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DISTRICT I

November 25, 2016

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

2016AP603-CRNM State of Wisconsin v. Daniel Edward Kroening (L.C. # 2015CF381)

Before Kessler, Brennan and Brash, JJ.

Daniel Edward Kroening appeals a judgment convicting him of operating while intoxicated, as a fourth offense within five years. Attorney Pamela Moorshead filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Kroening responded. After considering the no-

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

merit report and the response, and conducting an independent review of the record, we conclude that there are no issues of arguable merit that Kroening could raise on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there would be any basis for arguing that Kroening did not knowingly, intelligently, and voluntarily enter his guilty plea. In order to ensure that a defendant is knowingly, intelligently, and voluntarily waiving the right to trial by entering a guilty plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which he is pleading guilty, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Although the form is "not intended to eliminate the need for the court to make a record demonstrating the defendant's understanding of the particular information contained therein," the circuit court may refer to a plea colloquy and waiver-of-rights form, which the defendant has acknowledged reviewing and understanding, as part of its inquiry, reducing "the extent and degree of the colloquy otherwise required between the [circuit] court and the defendant." ***State v. Hoppe***, 2009 WI 41, ¶42, 317 Wis. 2d 161, 765 N.W.2d 794 (citation and quotation marks omitted).

During the plea hearing, the prosecutor stated the plea agreement on the record, and Kroening and his attorney both said it was in accord with their understanding. The circuit court told Kroening that it was not bound by what either the State or his lawyer recommended although it would consider the information they presented. *See* ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. The circuit court explained the elements of the crime to Kroening, informed him of the maximum penalties he faced by entering a plea, and personally

reviewed the constitutional rights he was waiving. The circuit court also explained that Kroening was giving up the right to raise defenses to the charge by pleading guilty. Kroening informed the court that he understood.

The circuit court ascertained that Kroening read the plea questionnaire and waiver-of-rights form, reviewed it with his attorney, understood the information on the form, and that Kroening signed it. The circuit court asked Kroening whether he reviewed the criminal complaint and whether the facts alleged in the complaint could serve as the basis for the plea. Kroening agreed that the complaint provided a factual basis for the plea. The circuit court also informed Kroening that if he was not a citizen of the United States of America, he could be deported if he pled guilty to the crime. *See* ***State v. Douangmala***, 2002 WI 62, ¶46, 253 Wis. 2d 173, 646 N.W.2d 1. Based on the circuit court's thorough plea colloquy with Kroening, and Kroening's review of the plea questionnaire and waiver-of-rights form, there would be no arguable merit to an appellate challenge to the plea.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its discretion when it sentenced Kroening to twelve months in the House of Corrections and the minimum fine of $600. The circuit court also revoked Kroening's driver's license for twelve months. The circuit court considered the seriousness of the crime, noting that Kroening's intoxicated driving had caused an accident. The circuit court considered Kroening's character, including his good work ethic, the need to protect the community, and the goal of deterring Kroening from driving while intoxicated. The circuit court considered appropriate factors in deciding what length of sentence to impose and explained its application of the various sentencing guidelines in accordance with the framework set forth in ***State v. Gallion***,

2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, there would be no arguable merit to an appellate challenge to the sentence.

In his response, Kroening argues that while he may have caused the accident, he was also a victim. He suggests that the police had a duty of care to him under tort law, which they breached. Tort law applies to civil cases, not criminal cases. Kroening's argument does not provide grounds for relief from his conviction.

Kroening also argues in his response that his lawyer should have moved for dismissal because the laboratory results were delayed. The circuit court continued the case because the forensic test results were not back from the laboratory. The circuit court would have not granted a motion to dismiss had Kroening's lawyer brought one because the delay was only five weeks and thus did not violate Kroening's right to a speedy trial or otherwise prejudice him. *See* ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324. There is no arguable merit to this claim.

Our independent review of the record also reveals no arguable basis for reversing the judgment of conviction. Therefore, we affirm the judgment and relieve Attorney Pamela Moorshead of further representation of Kroening.

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

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved of any further representation of Kroening in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals