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

July 5, 2023

To:

Hon. Jerilyn M. Dietz
Circuit Court Judge
Electronic Notice

April Higgins
Clerk of Circuit Court
Manitowoc County Courthouse
Electronic Notice

Winn S. Collins
Electronic Notice

Jacalyn C. LaBre
Electronic Notice

Timothy T. O'Connell
Electronic Notice

Wayne Albert Vancamp, #342865
Oakhill Correctional Inst.
P.O. Box 938
Oregon, WI 53575-0938

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

2020AP1960-CRNM State of Wisconsin v. Wayne Albert Vancamp (L.C. #2018CF96)

Before Gundrum, P.J., Grogan and Lazar, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Wayne Albert Vancamp appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI), as a seventh, eighth, or ninth offense. Vancamp's appointed appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Vancamp filed a response to the no-merit report, appellate counsel filed a supplemental no-merit report, and Vancamp then filed an additional response.

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Upon consideration of the no-merit report, the supplemental no-merit report, and Vancamp's responses, and upon an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The State charged Vancamp with OWI and operating with a prohibited alcohol concentration (PAC), each as a seventh, eighth, or ninth offense. According to the criminal complaint, an officer stopped Vancamp's vehicle at approximately 10:50 p.m. after noticing that the vehicle's headlights were not illuminated and that there was a large amount of snow obscuring the vehicle's windows. Upon making contact with Vancamp, the officer immediately noticed a strong odor of intoxicants emanating from his person. Vancamp admitted to drinking earlier that evening, and the officer learned that Vancamp was subject to a 0.02 blood alcohol concentration (BAC) restriction. After administering field sobriety tests—during which Vancamp displayed multiple indicators of intoxication—the officer placed Vancamp under arrest for OWI. The officer obtained a warrant to draw Vancamp's blood, and subsequent testing of the blood sample revealed a BAC of 0.38. The criminal complaint alleged that Vancamp had six prior OWI convictions—three Georgia convictions from 1989, and three Brown County, Wisconsin, convictions from 1990, 2011, and 2012, respectively.

The parties reached a plea agreement, which provided that Vancamp would enter a guilty or no-contest plea to the OWI charge, and, in exchange, nineteen charges from seven additional cases would be dismissed and read in. The circuit court conducted a plea colloquy with Vancamp, supplemented by a signed plea questionnaire and waiver of rights form. Following the colloquy, the court accepted Vancamp's no-contest plea to the OWI charge, finding that it was knowingly, intelligently, and voluntarily entered. Vancamp agreed that the court could rely

on the facts alleged in the criminal complaint as the factual basis for his plea, and the court found that an adequate factual basis for the plea existed. Vancamp also admitted that he had six prior OWI convictions, corresponding to the convictions listed in the criminal complaint, which remained "on [his] record." After accepting Vancamp's plea to the OWI charge, the court dismissed the PAC charge "as a matter of law." *See* WIS. STAT. § 346.63(1)(c).

With the parties' agreement, the circuit court proceeded directly to sentencing. The State recommended that the court impose three and one-half years' initial confinement and three and one-half years' extended supervision. The defense asked the court to impose three years' initial confinement—the mandatory minimum, *see* WIS. STAT. § 346.65(2)(am)6.—and three years' extended supervision. After Vancamp exercised his right of allocution, the court sentenced him to five years' initial confinement and five years' extended supervision, with 281 days of sentence credit. The court also imposed a $3,200 fine, revoked Vancamp's operating privilege for thirty-six months, and imposed a thirty-six-month ignition interlock device requirement. The court later granted Vancamp's postconviction motion for four additional days of sentence credit.

The no-merit report addresses whether there would be arguable merit to a claim that Vancamp's plea was not knowingly, intelligently, and voluntarily entered. The record shows that the circuit court engaged in an appropriate plea colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1) and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. Additionally, the court properly relied upon Vancamp's signed plea questionnaire and waiver of rights form when fulfilling its required duties during the plea colloquy. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). On this record, we agree with appellate counsel that any challenge to Vancamp's plea would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its sentencing discretion. During its sentencing remarks, the court appropriately considered the seriousness of Vancamp's offense, the prospect of rehabilitation, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-41, 270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). Vancamp's sentence is well within the maximum allowed by law and, therefore, is presumptively not unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. Under these circumstances, any claim that the court erroneously exercised its sentencing discretion would lack arguable merit.

Vancamp raises multiple arguments in his responses to the no-merit report. First, he asserts that his 1990 Brown County OWI conviction was erroneously charged as a first-offense OWI, even though he had three prior Georgia OWI convictions. Because the 1990 conviction was charged as a first offense, which is a civil forfeiture, rather than a fourth offense, which is a crime, no attorney was appointed to represent Vancamp in the 1990 case. Vancamp argues that, because he was not represented by counsel in the 1990 case, his 1990 conviction should not have been used as a countable offense in the instant case.

As a general rule, a valid guilty or no-contest plea forfeits the right to raise all nonjurisdictional defects and defenses, including claimed violations of constitutional rights occurring prior to the plea. *See* ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. We therefore construe Vancamp's argument regarding the 1990 conviction as a claim that he should be permitted to withdraw his no-contest plea because his trial attorney was constitutionally ineffective by failing to collaterally attack the 1990 conviction. *See* ***State v. Dillard***, 2014 WI 123, ¶¶36, 84, 358 Wis. 2d 543, 859 N.W.2d 44.

An ineffective assistance claim on these grounds would lack arguable merit. A defendant may collaterally attack a prior OWI conviction on the grounds that the defendant was not represented by counsel in the prior case and did not knowingly, intelligently, and voluntarily waive the right to counsel. *See* ***State v. Clark***, 2022 WI 21, ¶1, 401 Wis. 2d 344, 972 N.W.2d 533. However, first-offense OWI is a civil forfeiture, *see* ***id.***, ¶9 (citing WIS. STAT. § 346.65(2)(am)1.), and "a constitutional right to counsel does not attach in civil proceedings," *see* ***State v. Krause***, 2006 WI App 43, ¶11, 289 Wis. 2d 573, 712 N.W.2d 67. Thus, Vancamp had no right to counsel in the 1990 case, and, as a result, he cannot collaterally attack his 1990 conviction based on a claimed violation of his right to counsel. *See* ***St. Croix County v. Severson***, No. 2017AP1111, unpublished slip op. ¶16 (WI App Nov. 13, 2018) (stating that the right to counsel "is determined by what was actually charged, not by what should have been charged" and rejecting the defendant's attempt to collaterally attack a prior conviction for first-offense OWI, which should have been charged as a second offense, based on her lack of counsel in that case). Because a collateral attack motion would have been properly denied, Vancamp's trial attorney was not ineffective by failing to file such a motion.[2] *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (counsel does not perform deficiently by failing to raise a legal challenge that would have been properly denied).

Next, Vancamp argues that he is entitled to two additional days of sentence credit for February 9 and 10, 2018. Vancamp asserts that he spent those two days in a hospital "for the

[2] To the extent Vancamp intends to argue that a conviction for first-offense OWI cannot, as a matter of law, later be counted as a fourth-offense OWI, he cites no legal authority in support of that proposition, and our own research has not revealed any case law supporting it. Any claim that Vancamp's trial attorney was constitutionally ineffective by failing to raise such an argument would therefore lack arguable merit.

effects of detoxing from alcohol." He further asserts that while in the hospital, he was handcuffed to his bed and was not allowed to leave it. Accordingly, Vancamp argues that he was in custody on February 9 and 10, 2018, and he is therefore entitled to sentence credit for those two days.

The record shows that, on February 8, 2018, the State stipulated that Vancamp's cash bail should be modified to a signature bond while Vancamp was "hospitalized due to detoxing," with the condition that Vancamp would "return to the jail immediately upon release from the hospital." On the same day, the circuit court signed an order amending Vancamp's bail "[u]pon the stipulation of the parties," and Vancamp signed a signature bond.

In the supplemental no-merit report, appellate counsel explains that he obtained Vancamp's medical records, which show that Vancamp was brought to the hospital on February 8, 2018, at about 11:30 a.m. At about 6:00 p.m., an officer informed the hospital that the court had amended Vancamp's bond from a cash bond to a signature bond, which meant that Vancamp was no longer in custody and that the officer would not need to remain at the hospital. The officer further informed the hospital that the court's order required Vancamp to report to jail immediately upon discharge. Vancamp signed a release form permitting the hospital to contact the jail as soon as he was cleared for discharge. Vancamp was cleared for discharge on February 11, 2018, and the hospital contacted the sheriff's department to pick him up and return him to jail.

The supplemental no-merit report also states that appellate counsel "followed up with" Vancamp, who indicated that he remembered law enforcement giving him a ride to and from the hospital, and he remembered being handcuffed to his hospital bed "at some point." According to

appellate counsel, however, Vancamp "could not state that the sheriff handcuffed him to the bed, or that he was handcuffed to the bed after his bond was amended from a cash to a signature bond." Given that Vancamp was free on a signature bond on February 9 and 10, 2018, and given that he cannot definitively state that he was handcuffed to his hospital bed *on those dates* or that a law enforcement officer handcuffed him to the bed, we agree with appellate counsel that Vancamp cannot show that he was "in custody" on the relevant dates, for purposes of the sentence credit statute.[3] *See* WIS. STAT. § 973.155(1)(a).

Vancamp next argues that the dates of his three Georgia OWI convictions listed in the criminal complaint "have to be wrong." Again, however, Vancamp forfeited this issue by entering a no-contest plea. *See* ***Lasky***, 254 Wis. 2d 789, ¶11. In any event, Vancamp admitted his three Georgia OWI convictions on the record during the plea hearing, admitted that those convictions occurred on the dates listed in the criminal complaint, and admitted that the Georgia convictions remained on his record. A defendant's admission "is competent proof" of prior convictions, when used for sentence enhancement purposes. ***State v. Spaeth***, 206 Wis. 2d 135, 148, 556 N.W.2d 728 (1996).

In addition, appellate counsel asserts in the supplemental no-merit report that Vancamp's Wisconsin certified driving record includes prior OWI offenses that "match up" with those listed in the criminal complaint. Appellate counsel further asserts that he was "unable to find any Georgia records to dispute the Wisconsin certified driving record." We agree with appellate

[3] Vancamp suggests that he could not have signed the signature bond because he was suffering from hallucinations while detoxing from alcohol. However, Vancamp does not actually deny that he signed the signature bond, and his unsupported assertion that he was suffering from hallucinations is insufficient to give rise to an arguably meritorious claim that he was not competent to do so.

counsel that, under these circumstances, Vancamp's claim regarding the dates of his Georgia OWI convictions does not give rise to an arguably meritorious issue for appeal.

Relatedly, Vancamp also argues that an unspecified Georgia statute from the 1980s provided that an OWI conviction would be expunged after five years. Vancamp therefore asserts that his 1989 Georgia OWI convictions would have been expunged in 1994 and did not qualify as countable OWI offenses for purposes of this case. This claim lacks arguable merit. As already explained, Vancamp forfeited any challenge to his prior OWI convictions by entering a no-contest plea. Furthermore, as discussed above: Vancamp admitted during the plea hearing that the 1989 convictions remained on his record; Vancamp's Wisconsin certified driving record includes the 1989 convictions; and appellate counsel could not locate any Georgia records to dispute Vancamp's certified Wisconsin driving record. Additionally, our supreme court has held that an expunged OWI conviction "constitutes a prior conviction under WIS. STAT. § 343.307(1), when determining the penalty for OWI-related offenses." ***State v. Braunschweig***, 2018 WI 113, ¶41, 384 Wis. 2d 742, 921 N.W.2d 199. Thus, even assuming that Vancamp's Georgia OWI convictions were expunged in 1994, they would still be countable offenses for purposes of this case.

Next, Vancamp raises an issue regarding a $2,500 payment that he made toward his $3,200 fine, which he claims the Department of Corrections initially failed to acknowledge. Vancamp concedes, however, that the issue regarding his $2,500 payment has now been corrected. As such, Vancamp's assertions regarding the $2,500 payment do not give rise to an arguably meritorious basis for appeal.

Vancamp also contends that the circuit court judge who presided over his case had a "conflict of interest" because she "was involved with [seven] other cases [Vancamp] had just before [he] went to court for [his] OWI." It appears Vancamp is referring to the seven cases in which the charges were dismissed and read in at sentencing in the instant case. This claim lacks arguable merit because WIS. STAT. § 757.19(2), which lists the situations in which a judge must disqualify him- or herself, does not require disqualification simply because a judge has presided over multiple cases involving the same defendant. To the extent Vancamp intends to argue that the circuit court was biased against him, he provides no arguably meritorious basis for a judicial bias claim, and our independent review of the record has not revealed any grounds to assert such a claim. Although Vancamp apparently believes that the court should have imposed a shorter sentence, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." ***Liteky v. United States***, 510 U.S. 540, 555 (1994).

Finally, Vancamp asserts he "was led to believe" that the circuit court would follow the district attorney's sentence recommendation. Vancamp acknowledges that the circuit court informed him that it was not bound by the parties' sentence recommendations. Nevertheless, he claims he was told "that the judge usually goes with the [district attorney's] and public defender recommendations 90% of the time." Vancamp asserts that he "would [have] asked for a jury trial" if he "would [have] thought" that he would "[get] 5 year[s]."

These assertions do not provide an arguably meritorious basis for a claim that Vancamp should be permitted to withdraw his no-contest plea. Although Vancamp asserts he was led to believe that the circuit court would follow the district attorney's sentence recommendation, he acknowledges that he knew the court was not bound by the parties' sentence recommendations. Furthermore, even if Vancamp believed the alleged representation—made to him by an

unspecified individual—that courts follow the parties' sentence recommendations ninety percent of the time, Vancamp would have necessarily understood that there was a ten-percent chance the court would not follow the parties' recommendations. On this record, there would be no arguable merit to a claim that Vancamp's no-contest plea was not knowingly, intelligently, and voluntarily entered based on his alleged belief that the court would likely follow the parties' sentence recommendations. *See also* ***State v. Provo***, 2004 WI App 97, ¶18, 272 Wis. 2d 837, 681 N.W.2d 272 (explaining that an attorney's incorrect prediction or mistaken estimate of a defendant's sentence does not provide a basis for an ineffective assistance of counsel claim).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report and discharges appellate counsel of the obligation to represent Vancamp further in this appeal.

Upon the foregoing reasons,

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 Timothy T. O'Connell is relieved of further representation of Wayne Albert Vancamp in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals