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DISTRICT II

July 8, 2015

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

2015AP363-CRNM State of Wisconsin v. Alycia Ann Gonzalez (L.C. # 2012CT470)

Before Reilly, J.[1]

Alycia Ann Gonzalez appeals a judgment convicting her of operating a motor vehicle with a restricted controlled substance, second offense, with a passenger under the age of sixteen. Gonzalez's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Gonzalez received a copy of the report, was advised of her right to file a response, and has elected not to do so. After reviewing the record and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

counsel's report, we conclude that there are no issues with arguable merit for appeal. However, a $200 DNA surcharge was included on the judgment of conviction in violation of Gonzalez's constitutional rights.[2] Accordingly, we modify the judgment to vacate the DNA surcharge, affirm the judgment as modified, and remand with directions.[3]

On June 26, 2012, Officer Christopher Brunning of the Fontana Police Department stopped a vehicle Gonzalez was driving because he saw that she was not wearing a seat belt. Upon making contact with Gonzalez, Brunning noticed an odor of intoxicants and bloodshot and glassy eyes. Brunning also noticed a minor passenger in the vehicle. After conducting field sobriety tests, Brunning placed Gonzalez under arrest for operating while intoxicated and obtained a warrantless blood draw. Gonzalez's blood sample confirmed the presence of both alcohol and THC.

Gonzalez filed a motion to suppress in which she challenged both the stop of her vehicle and the results of the warrantless blood draw. After the circuit court denied the motion, she entered a guilty plea to the charge of operating a motor vehicle with a restricted controlled substance, second offense, with a passenger under the age of sixteen. The charge of operating a

[2] ***State v. Elward***, 2015 WI App 51, ¶7, __ Wis. 2d __, __ N.W.2d __, holds that the mandatory DNA surcharge under WIS. STAT. § 973.046(1r) for misdemeanor crimes committed before January 1, 2014, but sentenced after that date and before April 1, 2015, is an unconstitutional ex post facto punishment.

[3] The judgment of conviction also contains a clerical error as to Gonzalez's conviction. It indicates that Gonzalez pled guilty to count one of the criminal complaint (operating a motor vehicle while under the influence of an intoxicant, second offense, with a passenger under the age of sixteen) with count two (operating a motor vehicle with a restricted controlled substance, second offense, with a passenger under the age of sixteen) being dismissed and read in. As the transcript of the plea hearing makes clear, Gonzalez actually pled guilty to count two of the complaint with count one being dismissed and read in. On remand, the circuit court shall direct the clerk of circuit court to enter a new judgment correcting this clerical error and vacating the DNA surcharge.

motor vehicle while under the influence of an intoxicant, second offense, with a passenger under the age of sixteen, was dismissed and read in. On February 26, 2014, the circuit court imposed a sentence of 120 days in jail and a fine of $900 plus costs. This no-merit appeal follows.

The no-merit report first addresses whether the circuit court correctly rejected the challenge to the stop of Gonzalez's vehicle. A law enforcement officer may conduct a traffic stop of a vehicle when the officer has probable cause to believe a traffic violation has occurred. ***State v. Popke***, 2009 WI 37, ¶13, 317 Wis. 2d 118, 765 N.W.2d 569. Here, Brunning testified that he stopped Gonzalez's vehicle because he saw that she was not wearing a seat belt, which is a traffic violation.[4] The circuit court found Brunning's testimony credible and that finding is not clearly erroneous. We agree with counsel that any challenge to the stop of Gonzalez's vehicle would lack arguable merit.

The no-merit report next addresses whether the circuit court correctly rejected the argument to suppress the warrantless blood draw results. Gonzalez had argued that the warrantless blood draw was unconstitutional pursuant to ***Missouri v. McNeely***, 569 U.S. __, 133 S. Ct. 1552 (2013), a case decided after Gonzalez's arrest. Because Brunning acted in objectively reasonable reliance on pre-***McNeely*** precedent[5] in effectuating the search and seizure of Gonzalez's blood, the good faith exception to the exclusionary rule precludes suppression of evidence. *See* ***State v. Kennedy***, 2014 WI 132, ¶37, 359 Wis. 2d 454, 856 N.W.2d 834; ***State v.***

[4] WISCONSIN STAT. § 347.48(2m)(b) mandates seat belt use when operating a motor vehicle equipped with seat belts.

[5] *See* ***State v. Bohling***, 173 Wis. 2d 529, 547-48, 494 N.W.2d 399 (1993) (the dissipation of alcohol from a person's blood constitutes a sufficient exigency to justify a warrantless blood draw).

Foster, 2014 WI 131, ¶8, 360 Wis. 2d 12, 856 N.W.2d 847. We agree with counsel that any argument to suppress the warrantless blood draw results would lack arguable merit.

The no-merit report also addresses whether Gonzalez's guilty plea was knowingly, voluntarily, and intelligently entered. The record shows that the circuit court engaged in a colloquy with Gonzalez that satisfied the applicable requirements of WIS. STAT. § 971.08(1)(a) and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. In addition, a signed plea questionnaire and waiver of rights form was entered into the record. That form, which the court referred to during the colloquy, is competent evidence of a valid plea. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Finally, Gonzalez stipulated to the factual basis for the plea. We agree with counsel that any challenge to the entry of Gonzalez's guilty plea would lack arguable merit.

The no-merit report does not discuss issues of arguable merit relating to Gonzalez's sentence. That is because Gonzalez specifically informed counsel that she does not wish to appeal the sentence she received in the case. In any event, Gonzalez would not be able to challenge the circuit court's imposition of 120 days in jail and fine of $900 plus costs, as that was consistent with the parties' joint recommendation. *See* ***State v. Magnuson***, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998) (defendants may not attack their sentence on appeal when the circuit court imposes the sentence requested by them).

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Kiley Zellner of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment is modified to vacate the DNA surcharge and as modified, the judgment is summarily affirmed and remanded with directions. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kiley Zellner is relieved of further representation of Gonzalez in this matter.

Diane M. Fremgen
Clerk of Court of Appeals