OFFICE OF THE CLERK
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 II

August 21, 2013

To:

Hon. John R. Race
Circuit Court Judge
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Sheila Reiff
Clerk of Circuit Court
Walworth County Courthouse
P.O. Box 1001
Elkhorn, WI 53121-1001

Donald T. Lang
Asst. State Public Defender
P. O. Box 7862
Madison, WI 53707-7862

Daniel A. Necci
District Attorney
P.O. Box 1001
Elkhorn, WI 53121-1001

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

Shawn P. Moran 232763
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2013AP507-CRNM	State of Wisconsin v. Shawn P. Moran (L.C. # 2012CF116)
2013AP508-CRNM	State of Wisconsin v. Shawn P. Moran (L.C. # 2012CT151)
2013AP509-CRNM	State of Wisconsin v. Shawn P. Moran (L.C. # 2012CT181)

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

Shawn Moran appeals from judgments of conviction for fifth-offense operating while intoxicated (OWI), fifth-offense operating with a prohibited blood alcohol content (BAC), fifth-offense operating with a detectable amount of a restricted controlled substance in the blood (RCS), disorderly conduct, operating after revocation, and failure to install an interlock device. Moran's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967), to which Moran has filed a response. *See* RULE 809.32(1)(e). We required appellate counsel to file a supplemental no-merit report.[2] Upon consideration of these submissions and an independent review of the records, we modify the judgment in Walworth county case number 2012CF116 and conclude that the judgment, as modified, and the other judgments may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We direct that upon remittitur an amended judgment of conviction should be entered in case number 2012CF116.

Moran was stopped after he ran a stop sign and a check of his vehicle's license plate number showed the plate was suspended. Moran admitted he did not have a driver's license because it was revoked. Moran smelled of intoxicants and admitted he had consumed beer. He refused to perform field sobriety tests and was taken to a hospital for a blood draw. Three criminal complaints were filed charging him with OWI, operating after revocation, and failure to install an interlock device. The BAC, RCS, and disorderly conduct charges were included in an amended information filed in case number 2012CF116, after waiver of a preliminary hearing.

Moran entered guilty pleas to all charges and stipulated that the circuit court could rely on the facts set forth in the criminal complaints to establish a factual basis for entry of his pleas. Moran was sentenced to three years' initial confinement and three years' extended supervision on the OWI conviction, ninety days' consecutive jail time on the disorderly conduct conviction,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Appellate counsel moves to extend the time to file the required supplemental no-merit report. The extension is granted and the supplemental no-merit report filed July 26, 2013, is timely filed.

and fines on the operating after revocation and failure to install an interlock device convictions. No sentence was imposed for the BAC conviction in case number 2012CF116. *See* WIS. STAT. § 346.63(1)(c) (there shall be a single conviction for purposes of sentencing if a person is found guilty of a combination of OWI, BAC, RCS charges arising out of the same incident). Although at sentencing the court imposed a separate six-year consecutive sentence on the RCS conviction, the judgment of conviction does not include that sentence. The judgment of conviction in case number 2012CF116 lists the BAC and RSC counts with the notation "DJ-no sentence imposed."

The no-merit report first addresses Moran's guilty pleas and concludes that any claim challenging the pleas would be without arguable merit. We agree with the report's conclusion that the plea colloquy and reference to the plea questionnaires established that Moran's pleas were knowingly, voluntarily, and intelligently entered. However, the no-merit report overlooks that reliance on the criminal complaints to establish a factual basis for the pleas was insufficient with respect to the disorderly conduct charge because that charge was not set forth in the complaint but added in the amended information. During the plea hearing the circuit court must "[a]scertain personally whether a factual basis exists to support the plea." ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. The factual basis requirement is distinct from the requirement that the defendant's guilty plea be knowingly, voluntarily, and intelligently made. ***State v. Thomas***, 2000 WI 13, ¶14, 232 Wis. 2d 714, 605 N.W.2d 836. We required appellate counsel to address in a supplemental no-merit report whether a factual basis for the disorderly conduct was established on the record.

As appellate counsel's supplemental no-merit report points out, "a court may look at the totality of the circumstances" when considering whether a factual basis for the guilty plea is

established.[3] *Id.*, ¶18. That includes the sentencing hearing record and a prosecutor's statement of evidence. *Id.*, ¶¶18, 21. During Moran's initial appearance in case number 2012CF116, the prosecutor indicated that a disorderly conduct charge would be filed based on Moran's conduct at the hospital in which he used obscene language and disturbed other people in the emergency room. The presentence investigation report includes Moran's acknowledgement that he "cussed everyone out at the hospital." Because review of the entire record establishes a factual basis for the disorderly conduct conviction, there is no arguable merit to a claim for plea withdrawal.

With respect to the sentences imposed, the no-merit report addresses whether the sentences were the result of an erroneous exercise of discretion, whether Moran could claim he was sentenced on the basis of inaccurate information because a sentence was imposed on the RCS charge when WIS. STAT. § 346.63(1)(c) prohibits it or because the court initially sentenced Moran to a nine-month sentence on the disorderly conduct before realizing its mistake as to the maximum and reducing the sentence to ninety days, whether imposition of the maximum on the OWI and disorderly conduct convictions was unduly harsh, and whether Moran was entitled to sentence credit. We are satisfied that the no-merit report properly analyzes these issues as without merit, and we will not discuss them further.

Regarding the notation on the judgment of conviction that no sentence was imposed on the BAC and RCS convictions, we required appellate counsel's supplemental no-merit report to

[3] The supplemental no-merit report also discusses whether a factual basis for the BAC and RCS convictions was established since those charges were also not charged in the complaint and the controlled substance was never identified. For reasons explained later, we direct the modification of the judgment of conviction to dismiss the BAC and RCS charges. Moran is not prejudiced by any potential inadequacy in establishing the factual basis for the pleas to those charges, and we need not discuss them further.

address whether Moran was entitled to have the judgment of conviction modified to reflect that the BAC and RCS convictions are dismissed. *See* ***Town of Menasha v. Bastian***, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993). The supplemental report indicates that it is unclear whether Moran is entitled to have reference to the BAC and RCS counts removed from the judgment of conviction but concludes that any inclusion of those counts on the judgment is harmless error because in fact no sentence was imposed on those counts.[4] Regardless of the uncertainty, Moran is not prejudiced by the potential error in the judgment of conviction because in fact no sentence was imposed on the counts. *See* WIS. STAT. § 971.26. However, we are bound by ***Town of Menasha***, 178 Wis. 2d at 195, which explained that under § 346.63(1)(c), "the defendant is to be sentenced on one of the charges, and the other charge is to be dismissed." Also, to avoid possible confusion in the future it is better practice to designate those counts as dismissed. We modify the judgment in case number 2012CF116 to reflect that counts two and three, the BAC and RCS counts, are dismissed. Upon remittitur, an amended judgment of conviction shall be entered to reflect the modification.

We turn to the matters raised in Moran's response to the no-merit report. His first complaint is that his first trial attorney, Julie May, was ineffective in her investigation and representation of his case. However, May only represented Moran at his initial appearance and was replaced ten days after that appearance by attorney James Duquette. We do not consider

[4] The supplemental report acknowledges that the meaning of the abbreviation "DJ" on the judgment of conviction is not known. It suggests that if "DJ" was intended to mean "dismissed by judge," no further action is needed because the dismissal is accomplished. We will not rely on the unknown meaning of the "DJ" designation.

whether May was ineffective because the deficiencies Moran suggests would not have occurred during May's brief representation.

Moran suggests deficient performance by trial counsel because trial counsel did not tell him "that in accordance to the 6th amendment I am afforded 'two' jury trials, had anyone told me that I would have taken my case to trial and I'm sure there would have been a different outcome." Moran's claim that he would not have pled guilty if he had known that he could possibly have separate trials on the various charges stands in stark contrast to his choice, the day before trial and against the advice of trial counsel, to enter guilty pleas because he did not want to go to trial on any of the charges.[5] Moreover, it was unlikely the cases would be tried separately since they all arose from the same incident. There is no arguable merit to a claim that trial counsel was ineffective for not informing Moran of the right to separate trials.

One additional suggestion of ineffective assistance of trial counsel comes with Moran's complaint that both trial and appellate counsel failed to investigate or request a video tape that recorded the events at the hospital after Moran's arrest. Moran claims the video would show the police brutality to which he was subjected while in restraints in the hospital. Even if the video tape was made and showed what Moran claims it does, it does not provide a defense to his verbal obscenities which disturbed other people in the emergency room and constituted disorderly conduct. Additionally, by entering his guilty plea to the disorderly conduct charge, Moran

[5] At sentencing Moran also expressed a desire to "get this done with," and acknowledged that, "I know I broke the law."

waived his right to present a defense. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

Moran does not provide any further example of something trial counsel failed to do and the record does not suggest any way in which trial counsel's performance was deficient. We have already concluded that Moran's guilty pleas were demonstrated to be knowingly, voluntarily, and intelligently entered. A valid guilty plea waives the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***Id.***

Moran complains that his initial appearance was not held within forty-eight hours after his arrest. He cites ***County of Riverside v. McLaughlin***, 500 U.S. 44, 55-56 (1991), which held that a judicial determination of probable cause to support a warrantless arrest must be made within forty-eight hours of the arrest. *See* WIS. STAT. § 970.01 (initial appearance to be held within a reasonable time). Moran's assertion that he was not brought before the court within forty-eight hours is wrong. The record shows he was stopped at 2:08 a.m. on March 16, 2012, and arrested shortly after the stop. His first appearance was on March 16, 2012, at 1:00 p.m.[6] Even if no probable cause determination was made at the March 16, 2012 appearance, the failure to conduct a probable cause hearing within forty-eight hours of arrest is not a jurisdictional defect and not grounds for dismissal with prejudice or voiding of a subsequent conviction unless the delay prejudiced the defendant's right to present a defense. ***State v. Golden***, 185 Wis. 2d

[6] We note that at the initial appearance conducted March 16, 2012, on the OWI charge, the circuit court did not comply with the statutory duties set forth in WIS. STAT. § 970.02(1)(a). *See* ***State v. Thompson***, 2012 WI 90, ¶62, 342 Wis. 2d 674, 818 N.W.2d 904. Any issue that might exist from noncompliance was forfeited by Moran's guilty plea. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

763, 769, 519 N.W.2d 659 (Ct. App. 1994). Additionally, by his guilty plea Moran forfeited the rights to challenge any violation of § 970.01(1). ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886.

With respect to sentencing, Moran claims that the sentencing court's comment that "if I could give him a life sentence, I would" is totally illegal and that charges should have been filed against the court for making it. There was nothing illegal about the sentencing court's comment. There is no precedent that the sentencing court must impose sentence in a completely dispassionate manner. The relevant inquiry is whether the emotion displayed rises to the level of bias or partiality. *See* ***State v. Sinks***, 168 Wis. 2d 245, 257, 483 N.W.2d 286 (Ct. App. 1992). Here the sentencing court was merely assessing the seriousness of driving while intoxicated and the need to protect the public from repeat drunken drivers such as Moran. The comment did not exhibit any partiality.

Moran also asserts that all OWI cases are misdemeanors, no matter how many times a person is convicted, and that he should not have been sentenced for a felony. Moran is simply wrong about Wisconsin's OWI penalty structure. WISCONSIN STAT. § 346.65(2)5. declares that a fifth OWI offense is a class H felony.

The remainder of Moran's response is replete with Moran's contention that his appointed appellate counsel has not provided competent representation on appeal. A no-merit report is an approved method by which appointed counsel discharges the duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). We have concluded that there is no arguable merit to further postconviction or appellate proceedings in these cases. This court's decision accepting the no-merit report and discharging appointed counsel of any

further duty of representation rests on the conclusion that counsel provided the level of representation constitutionally required.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction in Walworth county case number 2012CF116 is modified, and as modified, the judgment is summarily affirmed and the cause remanded with directions. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the judgments of conviction in Walworth county case numbers 2012CT151 and 2012CT181 are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Donald T. Lang is relieved from further representing Shaun Moran in these appeals. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals