdraw. Counsel's motion stated that he and Jones had reached an impasse and that Jones wanted him to withdraw, believing that the SPD would appoint substitute counsel. By order entered April 12, 2012, we required a response from Jones prior to permitting appointed counsel's withdrawal. The SPD filed a report indicating that substitute counsel would not be appointed. Because Jones never confirmed his desire to proceed pro se as required by our orders entered April 12, 2012, and May 21, 2012, we denied appointed counsel's motion to withdraw and set a deadline for filing the appellant's brief.

Thereafter, appointed counsel filed a no-merit report.[3] The no-merit report addresses the potential issues of whether Jones's plea was freely, voluntarily, and knowingly entered, whether the sentence was the result of an erroneous exercise of discretion, and whether Jones was properly sentenced for an OWI as a fourth offense within five years. However, the no-merit report also asserts that counsel was not pursuing issues regarding sentence credit even though he "believes the issues were wrongly decided" in the trial court. As explained in our February 24, 2013 order, this constitutes an improper "partial no-merit" report and would normally result in our rejecting the no-merit appeal. Appointed counsel should not file a no-merit brief in a case

[3] The case was converted to a no-merit appeal when in July appointed counsel filed an extension motion indicating that he intended to file a no-merit report.

that he or she believes presents arguably meritorious issues. Regardless, having independently reviewed the record including the issues identified by counsel as potentially meritorious, we conclude that there is no merit to any issue that could be raised on appeal.

First, we agree with appellate counsel's assessment that no arguable issue of merit exists from the taking of Jones's guilty plea. Our review of the record—including the plea questionnaire, its addendum, and the plea hearing transcript—confirms that the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08, ***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.

In his response, Jones seems to argue that he was not aware he would be pleading to a felony charge of OWI as a fourth offense within five years. This assertion is contradicted by the record. At a hearing on June 3, 2011, in the defendant's presence, the State agreed not to use the prior uncounseled Indiana conviction for enhancement purposes. The parties acknowledged that the charge in 2010CT1465 would be amended to an OWI third, and that the present case would remain charged as a fourth offense within five years, with the anticipated conviction in 2010CT1465 serving as the requisite third prior conviction.[4] *See* ***Bangert***, 131 Wis. 2d at 268

[4] Though Jones's response alleges that this hearing never occurred, the hearing transcript is clearly in the record. Further, to the extent Jones argues that the complaint did not assert the correct prior offenses, any error is waived. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (valid guilty plea waives all nonjurisdictional defects and defenses). Once Jones was convicted of the OWI third offense in 2010CT1465, the trial court properly sentenced him using the enhanced penalties for an OWI fourth offense within five years. *See, e.g.*, ***State v. Matke***, 2005 WI App 4, ¶9, 278 Wis. 2d 403, 692 N.W.2d 265 (the fact of a prior offense is not an element of the crime of OWI, and the proper time for determining the number of priors is at sentencing).

(evidence "of defendant's knowledge of the nature of the charge established prior to the plea hearing" may be relevant to establishing his understanding at the time of plea).

The signed plea questionnaire and waiver of rights form further indicates that Jones expected to plead to the offense of conviction. The form attaches the jury instruction for the OWI offense and lists the correct maximum and minimum penalties for an OWI fourth within five years. The signed plea questionnaire addendum confirms that Jones read the criminal complaint, which clearly charged the offense of OWI fourth within five years. A completed plea questionnaire and waiver of rights form is competent evidence of a knowing, intelligent, and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987).

At the plea hearing, the trial court addressed Jones and explicitly ascertained his understanding of the six-year maximum penalty. The trial court directly asked Jones for his plea "to the operating while intoxicated, fourth offense in five years" and Jones answered "[g]uilty." Later in the colloquy, the trial court further engaged Jones:

> The Court: And then with regard to the operating while intoxicated, fourth offense, it was at Mayfair, same date and time and place [as the charges just reviewed in 2010CM7414], and you were operating a motor vehicle while under the influence of an intoxicant. It was the fourth time in five years. Do you understand what they have to prove there?
>
> The Defendant: Yes.
>
> The Court: And you admit doing that?
>
> The Defendant: Yes.

Jones was properly advised of the nature of the offense and the potential penalties. No issue of merit exists from the plea taking.

We also conclude that there was no error at Jones's sentencing hearing. As discussed in appellate counsel's no-merit report, the State adhered to the terms of the parties' plea agreement, which was to recommend on the felony OWI a term of probation with conditional jail time. Jones asserts that the State breached the plea agreement but fails to explain how. We will not develop an appellant's amorphous and unsupported arguments for him. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995). The record from the plea hearing demonstrates that the trial court ascertained Jones's understanding of the global plea agreement as it related to each of the five pending cases. With regard to the present case, the trial court ascertained Jones's understanding that "the district attorney's going to recommend that I place you in the House of Correction with Huber privileges and put you on probation. And you and your lawyer can argue for whatever you want." Jones agreed with this recitation, and the record demonstrates that the State fulfilled its plea bargain duties.

In fashioning the sentence, the trial court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court stated that given Jones's lengthy prior record, which included prison time, and the fact that he committed this crime while out on bail, the maximum prison sentence would further the trial court's primary objectives of punishment, general and specific deterrence, and community protection. The trial court balanced these considerations with Jones's rehabilitative needs and his recent success in treatment, and concluded that probation would give Jones credit for the positive strides he had made, permit his treatment to continue, and provide him the opportunity to avoid prison. This constitutes an appropriate exercise of sentencing discretion, and the sentence is not so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

We also conclude that the trial court properly exercised its discretion in imposing the $250 DNA analysis surcharge. *See* WIS. STAT. § §973.046(1g); ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. The trial court explained that it was ordering the surcharge as part of the punitive and rehabilitative aspects of its sentence. Finally, we conclude that the trial court properly exercised its discretion in ordering that the eighty days of presentence credit would not be taken off of Jones's six months of conditional jail time, but would be credited to his sentence in the event of revocation. *See* ***State v. Avila***, 192 Wis. 2d 870, 886-87, 532 N.W.2d 423 (1995), *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765. The trial court expressly explained that it intended for Jones to serve a full six months and that it chose to award the eighty days of credit upon revocation in lieu of imposing nine months of conditional jail time.

The remaining issues raised in counsel's no-merit brief and in Jones's response relate to whether Jones was entitled to earn good time and whether he was entitled to approximately ninety days of credit for presentence time spent in a residential treatment facility. With regard to whether Jones was entitled to earn good time on the six months of conditional jail time, we agree with appointed counsel that the issue is moot. Though Jones may have been eligible for statutory good time pursuant to WIS. STAT. § 973.09(1)(d), Jones has completed service of his conditional jail time and, if he is revoked, will receive day-for-day credit toward his sentence. If he indeed spent the entire six months in custody, then he will receive six months of credit upon revocation.

We also conclude that Jones was not entitled to sentence credit for time spent in a residential treatment facility because he was not subject to an escape charge. *See* ***State v. Magnuson***, 2000 WI 19, ¶¶31, 48, 233 Wis. 2d 40, 606 N.W.2d 536 (establishing a bright line rule that a criminal defendant is not in custody for purposes of sentence credit unless leaving his

or her status would subject him or her to an escape charge). The trial court reduced Jones's bail to an amount that he could post in order to facilitate his treatment efforts. Jones posted the reduced bail and entered an inpatient treatment facility that, he asserts, was a restrictive environment. Regardless of whether he was locked in and despite the presence of security guards, Jones is not entitled to sentence credit because he was not subject to an escape charge. The trial court explained that if Jones walked away from treatment, it would negatively impact his ultimate sentence. If Jones had failed to comply, he may have perhaps been exposed to a bail jumping charge. Once Jones completed treatment, he was not forced to return to jail as if on a furlough. There is no merit to any argument that Jones was entitled to sentence credit for time spent at a treatment facility because he was not subject to an escape charge.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Ricky Jones further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney James B. Duquette is relieved from further representing Ricky Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals