

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**MAY 21, 1996**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-3253-CR-NM**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**MICHAEL S. HOLMES,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Buffalo County:  
DANE F. MOREY, Judge. *Affirmed.*

CANE, P.J. A jury found Michael Stephen Holmes guilty of operating a motor vehicle while intoxicated, third offense. Holmes was sentenced to 180 days in the county jail, and ordered to pay a fine and penalties totaling \$1,796.

Appellate counsel, Attorney Stephen D. Phillips, has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 734 (1967). Holmes filed a response. This court has independently reviewed

the record, and considered the no merit report and Holmes' response. This court concludes that there are no arguable appellate issues. Therefore, the judgment of conviction is affirmed.

Holmes admitted to being the driver of a car that had slid into a ditch along the left side of the highway. A state trooper testified that an open beer can and a jacket containing an open bottle of vodka were visible in the car. The officer found Holmes at a cafe, where he had gone in search of assistance to get his car out of the ditch. The officer, and other persons who encountered Holmes, testified that Holmes was very intoxicated. At trial, Holmes admitted his intoxication, but stated that he had only drank after the car had left the highway.

In his no merit report, appellate counsel summarizes the trial evidence and concludes that sufficient evidence supports the jury's verdict. Counsel also concludes that the court properly exercised its sentencing discretion. We agree with each of counsel's conclusions.

In his response, Holmes suggests that the judge made a biased remark in the presence of the jury. The trial transcript does not show that the judge made any such remark, and Holmes does not elaborate as to the content of the alleged remark. Speculation and an unrecorded statement will not support an appeal.

Holmes next attacks the performance of his trial attorney. We conclude that none of the claimed inadequacies give rise to an appellate issue.

Holmes complains that his attorney did not present evidence of the "official road condition and weather reports," and of the "treacherous" condition of the sidewalk where the field sobriety tests were conducted. Several witnesses, including Holmes, described the road and sidewalk conditions. Photographs of the accident scene were introduced into evidence. Holmes has not shown a reasonable probability that the outcome would have been different if the additional evidence had been introduced. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984) (Prejudice is shown when there is a reasonable probability that, but for counsel's error, the result of the proceeding would have

been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.).

Holmes suggests that his attorney should have introduced "receipts and testimony" from the mechanic who performed brake repairs on the vehicle. Holmes testified that the car's brakes did not work properly, and that they contributed to his loss of control. Again, evidence of a brake problem was already before the jury. The absence of this additional testimony does not undermine this court's confidence in the outcome.

Holmes asserts that his trial attorney should have introduced evidence of other cars that left the highway that day without any allegation of intoxication. However, Holmes does not indicate that any similar incidents occurred. Holmes' argument is speculative.

Holmes next faults his attorney for not obtaining a scientific analysis of the contents of the vodka bottle found in the car and for not objecting when the vodka bottle was left on counsel's table. The vodka bottle was an exhibit at trial, and its presence on the table cannot be considered error. Holmes does not explain the relevance of the analysis evidence.

Holmes argues that his attorney should have introduced evidence of how much alcohol he would have had to drink in order to become intoxicated. Holmes refused to submit to a breathalyzer test. Therefore, precise blood alcohol content was not an issue, and evidence of intoxication rates would have been irrelevant.

Holmes next focuses on a black jacket that he testified he was wearing at the time of his arrest. The arresting officer testified that Holmes was not wearing a jacket. Holmes suggests that his attorney should have introduced evidence that corroborated Holmes' testimony. The conflict in the evidence was already before the jury. Whether Holmes was wearing a jacket is of marginal relevance. This court's confidence in the outcome is not undermined.

Lastly, Holmes states that his attorney made an inadequate argument concerning the State's ability to account for all of Holmes' time between the accident and arrest. Because closing arguments were not recorded, no appellate issue on that point can be pursued.

Based on an independent review of the record, this court finds no basis for reversing the judgment of conviction. Any further appellate proceedings would be without arguable merit within the meaning of *Anders* and RULE 809.32, STATS. Accordingly, the judgment of conviction is affirmed, and defense counsel is relieved of any further representation of the defendant on this appeal.

*By the Court.* – Judgment affirmed.