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December 6, 2013

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

2012AP1717-CRNM State of Wisconsin v. Stuart M. Buzzell (L.C. # 2011CT323)

Before Blanchard, P.J.¹

Attorney Susan Alesia, appointed counsel for Stuart Buzzell, has filed a no-merit report seeking to withdraw as appellate counsel. *See Anders v. California*, 386 U.S. 738, 744 (1967) and WIS. STAT. RULE 809.32. The no-merit report addresses: (1) the circuit court order denying Buzzell's suppression motion; (2) Buzzell's no-contest plea to operating while intoxicated (OWI), fourth offense; and (3) Buzzell's sentence of three years of probation with 120 days of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

conditional jail time. Buzzell has responded to the no-merit report. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Buzzell moved to suppress the State's evidence underlying charges of OWI and operating with a prohibited alcohol concentration. The circuit court held a hearing and then denied the motion. Pursuant to a plea agreement, Buzzell pled no-contest to OWI, fourth offense, and the parties jointly recommended a sentence of probation, with each side free to argue length and conditions of probation. The court sentenced Buzzell to three years of probation, sentence withheld, with 120 days of conditional jail time.

The no-merit report first addresses whether there would be arguable merit to a challenge to the circuit court order denying Buzzell's motion to suppress. Buzzell's suppression motion asserted that evidence of Buzzell's intoxication was illegally obtained because: (1) the police lacked reasonable suspicion to initially detain Buzzell upon making contact in a store parking lot; and (2) the police lacked reasonable suspicion to have Buzzell perform field sobriety tests.

At the suppression hearing, the State introduced evidence by Police Officer Brandon Mantych, who testified as to his interaction with Buzzell prior to placing him under arrest for OWI. Mantych testified to the following: Mantych was on patrol in a marked squad car when he observed Buzzell driving, and it appeared that Buzzell's passenger, Taro Perry, was waving his arms in an aggressive manner. As Buzzell's vehicle passed the squad car, Mantych could hear yelling coming from Buzzell's car, indicating the occupants were possibly fighting; additionally, a pedestrian at an intersection stepped back from Buzzell's vehicle, indicating the occupants in the vehicle were possibly yelling at the pedestrian. Mantych then turned around

and followed Buzzell two to three blocks, where Buzzell pulled into a store parking lot. Mantych stopped his vehicle behind Buzzell's vehicle because Buzzell and Perry were in the process of exiting the car, so it would not have been safe to pull up next to Buzzell's car. Mantych's vehicle did not block Buzzell's vehicle from exiting the parking lot.

Mantych made contact with Buzzell and asked Buzzell whether Buzzell and Taro had been fighting. Buzzell informed Mantych that Perry, not Buzzell, had been yelling. Buzzell stated that Perry had been drinking and that when Perry drinks he gets disorderly. Mantych immediately observed that Buzzell had bloodshot, glassy eyes; that Buzzell's speech was slurred; that Buzzell had a white mucus-type substance around the edges of his mouth, which Mantych believed indicated dehydration; and that Buzzell smelled of intoxicants. Mantych suspected, based on those observations, that Buzzell was intoxicated.

Mantych brought Buzzell to his squad car and had Buzzell sit on the hood of the car while Mantych radioed for back-up and obtained Buzzell's history, which indicated Buzzell had two prior OWIs. Mantych asked Buzzell if he had been drinking, and Buzzell indicated he had four mugs of beer earlier in the evening. Mantych then had Buzzell perform field sobriety tests.

Buzzell presented three witnesses: Buzzell's daughter, Jennifer Buzzell; Perry; and Buzzell. Jennifer Buzzell testified that she picked Buzzell up from the hospital following his arrest, and that Buzzell was not displaying any physical signs of intoxication. Perry testified that nobody had been yelling or waving arms in Buzzell's car prior to Buzzell and Perry's contact with the police in the store parking lot; that neither Buzzell nor Perry yelled at a pedestrian; that both Buzzell and Perry told Mantych that they had not been fighting; and that Buzzell was not exhibiting signs of intoxication. Buzzell testified that he and Perry had not been fighting in the

car; that no one had been yelling or waving arms; that Buzzell did not observe a pedestrian in the area Mantych described; that Buzzell informed Mantych that no one had been loud or fighting in the car; and that Mantych then immediately took Buzzell's license, and Buzzell did not feel free to leave.

