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**DISTRICT I/II**

June 14, 2017

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Milwaukee County Courthouse  
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Reserve Judge

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

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2016AP1352-CRNM      State of Wisconsin v. Ryan Paul O'Boyle (L.C. # 2010CT2661)

Before Hagedorn, J.<sup>1</sup>

Ryan O'Boyle appeals from a judgment convicting him of operating while intoxicated (2nd offense), a misdemeanor, contrary to WIS. STAT. § 346.63(1)(a) (2009-10) and from a postconviction order denying his motion to withdraw his guilty plea. O'Boyle's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*,

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

386 U.S. 738 (1967). We have received multiple responses from O’Boyle and a supplemental no-merit report from counsel. Upon consideration of the no-merit report, the supplemental no-merit report and O’Boyle’s responses, and after an independent review of the record as mandated by *Anders* and RULE 809.32, we summarily affirm the judgment and the order because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses only one possible appellate issue: whether O’Boyle is entitled to withdraw his guilty plea because his trial counsel was ineffective for not litigating a motion to suppress. Although we agree with appellate counsel that the one issue he raises lacks arguable merit for appeal, the no-merit report is nevertheless deficient. A no-merit report is supposed to “identify anything in the record that might arguably support the appeal and discuss the reasons why each identified issue lacks merit.” WIS. STAT. RULE 809.32(1)(a). Counsel was obligated to address possible appellate issues arising pretrial (motion to suppress, which was not waived by O’Boyle’s guilty plea, WIS. STAT. § 971.31(10)), and matters relating to the plea colloquy and the sentencing, and state why the issues do not have arguable merit. Future no-merit reports may be rejected if they do not fulfill the purpose of RULE 809.32.

With regard to the entry of his guilty plea, O’Boyle answered questions about the plea 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. O’Boyle stated that he read the complaint, heard and understood the elements of operating while intoxicated (2nd offense), had not been threatened or coerced into entering a guilty plea, waived each constitutional right explained to him by the circuit court, and agreed that the facts stated in the complaint were true. The plea colloquy record discloses that O’Boyle’s guilty plea was knowingly, voluntarily and intelligently entered, *State v. Bangert*, 131 Wis. 2d 246, 260, 389

N.W.2d 12 (1986), and that it 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 O’Boyle 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). Although 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. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of O’Boyle’s guilty plea.

The plea colloquy record also effectively counters any claim O’Boyle makes in his responses to counsel’s no-merit reports that he was coerced into pleading guilty (he stated that he was pleading guilty of his “own free will”), that he did not read the complaint, that there was no factual basis for the guilty plea,<sup>2</sup> or that his guilty plea was otherwise defective.

With regard to the sentence, 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. The court adequately discussed the facts and factors relevant to sentencing O’Boyle to a concurrent sixty-day term in the House of Correction and other sanctions. In fashioning the sentence, the court considered the seriousness of the offense,

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<sup>2</sup> The complaint stated a factual basis for the operating while intoxicated (2nd offense) charge. O’Boyle complains that his trial counsel did not tell him that if he entered a plea, he could not challenge the complaint. During the plea colloquy, O’Boyle specifically agreed that the facts in the complaint were true. A party cannot maintain a position on appeal which is inconsistent with the position taken by him or her in the circuit court. *State v. Michels*, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987).

O'Boyle's character and history of other offenses,<sup>3</sup> and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. No issue with arguable merit arises from the sentence.

The record reveals that O'Boyle filed a postconviction motion to withdraw his guilty plea because his trial counsel failed to pursue a motion to suppress on the grounds that the officer lacked probable cause to arrest him. The motion alleged that the law enforcement officer observed O'Boyle pulling over to the side of the road with a flat tire, approached O'Boyle's vehicle, offered assistance, O'Boyle gave a false name,<sup>4</sup> O'Boyle exhibited signs of intoxication (glassy, red eyes and an odor of intoxicants), and O'Boyle fled the scene. O'Boyle was later apprehended, and he failed field sobriety tests and was arrested. The circuit court denied the postconviction plea withdrawal motion because there was probable cause to arrest O'Boyle after he gave a false name to the officer before he fled, thereby obstructing the officer pursuant to WIS. STAT. § 946.41.<sup>5</sup> Because there was probable cause to arrest O'Boyle, trial counsel was not ineffective for failing to litigate a motion to suppress. *State v. Cummings*, 199 Wis. 2d 721, 748 n.10, 546 N.W.2d 406 (1996) (attorney's failure to pursue a meritless motion does not constitute deficient performance). In the absence of ineffective assistance, there was no basis to withdraw O'Boyle's guilty plea.

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<sup>3</sup> The circuit court considered that O'Boyle had been convicted in another case of attempted second-degree intentional homicide. O'Boyle received a thirteen-year sentence for that offense.

<sup>4</sup> O'Boyle does not dispute that he gave the law enforcement officer a false name, that of his twin brother.

<sup>5</sup> WIS. STAT. § 946.41 prohibits obstructing an officer by "knowingly giving false information to the officer ... with intent to mislead the officer in the performance of his or her duty...." Sections 946.41(1) and (2)(a).

O'Boyle raises a number of issues in his responses to counsel's no-merit report and supplemental no-merit report.

O'Boyle complains that his counsel filed a no-merit report. Counsel discharges the duty of representation by filing a no-merit report if counsel concludes, as here, that the case has no arguable merit for appeal. *State ex rel. Flores v. State*, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994).

O'Boyle claims that his trial counsel did not investigate and did not obtain audio and video recordings of the officer's encounter with O'Boyle and his disabled vehicle. O'Boyle does not suggest what such an investigation might have revealed. O'Boyle also suggests that exculpatory evidence was destroyed, but there is no indication in this record that such evidence existed. Most importantly, O'Boyle admitted at the plea hearing that the facts alleged in the complaint were true. The complaint alleged that the law enforcement officer observed O'Boyle pull over with a flat tire, and O'Boyle exhibited signs of intoxication when he exited the vehicle to fix the flat tire. O'Boyle's complaints regarding a lack of investigation and exculpatory evidence are at odds with his admission to the facts alleged in the complaint. A party cannot maintain a position on appeal which is inconsistent with the position taken by him or her in the circuit court. *State v. Michels*, 141 Wis. 2d 81, 98, 414 N.W.2d 311 (Ct. App. 1987). This issue lacks arguable merit for appeal.

O'Boyle argues that his trial counsel did not litigate a motion to suppress to challenge the manner in which the officer came into contact with O'Boyle.<sup>6</sup> O'Boyle alleges that the officer

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<sup>6</sup> The postconviction motion to withdraw O'Boyle's plea alleged the absence of probable cause to arrest. In his response to counsel's no-merit report, O'Boyle takes a different tack.

approached him to render assistance and did not have a basis to believe that O'Boyle had committed a crime. Accepting these allegations as true, they do not provide a factual basis for a motion to suppress. Not every law enforcement officer interaction with a driver is automatically adversarial or constitutes a seizure. *County of Grant v. Vogt*, 2014 WI 76, ¶54, 356 Wis. 2d 343, 850 N.W.2d 253 (in asking the parked driver to roll down the window, the officer did not exercise authority sufficient to constitute a Fourth Amendment seizure; signs of intoxication became apparent to the officer after the window was opened, which provided grounds for seizing the driver thereafter).

Applying *Vogt*, O'Boyle was neither stopped by the officer (he pulled over with a flat tire) nor seized by the officer at the time the officer approached to offer assistance. There would be no arguable merit to an ineffective assistance of trial counsel claim arising from a challenge to the manner in which the officer first came into contact with O'Boyle or the subsequent basis to seize and arrest due to signs of intoxication.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did 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 affirm the judgment of conviction and the postconviction motion order. We relieve Attorney Matthew Meyer of further representation of O'Boyle 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 Matthew Meyer is relieved of further representation of Ryan O'Boyle in this matter.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*