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DISTRICT II

March 30, 2016

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

2015AP1547-CRNM State of Wisconsin v. Charles W. Amburn (L.C. #2013CF938)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Charles W. Amburn appeals from a judgment of conviction and an order denying his postconviction motion. Amburn's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)¹ and *Anders v. California*, 386 U.S. 738 (1967). Amburn filed a response. Counsel then filed a supplemental no-merit report. After reviewing the record,

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

counsel's reports, and Amburn's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment and order. *See* RULE 809.21.

On the night of August 13, 2013, the Big Bend Police Department received a call from a citizen witness about a possible drunk driver. The caller reported observing a vehicle driving on the highway at varying speeds and nearly hitting several other cars. The caller also reported seeing the same vehicle pull over and stop, with the male driver and female passenger switching positions.

Police found and stopped the suspect vehicle. The female occupant told police that she had not been drinking but that her boyfriend, the male occupant, had. She further stated that her boyfriend had been driving until they switched "about a mile ago." The male occupant, Charles Amburn, gave police a photo identification card and social security card with a false name. He had glassy eyes and smelled of intoxicants. When asked if he had been drinking, he acknowledged that he had. When asked if he had been driving, he responded, "It's none of your fucking business."

After a poor performance on the field sobriety tests and a preliminary breath test of ".164," police arrested Amburn. They eventually learned his real name and the fact that he had four prior convictions for operating a motor vehicle while intoxicated (OWI). The prosecutor subsequently filed a complaint, charging Amburn with one count of OWI as a fifth offense and one count of obstructing an officer.

Ultimately, Amburn entered a guilty plea to the charge of OWI as a fifth offense. The charge of obstructing was dismissed and read-in. At the plea hearing, after some initial hesitation, Amburn acknowledged driving the vehicle while intoxicated, explaining, "That's the

reason we switched drivers.” The circuit court sentenced him to two years of initial confinement followed by two years of extended supervision. It also imposed the minimum fine of \$600.

After sentencing, Amburn filed a postconviction motion seeking plea withdrawal on the ground of ineffective assistance of counsel. Amburn claimed that his attorney had incorrectly advised him prior to his plea that he would receive sentence credit for the time he spent on electronic monitoring while on bond in the case. Following a hearing on the matter, the circuit court denied the motion. This no-merit appeal follows.

The no-merit report first addresses the adequacy of the circuit court’s plea colloquy. The record shows that the court engaged in a colloquy with Amburn that satisfied the applicable requirements of WIS. STAT. § 971.08(1) and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.² A signed plea questionnaire and waiver of rights form was entered into the record. The court referred to that form when discussing the rights Amburn was giving up by entering his plea. This was permissible under *State v. Moederndorfer*, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). We agree with counsel that any challenge to the adequacy of the plea colloquy would lack arguable merit.

The no-merit report next addresses whether the circuit court properly denied Amburn’s postconviction motion. As noted, Amburn filed a postconviction motion seeking plea withdrawal on the ground of ineffective assistance of counsel. He claimed that his attorney had

² There is one exception to this. The circuit court failed to provide the deportation warning required by WIS. STAT. § 971.08(1)(c). This failure does not present a potentially meritorious issue for appeal, however, as there is no indication that Amburn’s plea is likely to result in his deportation, exclusion from admission to this country, or denial of naturalization. Section 971.08(2). Indeed, at the plea hearing, Amburn indicated that he was a citizen of the United States.

incorrectly advised him prior to his plea that he would receive sentence credit for the time he spent on electronic monitoring while on bond in the case. At the hearing on the motion, Amburn's attorney denied the allegation. Although he did not have a specific recollection of discussing the issue with Amburn, he testified that his understanding of the case law is that "you get credit for time in jail and nothing else." Ultimately, the court concluded—based on credibility determinations—that Amburn's attorney did not provide the incorrect advice. Because the record supports these credibility determinations, we agree with counsel that any challenge to the decision denying the postconviction motion would lack arguable merit.

Finally, the no-merit report addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court considered and discussed the facts and factors relevant to Amburn's sentencing, including the seriousness of the offense, his character, and the need to protect the public. Under the circumstances of the case, which were aggravated by Amburn's lengthy criminal record, the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to the decision at sentencing would lack arguable merit.

As noted, Amburn filed a response to counsel's no-merit report. In it, he complains that he felt pressured into accepting the plea agreement. He also asserts that "at least two" of the prior OWI offenses cited against him were "unknown to him and that someone had used his identity."

There are multiple problems with Amburn's claims. First, at the plea hearing, he indicated that no one had threatened or forced him to plead guilty and that he had enough time to discuss the matter with his attorney. Second, also at the plea hearing, Amburn admitted to the prior OWI offenses via the following exchange:

THE COURT: The Complaint indicates that you have been convicted of an OWI-related offense on four prior occasions: June 12 of 2013—excuse me—June 12 of 2003; March 15 of 2005; September 29 of 2005; and June 19 of 2006. To the best of your knowledge, sir, do those convictions remain on the record and unreversed?

THE DEFENDANT: Yes, ma'am.

THE COURT: And so, therefore, do you acknowledge this is a 5th offense OWI?

THE DEFENDANT: Yes, ma'am.

In the supplemental no-merit report, counsel confirms that Amburn had four prior OWI convictions. She bases this determination on a review of the records in each of those cases, which reflect Amburn's full name and birthdate. Given this information, along with Amburn's statements at the plea hearing, we are not persuaded that Amburn's response presents any issues of arguable merit.

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 Hannah Schieber Jurss of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Hannah Schieber Jurss is relieved of further representation of Amburn in this matter.

Diane M. Fremgen
Clerk of Court of Appeals