STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT X

Appeal Nos. XXXXAPXXXX-CRNM
XXXXAPYYYY-CRNM

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN SMITH,

Defendant-Appellant.

Appeal from the Judgment of Conviction Entered in the
Bay County Circuit Court, the Honorable
Grover Cleveland Presiding

NO MERIT BRIEF OF DEFENDANT-APPELLANT PURSUANT TO WIS. STAT. RULE 809.32

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

INTRODUCTION

On July 19, 2010, John Smith pleaded guilty to the charge of resisting an officer in Appeal No. XXXXAPXXXX-CRNM. Adjudication of guilt was deferred and Smith was placed in the First Offenders Program. Smith was later terminated from the program. On January 14, 2011, Smith pleaded guilty to operating a motor vehicle while intoxicated (second offense) in Appeal No. XXXXAPYYYY-CRNM. That same day, Circuit Judge Grover Cleveland sentenced Smith to time served on both charges.

More than one year later, Smith filed notices of intent to pursue postconviction relief in both cases. (XXXX:24; YYYY:13).[1] In an order dated February 26, 2012, this court deemed the notices to be timely filed. Pursuant to Wis. Stat. Rule 809.30(2)(e), the State Public Defender appointed the undersigned attorney to represent Smith in postconviction proceedings. This attorney has reviewed the transcripts and court record pertaining to this case, has researched the applicable caselaw, and has discussed the case with his client in person. This attorney believes that further postconviction proceedings would be frivolous and without arguable merit, and accordingly seeks permission to withdraw as counsel in this appeal. This report is filed pursuant to Wis. Stat. Rule 809.32 and ***Anders v. California***, 386 U.S. 738 (1967).

By order dated October 16, 2012, this court has consolidated these appeals.

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[1] References to the record in Appeal No. XXXXAPXXXX-CRNM will begin with "XXXX" followed by the document and page numbers. References to the record in Appeal No. XXXXAPYYYY-CRNM will begin with "YYYY."

DISCUSSION OF POTENTIAL ISSUES

I. The Validity of the Defendant's Plea in Appeal No. XXXXAPXXXX-CRNM.

Under the Due Process Clause, a defendant's guilty or no-contest plea must be affirmatively shown to be knowing, voluntary and intelligent for a conviction to be based on that plea. ***Boykin v. Alabama***, 395 U.S. 238 (1969); ***State v. Cross,*** 2010 WI 70, ¶16, 326 Wis. 2d 492, 786 N.W.2d 64. Before accepting a plea of guilty or no-contest, circuit courts are also required to follow the procedures outlined in Wis. Stat. § 971.08. The Wisconsin Supreme Court has summarized the duties which the constitution and statute impose on the circuit courts before accepting pleas of guilty or no-contest:

> During the course of a plea hearing, the court must address the defendant personally and:
>
> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> (3) Alert the defendant to the possibility that an attorney may discover defenses or mitigating circumstances that would not be apparent to a layman such as the defendant;
>
> (4) Ensure the defendant understands that if he is indigent and cannot afford an attorney, an attorney will be provided at no expense to him;

> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;
>
> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in Wis. Stat. § 971.08(1)(c).

State v. Brown, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (footnotes and citations omitted).

Before accepting Smith's plea to the resisting charge, the court personally addressed the defendant and engaged him in a colloquy designed to fulfill these requirements. (XXXX:34). The court was also presented the defendant with a document entitled, "Plea Questionnaire/Waiver of Rights." (XXXX:13). Smith confirmed that he had spent enough time with his attorney going over the questionnaire and that he

understood its contents. (XXXX:34:2-3). The questionnaire bears Smith's signature immediately below a statement indicating that he had reviewed and understood the entire document and any attachments, that he had reviewed the document with his attorney, and that he had truthfully answered all the questions on the form. (XXXX:13). Smith told the court that the information contained on the form was true and correct. (XXXX:34:3).

With regard to the first requirement listed above, the trial court adequately determined the extent of Smith's education and general comprehension so as to assess his capacity to understand the proceedings. The questionnaire indicates that Smith was 24 years old; had completed 12 years of schooling; understood English; had not consumed any alcohol, medication, or drugs within the previous 24 hours; and was not being treated for a mental illness or disorder. (XXXX:13). The court's colloquy with Smith disclosed no problems with his ability to understand the proceedings, and the court noted that its observation of Smith during the colloquy suggested that his pleas were being entered knowingly and voluntarily. (XXXX:34:5).

The court likewise complied with the second requirement. The plea questionnaire specifically states that Smith was entering his plea of his own free will, that he had not been threatened or forced to enter his plea, and that no promises had been made to him other than those contained in the plea agreement. (XXXX:13). At the outset of the plea hearing, defense counsel stated the terms of the plea agreement: in exchange for his plea to the resisting an officer charge, the parties were jointly recommending that the court withhold an adjudication of guilt and refer Smith to the First Offender's Program. (XXXX:34:2). Smith denied that anyone

had threatened him or promised him anything to get him to plead guilty. (XXXX:34:3).

Because Smith was represented by counsel at these proceedings, it was unnecessary for the court to comply with the third and fourth requirements listed above.

As to the fifth requirement, the court established that Smith understood the nature of the crime to which he was pleading. Smith confirmed that he had gone over the criminal complaint with his attorney and that the attorney had explained to him the elements of resisting. (XXXX:34:4). Smith stated that he had no questions about "what's going on here." (*Id*.). The court also explained the maximum penalties which Smith faced, and again the defendant stated that he understood. (*Id*.). The maximum penalties are also accurately stated on the plea questionnaire. (XXXX:13).

With respect to the sixth requirement listed above, the trial court did not *personally* ascertain that a factual basis existed to support the resisting charge. However, any error in this regard would be harmless, since the facts of the criminal complaint easily establish a factual basis for the charge. The complaint alleged that two police officers were dispatched to the scene of a disturbance where Smith was observed to have been kicking at a garage door. When the officers confronted Smith as he left the scene, he allegedly raised his arm toward one of the officers. The second officer then grabbed Smith by the shoulders and commanded him to go to the ground. When Smith did not comply, the officer forced Smith to the ground. A struggle ensued. Smith did not heed the first officer's verbal commands to stop, despite being threatened with a taser. Smith refused to walk and attempted to kick the officer with whom he had struggled. Smith was then placed in leg restraints and transported to the jail. (XXXX:2).

The failure to establish a sufficient factual basis that the defendant committed the offense can constitute a "manifest injustice" which entitles the defendant to withdraw his plea. ***State v. Johnson***, 207 Wis. 2d 239, 244, 558 N.W.2d 375 (1997). A defendant seeking to withdraw his plea on this ground has the burden to show by clear and convincing evidence that there is no factual basis to support the charge. ***State v. Payette***, 2008 WI App 106, ¶253, 13 Wis. 2d 39, 756 N.W.2d 423. A court can find a factual basis in support of a plea based solely on the facts alleged in the complaint. ***State v. Black,*** 2001 WI 31, ¶14, 242 Wis. 2d 126, 624 N.W.2d 363. Because in this case those facts clearly support the resisting an officer charge, Smith could not meet his burden, and the error is essentially harmless. It is also significant that this was a negotiated plea, and well-settled caselaw establishes that "the trial court need not go to the same length to determine whether the facts would sustain the charge as it would where there is no negotiated plea." ***Spinella v. State***, 85 Wis. 2d 494, 499, 271 N.W.2d 91 (1978).

The court complied with the seventh requirement by referring to the list of constitutional rights Smith was waiving by entering his plea contained in the plea questionnaire. (XXXX:34:3-4). Smith stated that he had gone over those rights with his attorney, that he understood them, and that he understood he was waiving these rights by pleading guilty. *Id*.

The court did not comply with the requirement that it ascertain the defendant's understanding that it was not bound by the plea agreement, but that failure constituted harmless error because the court actually followed the joint recommendation for a referral to the First Offenders Program, and no other consideration was given in exchange for Smith's plea. See ***State v. Johnson***, 2012 WI App 21, ¶¶12-16, 339 Wis. 2d 421, 811 N.W.2d 441.

The court specifically advised Smith of the direct consequences of his plea, telling him that the court would find him guilty if he were terminated from the First Offenders Program, and that he could be sentenced to the maximum term for this offense. (XXXX:34:4.). Smith said that he understood. (*Id*.). The court thereby complied with the ninth requirement listed above.

Finally, the court did not comply with the tenth requirement, as it failed to specifically advise Smith of the potential deportation consequences of his plea. However, Smith would be entitled to withdraw his plea on this ground only if he could show that "the plea is likely to result in the defendant's deportation, exclusion from admission to this country or denial of naturalization." Wis. Stat. § 971.08(2). This attorney has determined that Smith is a citizen of the United States. Therefore, any error in this regard is harmless.

This record establishes that the trial court complied with most of the requirements of Wis. Stat. § 971.08 and Wisconsin caselaw before accepting Smith's plea, and that the failure to comply with the remaining requirements was harmless error. There is no arguable merit to any claim that Smith is entitled to withdraw his plea because of a defective plea colloquy.

The record also demonstrates that the plea was knowingly, voluntarily and intelligently entered, thereby satisfying the requirements of due process. ***Boykin v. Alabama***, 395 U.S. 238 (1969).

Counsel is aware of no basis for asserting that there is a factor extrinsic to the plea colloquy which constitutes a "manifest injustice" entitling Smith to withdraw this plea. *See* ***State v. Howell,*** 2007 WI 75, ¶74, 301 N.W.2d 350,

734 N.W.2d 48; ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

For all of these reasons, counsel is aware of no arguable basis for challenging the validity of Smith's guilty plea or for seeking the withdrawal of that plea.

Counsel is likewise unaware of any jurisdictional defects in this case. No other issues are preserved for appellate review, because a valid plea of guilty or no-contest constitutes a waiver of non-jurisdictional defects and defenses. ***State v. Princess Cinema of Milwaukee***, 96 Wis.2d 646, 651, 292 N.W.2d 807 (1980). Because there is no arguable basis for contending that Smith's plea was invalid, any challenge to his conviction lacks arguable merit.

II. The Validity of the Defendant's Plea in Appeal No. YYYY-CRNM.

Before accepting Smith's plea, the court personally addressed the defendant and engaged him in a colloquy designed to fulfill the requirements discussed above. (YYYY:36:3-7). The court was once again presented with a document entitled, "Plea Questionnaire/Waiver of Rights." (YYYY:10). Smith confirmed that he had gone over the questionnaire with his attorney before signing it, and that the answers provided on the form were true and correct. (YYYY:36:5). The questionnaire bears Smith's signature, immediately below a statement indicating that he had reviewed and understood the entire document and any attachments, that he had reviewed the document with his attorney, and that he had truthfully answered all the questions on the form. (YYYY:10).

With regard to the first requirement listed above, the trial court adequately determined the extent of Smith's

education and general comprehension so as to assess his capacity to understand the proceedings. Smith told the court that he not consumed any alcohol, medications or drugs within the previous 24 hours. (YYYY:36:5). The questionnaire, like the one used in the resisting case, otherwise established the level of his education and general comprehension. The court's colloquy with Smith disclosed no problems with his ability to understand the proceedings.

The court likewise complied with the second requirement. The plea questionnaire specifically stated that Smith was entering his plea of his own free will, that he had not been threatened or forced to enter his plea, and that no promises had been made to him other than those contained in the plea agreement. (YYYY:10). At the outset of the plea hearing, the prosecutor stated the terms of the plea agreement: in exchange for his plea to second-offense OWI, the parties would jointly recommend a $400 fine plus costs, 20 days in jail, a sixteen-month revocation of Smith's operating privileges, an AODA assessment, and the installation of an ignition interlock device. (YYYY:36:2). Smith stated that he understood the agreement. (YYYY:36:3). He denied that anyone had threatened him or promised him anything in exchange for his plea. (YYYY:36:6).

Because Smith was represented by counsel at these proceedings, it was again unnecessary for the court to comply with the third and fourth requirements listed above.

As to the fifth requirement, the court established that Smith understood the nature of the crime to which he was pleading. The court explained to Smith the facts which the state would have to prove to a jury's satisfaction in order to obtain a conviction, and both the minimum and the maximum penalties permitted by law. (YYYY:36:4). Defense counsel

told the court that Smith understood the possible defenses to these charges and the maximum penalties. (YYYY:36:7).

Complying with the sixth requirement listed above, the trial court personally ascertained that a factual basis existed to support the OWI charge to which Smith pleaded. Defense counsel stipulated that the court could rely on the facts in the criminal complaint to find a factual basis. (YYYY:36:7). The complaint alleged that at approximately 1:14 a.m. on February 2, 2010, a sheriff's deputy spotted a vehicle in the ditch off U.S. Highway 12 near Vista Lane. Smith was attempting to dig the vehicle out of the snow. When the officer spoke with Smith, he observed that Smith's eyes were bloodshot, his speech was "heavy" and he had to think about his answers, and there was an odor of marijuana emanated from him. Smith told the officer that a friend (whose name he did not know) had been driving the car, and that the friend had left to get a truck. But while the officer observed footprints in the snow coming out of the driver's door, he saw no footprints coming out of the passenger door, and no footprints leading away from the vehicle in any direction. After Smith admitted that he had smoked marijuana approximately one hour before the encounter and that he did not have a valid driver's license, the officer arrested him and transported him to the Bay City Police Department to have him perform field sobriety tests. Smith failed those tests. (YYYY:2). The complaint further alleged that Smith had previously been convicted of OWI in Bay County on September 18, 2010. *Id*. Smith admitted the existence of the prior conviction. (YYYY:36:7). These facts establish a factual basis for this charge.

The court complied with the seventh requirement by referring to the constitutional rights Smith was waiving by entering his plea listed in the plea questionnaire.

(YYYY:36:5-6). Smith stated that he had gone over those rights with his attorney, that he understood them, and that he understood he was waiving these rights by pleading guilty. (YYYY:36:6).

The court explained to Smith that it was "not required to follow recommendations for sentencing," and Smith said that he understood. (YYYY:36:6). The same advice also appears on the plea questionnaire. (YYYY:10). The court thereby complied with the eighth requirement listed above.

The court specifically advised Smith of the direct consequences of the plea by advising him of the minimum and maximum jail sentences, the minimum and maximum fines, and the minimum and maximum periods during which his operating privileges would be revoked. (YYYY:36:4). The court thereby complied with the ninth requirement listed above.

Finally, the court complied with the tenth requirement by specifically advising Smith of the potential immigration consequences of his plea and eliciting the defendant's acknowledgment that he understood this information. (YYYY:36:6).

This record clearly establishes that the trial court complied with the requirements of Wis. Stat. § 971.08 and Wisconsin caselaw before accepting Smith's plea. There is no arguable merit to any claim that Smith is entitled to withdraw his plea because of a defective plea colloquy.

The record also demonstrates that the plea was knowingly, voluntarily and intelligently entered, thereby satisfying the requirements of due process. ***Boykin v. Alabama***, 395 U.S. 238 (1969).

Counsel is aware of no basis for asserting that there is a factor extrinsic to the plea colloquy which constitutes a "manifest injustice" entitling Smith to withdraw this plea. *See*, ***State v. Howell,*** 207 WI 75, ¶74, 301 N.W.2d 350, 734 N.W.2d 48; ***State v. Bentley***, 201 Wis. 2d 303, 548 N.W.2d 50 (1996).

For all of these reasons, counsel is aware of no arguable basis for challenging the validity of Smith's guilty plea or for seeking the withdrawal of that plea.

Counsel is likewise unaware of any jurisdictional defects in this case. No other issues are preserved for appellate review, because a valid plea of guilty or no-contest constitutes a waiver of non-jurisdictional defects and defenses. ***State v. Princess Cinema of Milwaukee***, 96 Wis.2d 646, 651, 292 N.W.2d 807 (1980). Once again, because there is no arguable basis for contending that Smith's plea was invalid, any challenge to his conviction lacks arguable merit.

III. The Validity of the Defendant's Sentences.

The court imposed a 30-day sentence for the resisting charge and a 20-day sentence for the OWI. (XXXX:36:11-12). Both sentences were deemed served on the day they were imposed. (*Id*.).

For two reasons, it is unnecessary to discuss the validity of these jail sentences in any detail. First, the court adopted the parties' joint recommendation by sentencing Smith to "time served." (XXXX:36:2-3). Because Smith affirmatively approved the sentence the court imposed, he is estopped from attacking it on appeal. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Second, because Smith has already served the imposed sentences, he could derive no conceivable benefit from having them overturned on appeal. *See,* ***State v. Leitner*****,** 2002 WI 77, ¶13, 253 Wis. 2d 449, 646 N.W.2d 341 ("Ordinarily, this court, like courts in general, will not consider a question the answer to which cannot have any practical effect upon an existing controversy") (quoting ***State ex rel. La Crosse Tribune v. Circuit Court for La Crosse County***, 115 Wis. 2d 220, 228, 340 N.W.2d 460 (1983)).

In the OWI case, Appeal No. XXXXAPYYYY-CRNM, the court also ordered Smith to pay a fine of $400 plus costs, revoked his operating privileges for 16 months, required him to complete a mandatory alcohol assessment, and ordered him to install an ignition interlock device on any vehicle he operates once his operating privileges were reinstated. (XXXX:36:12).

Once again, the court adopted the joint recommendation in ordering the fine, revocation, assessment and installation, so Smith would be estopped from challenging them on appeal. The fine was well within the range permitted by statute, of $350 to $1,100. Wis. Stat. §§ 346.65(2)(am)2. The law also required a jail surcharge of $10, § 302.46(1)(a); a driver improvement surcharge of $365, § 365.655(1); a penalty surcharge equal to 26% of the fine, § 757.05(1); a crime lab and drug law enforcement surcharge of $13, § 165.755(1)(a); and a victim/witness surcharge of $67, § 973.045(1)(a). In addition, the defendant was required to pay a filing fee of $20, § 814.60(1). All of these costs and surcharges were accurately assessed and appear on the judgment. (XXXX:18). The court likewise appropriately imposed the court filing fee, the crime lab surcharge and the victim witness surcharge with respect to the resisting conviction. (XXXX:28).

Finally, the 16-month revocation of Smith's operating privileges was well within the maximum range of 12-to-18 months permitted by statute. Wis. Stat. § 343.30(1q)(b)3. Installation of the ignition interlock device was mandated by Wis. Stat. § 343.301(1g)(b)2. Challenges to either the revocation or the ignition interlock device order consequently lack arguable merit.

For these reasons, this attorney is unaware of any basis for challenging the defendant's sentences.

CONCLUSION

Counsel's review of the record and discussion of the case with the defendant have revealed no other potential issues that could be raised in postconviction proceedings. Because the issues addressed in this report are frivolous and without arguable merit, this attorney requests permission to withdraw from this case.

Dated this 24th day of October, 2012.

Respectfully submitted,

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

CERTIFICATION IN COMPLIANCE WITH 809.32(1)(b)

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at his/her request. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this 24th day of October, 2012.

Signed:

_____

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this no-merit brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic no-merit brief is identical in content and format to the printed form of the no-merit brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this no-merit brief filed with the court and served on all opposing parties.

Dated this 24th day of October, 2012.

Signed:

_____

[NAME OF ATTORNEY]
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant