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October 8, 2014

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

2013AP2476-CRNM State of Wisconsin v. Orry K. Hanson (L.C. # 2012CF37)

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

Orry Hanson appeals from a judgment convicting him of operating while intoxicated (4th offense) with injury contrary to WIS. STAT. § 346.63(2)(a)1. (2011-12).[1] Hanson's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Hanson received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether the circuit court erred when it determined that Hanson was competent for trial notwithstanding the traumatic brain injury he suffered as a result of operating while intoxicated; (2) whether Hanson's guilty plea was knowingly, voluntarily, and intelligently entered and had a factual basis; and (3) whether the circuit court misused its sentencing discretion in imposing three years of probation and seven months of condition time. We agree with appellate counsel that these issues do not have arguable merit for appeal.

The circuit court's determination that Hanson was competent for trial was based upon testimony from examining professionals who had rendered conflicting opinions about Hanson's competency. It was for the circuit court to assess the credibility of these professionals. ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345.

With regard to the entry of his guilty plea, Hanson answered questions about the plea and his understanding of his constitutional rights during a colloquy with the circuit court. We note three defects in the plea colloquy, but none of these defects undermines the knowing, voluntary, and intelligent nature of Hanson's guilty plea.

At the plea colloquy, the court must establish that the defendant understands the nature of the charged crime. ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. During the plea colloquy in this case, the court did not mention the elements of operating while intoxicated with injury. Rather, the court confirmed that Hanson had signed a plea questionnaire. The court did not note that the elements for the wrong crime were attached to the

plea questionnaire. Although Hansen was pleading guilty to operating while intoxicated with injury (count 1 of the complaint), the elements for operating with a prohibited blood alcohol concentration with injury (count 2 of the complaint) were mistakenly attached to the questionnaire.

Appellate counsel's no-merit report points out that the elements of the crime of conviction were not discussed at the plea hearing. However, appellate counsel opines that this issue lacks arguable merit for appeal given the similarity in the elements of the two crimes. The elements of operating while intoxicated with injury, WIS. STAT. § 346.63(2)(a)1. are: operation of a motor vehicle under the influence of an intoxicant and causing injury. WIS JI—CRIMINAL 2665. The elements of operating with a prohibited blood alcohol concentration, § 346.63(2)(a)2., are: operation of a motor vehicle with a prohibited blood alcohol concentration and causing injury. WIS JI—CRIMINAL 2661. The chief difference between the crimes is whether the defendant operated while intoxicated or with a prohibited blood alcohol concentration. In the complaint, which formed the factual basis for the plea, the injured passenger alleged that Hanson was intoxicated when he rolled his vehicle. The complaint also alleged a blood alcohol concentration of .24, well in excess of any applicable limit. The complaint supported both crimes.

Our review of the record reveals that at a competency hearing six months before the plea hearing, the circuit court noted that the case was straightforward and mentioned, at that time, the elements of operating while intoxicated with injury.

Given the similarity of the elements of the two crimes, that appellate counsel identified the colloquy defect in the no-merit report and Hanson has not responded, and that the elements

were mentioned at a prior hearing, we conclude that no arguable issue arises from the court's failure to review the elements at the plea hearing. This defect was "insubstantial" and did not affect the validity of Hanson's guilty plea. ***State v. Taylor***, 2013 WI 34, ¶39, 347 Wis. 2d 30, 829 N.W.2d 482. In ***Taylor***, the supreme court affirmed the denial of a plea withdrawal motion because the record showed that the defendant knew he was exposed to an eight-year sentence as a repeater even though the circuit court informed him at the plea colloquy that the maximum penalty was six years. ***Id.***, ¶8. The ***Taylor*** court held that a ***Bangert***[2] plea colloquy violation exists only when the plea was not entered knowingly, intelligently, and voluntarily. ***Id.***, ¶39. Where the record reflects that the plea was properly entered, no ***Bangert*** violation occurs. ***Id.***[3]

We note two other defects in the plea hearing which are not of consequence in this case. First, the court did not warn Hanson that he might face deportation upon conviction. ***Hoppe***, 317 Wis. 2d 161, ¶18. This failure is of no consequence because the record indicates that Hanson was born in the United States. Second, the circuit court did not give the ***Hampton***[4] warning that "that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney…." ***Id.*** This error was also of no consequence because the court accepted and imposed the parties' joint recommendation of three

[2] ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986).

[3] In another case, the circuit court's failure to "[e]stablish the defendant's understanding of the nature of the crime with which he is charged," ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794, could provide a basis for a motion to withdraw a plea on the grounds that the plea was not knowingly, voluntarily, and intelligently entered.

[4] ***State v. Hampton***, 2004 WI 107, 274 Wis. 2d 379, 683 N.W.2d 14.

years of probation and seven months of condition time. ***State v. Johnson***, 2012 WI App 21, ¶¶12-14, 339 Wis. 2d 421, 811 N.W.2d 441.[5]

After considering the defects mentioned above, we conclude that the record discloses that Hanson's guilty plea was knowingly, voluntarily, and intelligently entered, ***Bangert***, 131 Wis. 2d at 260, and that it had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). The record reveals that Hanson admitted the requisite prior convictions. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Hanson's guilty plea.

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 clearly found the joint recommendation reasonable and noted that Hanson had an alcohol problem. We agree with appellate counsel that there would be no arguable merit to a challenge to the circuit court's imposition of the agreed-upon sentence.

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, affirm the judgment of conviction, and relieve Attorney William Schmaal of further representation of Hanson in this matter.

[5] In another case, these defects could provide a basis for a motion to withdraw a plea on the grounds that the plea was not knowingly, voluntarily, and intelligently entered.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney William Schmaal is relieved of further representation of Orry Hanson in this matter.

Diane M. Fremgen
Clerk of Court of Appeals