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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 III/I

February 25, 2016

To:

Hon. Michael W. Gage
Circuit Court Judge
Outagamie County Courthouse
320 S. Walnut Street
Appleton, WI 54911

Barb Bocik
Clerk of Circuit Court
Outagamie County Courthouse
320 S. Walnut Street
Appleton, WI 54911

Susan E. Alesia
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Carrie A. Schneider
District Attorney
320 S. Walnut St.
Appleton, WI 54911

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

Dennis R. Grimh 129526
Stanley Corr. Inst.
100 Corrections Drive
Stanley, WI 54768

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

2015AP1401-CRNM State of Wisconsin v. Dennis R. Grimh (L.C. #2013CF96)
2015AP1402-CRNM State of Wisconsin v. Dennis R. Grimh (L.C. #2012CF913)

Before Curley, P.J., Kessler and Brennan, JJ.

Dennis R. Grimh appeals from judgments of conviction, entered upon his no-contest pleas to one count of operating while intoxicated (OWI) as a fifth offense and one count of operating with a prohibited alcohol concentration (PAC) as a sixth offense. Appellate counsel, Susan E. Alesia, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Grimh was advised of his right to file a

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

response, but he has not responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and a supplemental report ordered by this court, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments.

On March 9, 2004, a citizen witness reported a possible drunk driver who was "all over the road and nearly struck mailboxes." The caller described the vehicle and the license plate. The responding officer found the car in a ditch and Grimh about a tenth of a mile north, smelling of alcohol with bloodshot eyes and slurred speech. Grimh failed field sobriety tests, and one empty and four full beer bottles were found in the car. Grimh's blood-alcohol concentration was later shown to be .217. As a result, Grimh was charged with fourth-offense OWI and PAC in Outagamie County Circuit Court case No. 2004CT464. Grimh moved from Wisconsin during the pendency of that case, and a warrant was issued.

Grimh returned to Wisconsin about seven years later. On November 4, 2012, he was stopped for a seat belt violation by an Appleton police officer, who came to suspect that Grimh was operating under the influence of alcohol or at least with a prohibited alcohol concentration. Grimh smelled faintly of alcohol, had difficulty extracting his license for the officer, admitted drinking at least one beer, and admitted having three prior OWI convictions. During the stop, the officer discovered Grimh's active warrant from 2004 and that Grimh's driving record now had four prior OWI-related convictions.[2] Grimh refused to perform field sobriety tests or submit to a preliminary breath test. He was arrested and transported for a warrantless blood draw. He

[2] It appears the fourth OWI-related conviction is from North Dakota.

was charged in Outagamie Circuit Court case No. 2012CF913 with OWI as a fifth or sixth offense and misdemeanor bail jumping. When the blood test results revealed Grimh's blood-alcohol level was .047, the State added a charge of PAC as a fifth or sixth offense.[3]

Because of the fourth OWI conviction now on Grimh's record, the fourth-offense OWI and PAC charges in case No. 2004CT464 were dismissed and reissued as fifth-or-subsequent OWI and PAC in Outagamie County Circuit Court case No. 2013CF96. Grimh entered no-contest pleas to the PAC charge in the 2012 case and the OWI charge in the 2013 case. The circuit court sentenced him to seventeen months' initial confinement and thirty-five months' extended supervision.

The first issue counsel raises in the no-merit report is whether the circuit court erred in denying Grimh's pretrial motions. In case No. 2012CF913, Grimh, by counsel,[4] moved to suppress evidence from the traffic stop, arguing the officer lacked reasonable suspicion to conduct field sobriety tests or a blood draw. Later, Grimh filed *pro se* suppression motions, challenging the blood draw because it was warrantless and challenging the jurisdiction of the officer who stopped him. The circuit court denied both counsel's and Grimh's motions.

The circuit court appropriately rejected the "reasonable suspicion" challenge. The police officer validly stopped Grimh for his failure to wear a seat belt. *See* WIS. STAT. § 347.48(2m)(b)

[3] The prohibited alcohol concentration for someone with three or more prior OWI-related convictions is .02. *See* WIS. STAT. § 340.01(46m)(c) (defining "prohibited alcohol concentration").

[4] During pretrial proceedings, Grimh discharged his attorney to proceed *pro se*. Our review of the record satisfies us that Grimh made a knowing, intelligent, and voluntary wavier of the right to counsel. *See* ***State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997); *see also* ***State v. Gracia***, 2013 WI 15, ¶35, 345 Wis. 2d 488, 826 N.W.2d 87; ***State v. Ernst***, 2005 WI 107, ¶14, 283 Wis. 2d 300, 699 N.W.2d 92. We also note that Grimh's trial attorney was appointed to be standby counsel.

("If a motor vehicle is required to be equipped with safety belts in this state, no person may operate that motor vehicle unless the person is properly restrained in a safety belt."). Grimh fumbled with his driver's license, smelled faintly of beer, and admitted he had been drinking. Those three factors were probably sufficient, but Grimh also admitted he had three prior OWI convictions, which a reasonable police officer would know meant Grimh's permitted alcohol level was only .02, not .08. *See* WIS. STAT. § 340.01(46m)(c) (defining "prohibited alcohol concentration"). Thus, the police officer had reasonable suspicion to ask Grimh to perform field sobriety tests and submit to a chemical test.

The circuit court also properly rejected Grimh's challenge to the warrantless blood draw. Grimh's blood was drawn without a warrant on November 4, 2012. The law in Wisconsin at the time was that the natural dissipation of alcohol in the bloodstream is a sufficiently exigent circumstance to justify a warrantless, investigatory blood draw. *See* ***State v. Bohling***, 173 Wis. 2d 529, 547, 494 N.W.2d 399 (1993). The United States Supreme Court effectively abrogated ***Bohling*** with its decision in ***Missouri v. McNeely***, 133 S. Ct. 1552 (2013), released in April 2013. Because of ***McNeely***, Grimh argued that the results of his blood test should be suppressed.

Here, the circuit court denied the motion after concluding the good faith exception to the exclusionary rule applied, meaning the officer appropriately relied on and followed the law as it was at the time of the stop. In ***State v. Kennedy***, 2014 WI 132, ¶¶36-37, 359 Wis. 2d 454, 856 N.W.2d 834, our supreme court approved the application of the good faith exception in pre-***McNeely***, warrantless blood draw cases. Thus, ***McNeely*** provides no basis for suppression in this matter; the warrantless blood draw results were admissible.

Grimh challenged the arresting officer's jurisdiction because the officer worked for the City of Appleton Police Department, but Grimh was stopped and arrested in the Village of Kimberly. The officer was participating in a multi-agency "OWI enforcement action" under the coordination of the Outagamie County Sheriff's Department. Such multiagency action is permitted by WIS. STAT. §§ 59.28(1)-(2) ("Sheriffs … shall keep and preserve the peace in their respective counties …; for which purpose … [they] may call to their aid such persons or power of their county as they consider necessary;" "County law enforcement agencies may request the assistance of law enforcement personnel … as provided in ss. 66.0313[.]") and WIS. STAT. § 66.0313(2) ("[U]pon the request of any law enforcement agency, including county law enforcement agencies as provided in s. 59.28(2), the law enforcement personnel of any other law enforcement agency may assist the requesting agency within the latter's jurisdiction[.]"). While Grimh takes issue with the "acknowledgement of duties" form completed by the officer prior to participating in the enforcement action, there is no requirement for any such forms to be completed, much less any prescribed format for them. The circuit court properly rejected the challenge to the officer's jurisdiction. There is no arguable merit to a claim the circuit court improperly denied any of Grimh's pretrial motions.

Counsel next discusses whether there is any basis for a challenge to the validity of Grimh's no-contest pleas as not knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). With the assistance of his standby counsel, Grimh completed plea questionnaire and waiver of rights forms, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987), in which he acknowledged that he understood the elements of the offenses. The forms correctly acknowledged the maximum

penalties Grimh faced and specified the constitutional rights he was waiving with his pleas. *See* ***Bangert***, 131 Wis. 2d at 262.

The circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The colloquy was largely compliant with the requirements for a plea colloquy, as collected in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, though the circuit court failed to provide the immigration warning required by WIS. STAT. § 971.08(1)(c). However, in order to obtain relief because of such an omission, a defendant must show that the plea is likely to result in deportation, exclusion from admission, or denial of naturalization. *See* ***State v. Negrete***, 2012 WI 92, ¶26, 343 Wis. 2d 1, 819 N.W.2d 749; ***State v. Douangmala***, 2002 WI 62, ¶¶3-4, 253 Wis. 2d 173, 646 N.W.2d 1. Here, the record shows that Grimh was born in Wisconsin, so he would not be able to make the necessary threshold allegations for relief.

The plea questionnaire and waiver of rights forms and the court's colloquy appropriately advised Grimh of the elements of his offenses and the potential penalties he faced and otherwise sufficiently complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that a plea is knowing, intelligent, and voluntary. There is no arguable merit to a challenge to the validity of Grimh's pleas.

The final issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and

determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The circuit court noted that the community is concerned about repeat drunk driving, as evidenced by the structure of laws reducing the acceptable blood-alcohol level based on prior convictions. The court explained that Grimh's offenses, as fifth and sixth offenses, were serious. It commented that driving off the road includes an element of recklessness to it, and that walking away from the car in the ditch demonstrated irresponsibility. The circuit court commented that Grimh's age—fifty-four at the time of sentencing—was an aggravating factor, because it demonstrated that Grimh had not learned anything despite the expenses of prior convictions. It further observed that one of Grimh's cases had been in warrant status for years. The circuit court was of the opinion that jail as opposed to prison would diminish the seriousness of the offense and noted that the system was running out of alternatives for Grimh.

The maximum possible sentence Grimh could have received was twelve years' imprisonment. The sentence totaling four years and three months' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***,

70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion.[5]

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Susan E. Alesia is relieved of further representation of Grimh in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[5] By order dated November 16, 2015, we directed counsel to file a supplemental report regarding sentence credit. Grimh had commented that he thought he had spent about nine days in jail in Sauk County on the original 2004 case that was recharged in 2013. The State offered to check with Sauk County and get back to the Outagamie County court with an answer, but the record contained no follow-up correspondence of any kind. Counsel's supplemental report indicates that the credit issue has been resolved by stipulation, with Grimh receiving an additional nineteen days of credit. There is, therefore, no issue of arguable merit regarding sentence credit.