

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 13, 1997

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. 96-3206-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID J. CEE,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dodge County:
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

DYKMAN, P.J. David Cee appeals from a judgment of conviction for operating a motor vehicle while under the influence of alcohol, operating a motor vehicle with a prohibited blood alcohol concentration, and operating after revocation. Cee's appellate counsel has filed a no merit report pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967). Upon consideration of the report, Cee's response, and an independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we affirm the judgment of conviction and relieve Attorney Steven G. Bauer of further representing Cee in this matter.

On January 30, 1994, a police officer observed Cee operating a motor vehicle. The police officer knew that Cee did not possess a valid operator's license and followed the vehicle. He observed Cee exit the vehicle at an apartment building where Cee lived. The officer was informed that Cee had run from the back door of the apartment into a nearby field. The officer continued to pursue Cee and eventually took Cee into custody in a wooded area.

The no merit report addresses four issues. The first is whether the trial court erred when it instructed the jury concerning flight as possible consciousness of guilt. *See* WIS J I—CRIMINAL 172.¹ Counsel's analysis correctly points out that the instruction correctly stated the law and was supported by the arresting officer's testimony that he observed Cee exit the vehicle, run into an apartment building, and run from the back of the apartment building to a field. There is no arguable merit to a claim of instructional error.

The next issue is one Cee raises in his response. He contends that trial counsel was ineffective because counsel did not move for a trial continuance so that Cee could more fully recover from injuries sustained in a car accident three months before trial. Cee claims that at the time of trial he was unable to recall things and think coherently. The record belies that claim. Although Cee testified that he could not recall all the events of the day he was chased and arrested, there was no indication that he suffered any health problems which interfered with his recollective powers or ability to present coherent testimony. Cee was not prejudiced by trial counsel's failure to seek a continuance.

The no merit report also addresses whether trial counsel was ineffective for not stressing Cee's theory of defense that he was not driving the car. The record demonstrates that trial counsel's cross-examination of the police officer focused on the officer's ability to identify Cee as the operator of the vehicle, including questions about distance and light conditions.

¹ The trial court modified the standard instruction WIS J I—CRIMINAL 172 by adding the word "allegedly" in the first sentence. The modified first sentence was: "Evidence of the conduct or the whereabouts of a person after a crime has allegedly been committed or after that person has been accused of a crime are circumstances which you may consider along with all the other evidence in determining guilt or innocence."

Cee concedes that it would not have been helpful to the defense to call his ex-girlfriend as a witness to his activities that day. Rather, Cee suggests that trial counsel should have asked the police officer whether the hood of the car was hot or cold to demonstrate that it had not been operated.

Cee can only speculate that such a question would have yielded a response favorable to the defense. Indeed, there was no indication in the officer's rendition of the events that he paused to observe the condition of the vehicle.² Trial counsel made a reasonable decision not to ask the question to which he did not know the answer. We cannot in hindsight conclude that trial counsel was ineffective for failing to give the best defense. See *State v. Williquette*, 180 Wis.2d 589, 605, 510 N.W.2d 708, 713 (Ct. App. 1993), *aff'd*, 190 Wis.2d 677, 526 N.W.2d 144 (1995). "Counsel need not be perfect, indeed not even very good, to be constitutionally adequate." *Id.* (citation omitted). A claim of ineffective trial counsel lacks arguable merit.

The final issue is whether there is arguable merit to a claim that the trial court erroneously exercised its discretion at sentencing. Cee was sentenced to one year in jail and a \$2,000 fine on the alcohol-related offenses, the maximum under the law. He also received a consecutive ninety day jail term and \$1,000 fine for the operating after revocation conviction. We agree with counsel's analysis that based on Cee's prior drunk driving convictions, six within eight years, and the other factors cited in the trial court's sentencing decision, that discretion was properly exercised.

Cee's claim that he received a stiffer sentence than that offered in a plea bargain does not suggest a misuse of the trial court's discretion. The trial court is not involved in the plea bargaining process. We conclude that this issue has no arguable merit.

² Cee also asserts that trial counsel should have questioned why Cee was not wearing a jacket when he was apprehended. Cee contends that it was a cold day and if he had been out driving, he would have worn a coat. Cee fails to recognize that he entered the apartment building before fleeing on foot and could have removed his coat in an attempt to change his appearance.

We acknowledge Cee's claim of innocence by his recitation of his version of the arrest. Suffice it to say that the evidence was sufficient to support his convictions. Our review of the record discloses no other potential issues for appeal. Attorney Steven G. Bauer is relieved from further representing Cee in this matter.

By the Court.—Judgment affirmed.