



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, 2024

To:

Hon. Paul V. Malloy
Circuit Court Judge
Electronic Notice

Connie Mueller
Clerk of Circuit Court
Ozaukee County Justice Center
Electronic Notice

David Malkus
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Eduardo Zopiyactle Xochiquiquixqui #715705
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

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

2024AP542-CRNM State of Wisconsin v. Eduardo Zopiyactle Xochiquiquixqui
(L.C. #2021CF000195)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Eduardo Zopiyactle Xochiquiquixqui appeals a judgment, entered following his guilty pleas, convicting him of possession with intent to deliver methamphetamine (>10-50g), possession with intent to deliver cocaine (>15-40g), and felony bail jumping. [60.] He also appeals an order denying postconviction relief. Zopiyactle Xochiquiquixqui's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*,

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

386 U.S. 738 (1967). Zopiyactle Xochiquixqui was advised of his right to file a response, and he has not responded. After reviewing the record and counsel's report, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment and order. *See* WIS. STAT. RULE 809.21.

While on patrol, an officer saw Zopiyactle Xochiquixqui at a gas station next to a vehicle parked at a fuel pump. The officer recognized Zopiyactle Xochiquixqui from prior encounters and knew Zopiyactle Xochiquixqui did not have a driver's license. The officer explained he previously booked Zopiyactle Xochiquixqui into the jail for operating without a license. The officer confirmed with the Department of Transportation that Zopiyactle Xochiquixqui did not have a license and then stopped Zopiyactle Xochiquixqui after he drove away from the gas station in his vehicle. During the stop, police observed Zopiyactle Xochiquixqui reaching down in the center console area. They removed Zopiyactle Xochiquixqui from the vehicle and handcuffed him. Then, looking back into the vehicle, police saw a black box underneath the steering wheel wedged between the center console and the driver's side carpeting. Police found drugs in the black box. They searched the vehicle and found another box containing more drugs. The State charged Zopiyactle Xochiquixqui with possession with intent to deliver methamphetamine (>10-50g), possession with intent to deliver cocaine (>15-40g), operating without a license as a third or subsequent offense within three years, and three counts of felony bail jumping.

Zopiyactle Xochiquixqui filed a suppression motion, challenging the stop and the search of the vehicle. Following an evidentiary hearing, the circuit court denied the motion. The court first concluded that the stop was constitutionally valid because police reasonably suspected

Zopiyactle Xochiquixqui was operating a vehicle without a license. As for the search of the vehicle, the court determined:

They had probable cause to search the vehicle I think from the time that they got him out and saw that small box[.] There are all kinds of exceptions that would justify [the search]. You could say it's the automobile exception, you could say it's the inventory exception. The vehicle's on a county road. They are going to tow that vehicle because the department's policy is to not leave it there. They are going to take it. So they have to protect themselves to see what's in the vehicle.

Pursuant to a plea agreement, Zopiyactle Xochiquixqui pled to both possession charges and one felony bail jumping charge. The remaining charges were dismissed and read-in. The circuit court sentenced Zopiyactle Xochiquixqui to a cumulative sentence of seven years of initial confinement and three years of extended supervision.² The circuit court denied eligibility to the Challenge Incarceration Program (“CIP”) based on concerns about how quickly Zopiyactle Xochiquixqui might be able to enter and complete the program and how that would diminish the court's sentence.

Zopiyactle Xochiquixqui filed a postconviction motion, asking the circuit court to amend the judgment of conviction by making him eligible for the CIP on the condition that he must serve a certain portion of initial confinement before becoming eligible for the program. Following a hearing, the circuit court denied the request, elaborating that the court believed the CIP was not a good fit for Zopiyactle Xochiquixqui based on his criminal history. This no-merit appeal follows.

² Specifically, the circuit court sentenced Zopiyactle Xochiquixqui to seven years of initial confinement and three years of extended supervision on each of the possession counts, making them concurrent to each other but consecutive to any other sentence. The court also sentenced Zopiyactle Xochiquixqui to three years of initial confinement and three years of extended supervision on the felony bail jumping count concurrent to the possession sentences.

The no-merit report addresses potential issues of: whether the circuit court erred by denying Zopiyactle Xochiquixqui's suppression motion; whether Zopiyactle Xochiquixqui's pleas were knowingly, voluntarily, and intelligently entered; whether the court properly exercised its discretion at sentencing; and whether the circuit court erred by denying Zopiyactle Xochiquixqui's postconviction motion. Upon reviewing the record, we agree with counsel's analysis and conclusion that there is no arguable basis to pursue any of these issues. We comment briefly on these issues.

As to the suppression motion, we agree with counsel's analysis that there is no arguable merit to challenge the stop or the subsequent search. The record established that police reasonably suspected Zopiyactle Xochiquixqui was operating without a license. *See State v. Popke*, 2009 WI 37, ¶23, 317 Wis. 2d 118, 765 N.W.2d 569. Additionally, the record from the motion hearing established that police had probable cause to arrest Zopiyactle Xochiquixqui for operating without a license based on his recent prior operating-without-a-license convictions. Police also had probable cause to search the vehicle because the record established that Zopiyactle Xochiquixqui's vehicle was parked on the road during the stop in a manner that obstructed traffic, and, as a result, police could impound his vehicle and lawfully inventory the vehicle's contents without a warrant. *See State v. Brooks*, 2020 WI 60, ¶24, 392 Wis. 2d 402, 944 N.W.2d 832.

With regard to the circuit court's plea colloquy, appellate counsel points out that the circuit court did not expressly ask Zopiyactle Xochiquixqui during the plea hearing whether anyone had threatened or promised him anything in order to make him plead guilty; however, counsel advises this court that there is no merit to seek plea withdrawal on this basis because "for reasons that are outside of the court record, undersigned counsel is unable to allege that

Mr. Zopiyactle Xochiquiquixqui pled guilty based on a threat or promise.” We agree with counsel that there is no arguable merit to seek plea withdrawal on this basis. *See State v. Brown*, 2006 WI 100, ¶39, 293 Wis. 2d 594, 716 N.W.2d 906 (motion for plea withdrawal based on purported plea colloquy deficiency must “allege that the defendant did not know or understand the information that should have been provided at the plea hearing.”).

The remainder of the court’s plea colloquy sufficiently complied with the requirements of *Brown*, 293 Wis. 2d 594, ¶35, and WIS. STAT. § 971.08 relating to the nature of the charges, the rights Zopiyactle Xochiquiquixqui was waiving, and other matters. The record shows no other ground to withdraw the pleas. We therefore agree with counsel’s analysis and conclusion that any challenge to the validity of Zopiyactle Xochiquiquixqui pleas would lack arguable merit.

With regard to the circuit court’s sentencing discretion, our review of the record confirms that the court appropriately considered the relevant sentencing objectives and factors. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695; *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The resulting sentence was within the maximum authorized by law. *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. The sentence was not so excessive so as to shock the public’s sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Therefore, there would be no arguable merit to a challenge to the court’s sentencing discretion.

As for the circuit court’s denial of Zopiyactle Xochiquiquixqui’s postconviction motion regarding CIP eligibility, the circuit court had discretion to determine whether Zopiyactle Xochiquiquixqui was eligible for the CIP and the record reveals the court exercised that discretion to determine he was not eligible. *See State v. Lehman*, 2004 WI App 59, ¶19, 270

Wis. 2d 695, 677 N.W.2d 644. We agree with counsel that there is no arguably meritorious basis to claim that the circuit court erroneously exercised its discretion in denying the postconviction motion.

Our independent review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment of conviction and postconviction order, and discharges appellate counsel of the obligation to represent Zopiyactle Xochiquixqui further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of further representation of Eduardo Zopiyactle Xochiquixqui 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