The State also introduced a videotape of the interaction between Buzzell and Mantych. Buzzell argued that the only portion of the videotape that was relevant to the suppression motion was the part prior to the field sobriety tests, because Buzzell was not challenging the tests themselves but only whether there was the necessary reasonable suspicion leading up to the tests. The State argued that the entire videotape was relevant, to impeach the credibility of the defense witnesses who had testified that Buzzell had exhibited no signs of intoxication. The court determined that the entire tape was relevant as to the issue of witness credibility.

The circuit court found that Mantych was credible and that the defense witnesses were not credible. The court explained that the videotape established that Buzzell's speech was slurred, and that he was very unsteady and wobbly, contrary to the defense witness testimony that Buzzell was showing no signs of intoxication. The court found the facts occurred as Mantych testified, and that those facts established that the police conduct was reasonable under all of the circumstances.

First, we agree with counsel's assessment that there would be no arguable merit to a challenge to the circuit court's decision to admit the entire videotape into evidence. The entire videotape, which showed Buzzell's conduct during his interaction with police prior to his arrest, was relevant to impeach the defense witness testimony that Buzzell was not exhibiting signs of intoxication. *See* WIS. STAT. § 904.01.

Next, we agree with counsel's assessment that there would be no arguable merit to a challenge to the circuit court's decision to deny the suppression motion. The circuit court found that Buzzell had already parked and exited his vehicle when Mantych approached Buzzell and asked about the yelling in the car, and that Mantych immediately observed indicia of intoxication when he interacted with Buzzell. Those findings were supported by Mantych's testimony and established that the police conduct was constitutionally reasonable. See *State v. Luebeck*, 2006 WI App 87, ¶10, 292 Wis. 2d 748, 715 N.W.2d 639 (police may approach and question an individual without implicating the Fourth Amendment "as long as the questions, the circumstances and the officer's behavior do not convey that compliance with the requests is required"); *State v. Colstad*, 2003 WI App 25, ¶¶8, 19, 260 Wis. 2d 406, 659 N.W.2d 394 (police may detain an individual and perform field sobriety tests based on a reasonable suspicion that the defendant was driving while intoxicated).

In his no-merit response, Buzzell challenges the court's decision to deny his suppression motion. Buzzell argues that Mantych lacked credibility because, following Mantych's involvement in this case, Mantych was convicted of operating a motor vehicle while intoxicated and operating a firearm while intoxicated, and was suspended from the police department. Buzzell contends that the circuit court erred by finding Mantych credible and truthful.

We conclude that this issue lacks arguable merit. The circuit court issued a detailed decision denying Buzzell's suppression motion, explaining that it made credibility determinations after listening to witness testimony and viewing the videotape evidence. On our review of the record, we agree that the videotape evidence supports Mantych's testimony that he viewed signs that Buzzell was intoxicated, and undermines defense testimony that Buzzell was

not exhibiting signs of intoxication. We discern no arguable merit to a challenge to the court's determination based on Buzzell's assertions as to Mantych's subsequent convictions.²

Buzzell also sets forth his version of the events leading up to his arrest, apparently challenging the circuit court's factual findings underlying the court's decision on Buzzell's motion to suppress. Buzzell asserts the following: Buzzell parked at the gas station and exited his car. Mantych pulled into the gas station and parked behind Buzzell's car, even though there were empty spaces on either side of Buzzell's car. Mantych exited his car and asked Buzzell and Perry if they had been loud and arguing, and Buzzell and Perry answered no. Mantych gave Buzzell and Perry disorderly conduct warnings and then immediately asked for Buzzell's license. Perry asked to go into the gas station and Mantych did not respond. Police back-up arrived and the officers asked Buzzell to do the "heel-to-toe" and "one-leg-stand" field sobriety tests. Buzzell stated he was unable to do those tests but that he would try. There was no pedestrian in the location that Mantych described and Mantych would have had to see through a hill to observe what he described. Buzzell did not have bloodshot eyes or mucus around his mouth, and Buzzell naturally has somewhat slurred speech.³

We determine that there would be no arguable merit to a challenge to the circuit court's factual findings. As we have explained above, the court's factual findings were all supported by

² Buzzell has not provided us with any material as to this issue, and counsel has declined to file a supplemental no-merit report addressing Buzzell's factual claims and whether those claims would support any postconviction or appellate issues with arguable merit. For purposes of this opinion, we assume that Buzzell's factual claims as to Mantych have evidentiary support. We determine that, if true, those claims would not support any issues of arguable merit.

³ Additionally, Buzzell asserts that he never refused a blood draw. That assertion does not appear relevant to any potential postconviction issues.

Mantych's testimony, which the circuit court deemed credible. *See* WIS. STAT. § 805.17(2). We discern no arguable basis to disturb those findings.

Buzzell also appears to be claiming that he was denied the effective assistance of counsel. Buzzell asserts that his trial counsel did not defend him. Specifically, Buzzell claims that Buzzell provided his attorney with his medical records as to Buzzell's back and hip problems, but his counsel failed to provide that information to the circuit court, and that Buzzell's trial counsel stated Buzzell did not have the right to a medical expert to prove his medical problems.

So far as we can tell, Buzzell is asserting that his physical limitations prevented him from properly performing some of the field sobriety tests, and that his attorney failed to raise that issue at the suppression hearing. However, the criminal complaint indicates that Mantych first performed the Horizontal Gaze Nystagmus test on Buzzell, and that Mantych observed six out of six clues of intoxication. Buzzell's claimed back and hip problems would not have compromised the accuracy of that test.

The other test Buzzell completed was the walk and turn test. The criminal complaint indicates that, prior to performing this test, Buzzell stated he had a bad back and hips, but that Mantych observed Buzzell walk a straight line and observed no back or hip issues that would prevent Buzzell from performing the test. Additionally, Buzzell does not explain what information is in his medical records that would have rendered the field sobriety tests invalid. In sum, our review of the entire record and the information in the no-merit response does not support an arguably meritorious claim of ineffective assistance of counsel for failing to pursue a claim that Buzzell had injuries that invalidated the results of the field sobriety tests or on any other basis.

Buzzell also contends that he was denied his right to fair hearings because the circuit court judge had represented Buzzell's ex-wife when Buzzell and his wife separated, and the sentencing judge and Buzzell had gone to school together. However, Buzzell does not explain why Buzzell's prior contacts with the circuit court judges would have rendered the judges incapable of acting impartially in this case, and does not provide facts sufficient to support a claim of bias. See *State v. Gudgeon*, 2006 WI App 143, ¶¶20-24, 295 Wis. 2d 189, 720 N.W.2d 114 (test for judicial bias has two parts; first, "[j]udges must disqualify themselves based on subjective bias whenever they have any personal doubts as to whether they can avoid partiality to one side"; next, "[t]he second component, the objective test, asks whether a reasonable person could question the judge's impartiality"). Our review of the record, together with Buzzell's claim of prior contacts with the circuit court judges, does not reveal an arguably meritorious claim of judicial bias.

Buzzell also contends that the court should not have considered a charged and dismissed OWI charge. However, that charge was not counted as a prior OWI offense. Rather, the court recognized that Buzzell had six prior lifetime OWI convictions, plus the dismissed charge. The court did not indicate that it considered the dismissed charge as anything other than what it was: a charge that was then dismissed. We discern no arguable merit to any postconviction or appellate arguments on this basis.

Buzzell then asserts that the State failed to prove Buzzell's blood test results. However, Buzzell pled no-contest to the charges in the criminal complaint, which included a statement of Buzzell's blood test results. Because Buzzell pled no contest rather than going to trial, the State did not have to provide proof of the blood test results.

The no-merit report also addresses whether there would be arguable merit to a challenge to the validity of Buzzell's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that satisfied the court's mandatory duties to personally address Buzzell and determine information such as Buzzell's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Buzzell's plea would lack arguable merit.

Finally, the no-merit report addresses whether there would be arguable merit to a challenge to Buzzell's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. *State v. Ramuta*, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered the facts relevant to the standard sentencing factors and objectives, including the gravity of the offense, Buzzell's character, and the need to protect the public. *See State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was within the applicable penalty range. *See* WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)4. The sentence was not so excessive or unduly harsh as to shock the conscience. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We discern no erroneous exercise of the court's sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Alesia is relieved of any further representation of Buzzell in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals