



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 III

January 27, 2015

To:

Hon. Kendall M. Kelley
Circuit Court Judge
Brown County Courthouse
100 S. Jefferson St, PO Box 23600
Green Bay, WI 54305-3600

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
P.O. Box 23600
Green Bay, WI 54305-3600

Steven D. Grunder
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

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

John W. Zibolsky 100005
Wisconsin Resource Center
P.O. Box 220
Winnebago, WI 54985-0220

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

2014AP1816-CRNM State of Wisconsin v. John W. Zibolsky (L. C. No. 2012CF163)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for John Zibolsky filed a no-merit report concluding there is no arguable basis for Zibolsky to withdraw his no-contest and *Alford*¹ pleas or to challenge the sentences imposed for fifth-offense operating a vehicle while intoxicated and operating a motor vehicle without the owner's consent. Zibolsky was advised of his right to respond to the report and has not

¹ *North Carolina v. Alford*, 400 U.S. 25 (1970).

responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

According to the complaint, a citizen at a gas station encountered a man, eventually identified as Zibolsky, who tried to get into her locked vehicle. Zibolsky said he worked at the gas station, and asked a number of unusual questions, like how many gas tanks her vehicle had. A store clerk intervened and Zibolsky walked away, stating that he had mistaken the vehicle for his brother's vehicle. The citizen observed Zibolsky as he walked about fifty yards away and entered the passenger compartment of another vehicle in a restaurant parking lot. The observer entered the restaurant to warn the patrons about Zibolsky. Zibolsky exited the vehicle and entered a van parked at a nearby Kwik Trip. The driver of the van approached the vehicle with groceries and opened a passenger door. Upon seeing Zibolsky in the driver's seat, the van owner yelled at Zibolsky and went back to the Kwik Trip to call police. Zibolsky started the vehicle and, after some fumbling, put the van in gear and squealed the tires.

The citizen who followed the man to the Kwik Trip then saw Zibolsky drive between the gas station and its car wash facility. The van jumped a curb and collided with the building. The van made another turn and then collided with the gas station building. The citizen heard squealing tires as the van drove around the building reappearing and striking a different section of the Kwik Trip. The van also struck another van and ultimately collided with a concrete pillar, immobilizing the vehicle. By this time other bystanders approached the scene and attempted to detain Zibolsky as he got out of the van. A Kwik Trip employee followed the man as he walked away, and police soon arrived to question Zibolsky.

The responding officers detected a strong smell of intoxicants on Zibolsky and noticed his slurred speech, extremely glossy red eyes and difficulty maintaining his balance. A preliminary breath test showed a blood alcohol concentration of .122%. A subsequent blood draw tested at .162%.

Pursuant to a plea agreement, Zibolsky pled no contest to fifth-offense operating while intoxicated and entered an *Alford* plea to operating a vehicle without the owner's consent. Charges of criminal damage to property, hit and run of an attended vehicle, and disorderly conduct were dismissed and read in for sentencing purposes and a charge of operating a vehicle with a prohibited alcohol concentration was dismissed. The State agreed to cap its sentencing recommendation at two years' initial confinement and five years' extended supervision, leaving the defense free to argue for a lesser sentence. Trial counsel told the court he considered raising a defense of not guilty by reason of mental disease or defect (NGI) or involuntary intoxication, but he and Zibolsky decided to resolve the charges with a plea agreement.

The record discloses no arguable manifest injustice upon which Zibolsky could withdraw his pleas. *See State v. Dychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court, aware that Zibolsky had mental health issues, made certain that Zibolsky understood his constitutional rights, the elements of the offenses and the potential penalties. When initially asked whether his counsel explained the plea questionnaire in a way that Zibolsky was able to understand, Zibolsky responded, "I tried my best." The court further asked whether there was some part Zibolsky did not understand and Zibolsky responded, "No, I understood." Zibolsky declined the court's offer to give him additional time to consult with his attorney. Nonetheless, the court called a fifteen minute recess to allow Zibolsky to again consult with his attorney and for the attorney to raise any competency issues if doing so appeared appropriate. After the

recess, Zibolsky's attorney informed the court he went over the plea questionnaire with Zibolsky on a previous day and counsel believed Zibolsky was competent. Zibolsky elected to proceed with the plea hearing. The court noted Zibolsky's diagnosis and treatment for mental illness and disorders. Zibolsky indicated the Social Security Administration diagnosed him with paranoid schizophrenia and doctors also diagnosed him with psychomotor retardation. Zibolsky identified the medications he took for these disorders and told the court the medications helped him focus better. Zibolsky assured the court that neither the medications nor the mental health conditions affected his ability to understand his counsel or the court proceedings.

Utilizing the plea questionnaire and waiver of rights form, the court asked Zibolsky whether it could accept each statement on the form as though they went through it line by line. Zibolsky answered "yes." The court then explained the elements of both offenses, and Zibolsky indicated he understood them. Zibolsky indicated he was entering an *Alford* plea to the charge of operating a vehicle without the owner's consent because he did not remember committing that offense. However, based on police reports, he was confident the jury would find him guilty if he went to trial. The court also explained the constitutional rights Zibolsky waived by entering no-contest and *Alford* pleas. Zibolsky stated he understood and waived each of those rights. The court then addressed the applicable penalties and, as required by *State v. Hampton*, 2004 WI 107, ¶20, 274 Wis. 2d 379, 683 N.W.2d 14, notified Zibolsky the court was not bound by the plea agreement. Zibolsky informed the court that, other than the plea agreement, his pleas were not a result of any promises or threats. Finally, Zibolsky agreed to use of the probable cause section of the complaint to establish a factual basis for the pleas. The court indicated it observed Zibolsky's demeanor at the plea hearing and believed Zibolsky's responses were coherent and appropriate. The record shows the court complied with all of the requirements for accepting

Zibolsky's pleas set out in *State v. Bangert*, 131 Wis. 2d 246, 270-72, 389 N.W.2d 12 (1986). Entry of valid no-contest or *Alford* pleas constitutes a waiver of all nonjurisdictional defects and defenses. *Bangert*, 131 Wis. 2d at 293. The court failed to give the deportation warning required by WIS. STAT. § 971.08(1)(c). However, a defense presentence investigation report indicates Zibolsky was born in Milwaukee. Because he is a citizen of the United States, the failure to give the deportation warning provides no basis for appeal.

The record also discloses no arguable basis for challenging the sentencing court's discretion when it imposed consecutive sentences totaling four years' initial confinement and six years' extended supervision along with the minimum fine and court costs, and made Zibolsky eligible for the Earned Release Program. The court could have imposed sentences totaling twelve years' imprisonment and \$20,000 in fines. Both Zibolsky and his counsel stipulated to the prior drunk driving offenses, which were also appropriately detailed in the presentence investigation. *See State v. Wideman*, 206 Wis. 2d 91, 108, 556 N.W.2d 737 (1996). The court properly considered the aggravated nature of the offenses; the impact on the victim; Zibolsky's character, which included numerous prior convictions other than the drunk driving offenses; and his cooperativeness, age, educational background, employment record and need for close rehabilitative control. Finally, the court considered the need to protect the public in light of the frightening circumstances of these offenses. The court considered no improper factors, and the sentences are not arguably so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney Steven Grunder is relieved of his obligation to further represent Zibolsky in this matter. WIS. STAT. RULE 809.32(3) (2011-12). .

Diane M. Fremgen
Clerk of Court of Appeals