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DISTRICT II

April 20, 2016

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

2015AP2466-CRNM State of Wisconsin v. Mark E. Wagner (L.C. #2014CF398)
2015AP2467-CRNM State of Wisconsin v. Mark E. Wagner (L.C. #2014CF771)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

In these consolidated cases, Mark E. Wagner appeals from judgments convicting him, upon his guilty pleas, of sixth-offense operating a motor vehicle while intoxicated (OWI) and felony bail jumping. Wagner's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Wagner has elected not to file a response. Upon consideration of the no-merit report and our independent

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

review of the record as mandated by ***Anders*** and RULE 809.32, we conclude that the appeal may be disposed of summarily. *See* WIS. STAT. RULE 809.21.

Wagner flipped his vehicle when he lost control navigating a curve. He refused field sobriety and breath tests. Blood drawn pursuant to a warrant indicated an elevated blood alcohol concentration. He was charged with sixth-offense OWI and a no-alcohol order was imposed. Some weeks later, he was charged with felony bail jumping after a neighbor called police complaining that an intoxicated Wagner was harassing her. After pleading guilty to sixth-offense OWI and felony bail jumping, Wagner was sentenced to five years' imprisonment for the OWI, bifurcated as three years' confinement and two years' extended supervision, and two years for the bail jumping, bifurcated as one year each of confinement and supervision. The court ordered that the sentences be served consecutively. This no-merit appeal followed.

The no-merit report addresses the following possible appellate issues: (1) whether the sentence is unduly harsh; (2) whether the circuit court had the authority to make Wagner ineligible for Earned Release Program (ERP) until he served three years' confinement; and (3) whether trial counsel should have recommended a substitution of judges because a different judge may have imposed a lighter sentence. We agree with appellate counsel that these issues do not have arguable merit for appeal.

Although casting the sentence under the rubric of "harshness," counsel examined it within the broader context of whether the court properly exercised its sentencing discretion. Our review of the record reveals that the sentencing court's discretionary 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 thoroughly discussed the facts and factors relevant to imposing the

sentence it fashioned. It considered the seriousness of the offenses; Wagner's conduct in the offense, character, untreated and long-term alcoholism, and history of other offenses; and—significant to the court—the need to protect the public. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court declared him statutorily ineligible for the challenge incarceration program due to his age, WIS. STAT. § 302.045(2)(b), but approved the ERP after three years' confinement.

As to the harshness of the sentence, Wagner faced a maximum of six years' imprisonment on each of the two felonies and up to $40,000 in fines.[2] We cannot say that his global seven-year sentence, and no fine, "is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with appellate counsel that there would be no arguable merit to a challenge to the sentence.

The report indicates that Wagner feels the circuit court erroneously imposed a waiting period for him to enter the ERP. No arguable issue could arise from this point.

A sentencing court has the authority to decide both whether a defendant is eligible for ERP, *see* WIS. STAT. § 973.01(3g), and when the period of eligibility will begin, ***State v. White***, 2004 WI App 237, ¶2, 277 Wis. 2d 580, 690 N.W.2d 880. The court noted that he has been through many programs only to return to drinking and driving, imperiling the public. The court

told Wagner it wanted him to "serve some time and think about … whether it's worth it" to him to get sober and to "think about spending the rest of your life" in prison, because in the event of a seventh offense "they're going to max you out." No arguable challenge could be made to the court's decision to delay Wagner's eligibility.

Wagner also opined to counsel that he would have gotten a lighter sentence from a different judge. The implication is that trial counsel was ineffective for not requesting a judicial substitution. A claim of ineffective counsel for failure to seek or obtain substitution of the circuit court judge cannot succeed without some demonstration that the assigned judge was partial or fundamentally unfair. *See* ***State v. Damaske***, 212 Wis. 2d 169, 198-99, 567 N.W.2d 905 (Ct. App. 1997). Wagner offers nothing, and we find nothing in the record to substantiate that claim.

A potential issue not raised in the no-merit report is whether Wagner's guilty pleas were knowingly, voluntarily, and intelligently entered. We conclude there would be no arguable merit to a challenge to the entry of his guilty pleas.

Wagner answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that his pleas were knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver-of-rights form Wagner

[2] Each of the "base" felonies exposed Wagner to a fine of up to $10,000 but, because of his multiple convictions and blood alcohol level, he faced enhanced penalties on the OWI. He faced a triple (continued)

signed is competent evidence of a knowing and voluntary plea. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). While a plea questionnaire and waiver-of-rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32.

Our independent review of the record did not disclose any other 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, affirm the judgment of conviction, and relieve Attorney Gregory Bates of further representation of Wagner in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Gregory Bates is relieved of further representation of Mark Wagner in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

fine if the court used the value from the sample taken an hour after the initial draw and a quadruple fine if the court used the higher value from the initial draw. *See* WIS. STAT. § 346.65(2)(g)2., 3.