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DISTRICT II

December 10, 2014

To:

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

2014AP1434-CRNM State of Wisconsin v. Michael D. Montague (L.C. #2010CF676)

Before Brown, C.J., Neubauer, P.J. and Reilly, J.

Michael D. Montague appeals from a judgment convicting him of operating while intoxicated (OWI) as a fifth offense. Montague's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Montague received a copy of the report, was advised of his right to file a response, and has elected not to do so. After reviewing the record and counsel's report, we conclude that there are

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[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

On July 19, 2010, the State filed a criminal complaint charging Montague with OWI as a fifth offense. The charge stemmed from Montague's actions the day before in the town of Somers where he rear-ended another vehicle causing two additional vehicles to be hit. Montague did not successfully complete field sobriety tests and, after being taken to the hospital, his blood results showed a blood-alcohol content of almost .3. The case was tried to a jury, and Montague was found guilty of the charged offense.[2] The circuit court subsequently imposed the maximum sentence of six years of imprisonment, consisting of three years of initial confinement and three years of extended supervision.

The no-merit report addresses the following appellate issues: (1) whether the evidence at Montague's jury trial was sufficient to support his conviction; and (2) whether the circuit court properly exercised its discretion at sentencing.

With respect to the sufficiency of the evidence, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced ample evidence

[2] The jury also found Montague guilty of operating with a prohibited alcohol concentration. That charge was added via an amended information and later dismissed after verdict by operation of law.

to convict Montague of his crime. Accordingly, we agree with counsel that any challenge to the sufficiency of the evidence would lack arguable merit.

With respect to the sentence imposed, the record reveals that the circuit court's sentencing decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In imposing its sentence, the court considered the seriousness of the offense, Montague's character, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Montague's criminal record and the fact that a baby was in the vehicle that Montague hit, the sentence does not "shock public sentiment and violate the judgment of reasonable people concerning what is right and proper." ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Montague's sentence would lack arguable merit.

In addition to the foregoing issues, we considered other potential issues that arise in cases tried to a jury, *e.g.*, jury selection, objections during trial, use of proper jury instructions, and propriety of opening statements and closing arguments. Here, the jury was selected in a lawful manner.[3] Objections during trial were few in number and properly ruled on. The jury instructions accurately conveyed the applicable law and burden of proof. No improper

[3] Defense counsel did object to the circuit court excusing two jurors for cause—one who indicated that he could not be fair because he had been accused of a crime that was ultimately dismissed and one who indicated that she would be biased because of someone close to her having been the victim of a drunk driving hit and run case. As the circuit court had discretion to decide whether to excuse the jurors in such circumstances, *see* ***State v. Erickson***, 227 Wis. 2d 758, 775, 596 N.W.2d 749 (1999), and in light of the prospective jurors' statements, any challenge to the circuit court's decision to strike these jurors would lack arguable merit.

arguments were made to the jury during opening statements or closing arguments. Accordingly, we conclude that such issues would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.[4] Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Hannah B. Schieber of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Hannah B. Schieber is relieved of further representation of Montague in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

[4] Any argument that the State failed to establish that Montague had four prior qualifying offenses would also fail. Not only did the State provide a certified driving record, but Montague also stipulated pre-trial to having the four prior offenses.