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December 30, 2014

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

2013AP2494-CRNM State of Wisconsin v. Edward O. Patrisio (L.C. # 2011CF1377)

Before Blanchard, P.J., Lundsten and Higginbotham, JJ.

Attorney Gina Frances Bosben, appointed counsel for Edward Patrisio, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) the sufficiency of the evidence to support the jury verdicts; (2) whether Patrisio received the effective assistance of counsel; (3) whether the circuit court properly admitted evidence as to

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

injuries sustained by occupants of other cars involved in the crash; (4) whether the circuit court properly denied Patrisio's motion to dismiss based on the destruction of police squad car videos; (5) whether the circuit court properly denied Patrisio's motion to suppress Patrisio's statements to police at the hospital; and (6) whether there would be arguable merit to a challenge to the sentence imposed by the circuit court. Patrisio was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Patrisio was charged with multiple criminal counts based on a multi-vehicle traffic accident that resulted in the death of the passenger in Patrisio's car. At trial, Patrisio testified that, on the night of the crash, he was driving with the victim as a passenger in his car and that both Patrisio and the victim had been drinking alcohol. Patrisio defended on the ground that the crash occurred because his brakes failed. Patrisio was convicted on jury verdicts finding him guilty of homicide by intoxicated use of a motor vehicle and operating while intoxicated. The circuit court sentenced Patrisio to four years of initial confinement and five years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to support the convictions. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The State's evidence, if deemed credible by the

jury, was sufficient to sustain the verdicts. The State introduced testimony by the responding officers, the drivers and passengers of the other vehicles, an accident reconstructionist, a forensic toxicologist as to the blood alcohol content of blood taken from Patrisio after the crash, and an expert as to the condition of Patrisio's brakes at the time of the crash. While Patrisio presented a defense that his brakes failed, causing the accident, the jury was not required to accept that testimony. The evidence presented by the State was sufficient to sustain the jury verdicts as to both convictions.

The no-merit report also addresses whether there would be arguable merit to a claim that Patrisio was denied the effective assistance of counsel. We agree with counsel's assessment that a claim of ineffective assistance of counsel would lack arguable merit. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel "must show that counsel's performance was deficient [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that "the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). Our review of the record reveals no basis to support a claim of ineffective assistance of counsel, and we do not discuss the issue further.

The no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's decision to admit evidence of the injuries sustained by the occupants of the other vehicles involved in the crash. Patrisio moved to exclude the evidence as irrelevant and unduly prejudicial. The circuit court determined that the evidence was relevant to provide context and was not unduly prejudicial, given the minor injuries sustained by the occupants of the other cars.

We agree that a challenge to the circuit court's exercise of discretion in admitting that evidence would lack arguable merit.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's decision denying Patrisio's motion to dismiss based on destruction of police squad car videos of the roads leading to the scene of the crash. Patrisio argued that his due process rights were violated when police destroyed the responding officers' squad videos. *See* ***State v. Munford***, 2010 WI App 168, ¶20, 330 Wis. 2d 575, 794 N.W.2d 264 ("The State's destruction of evidence violates a defendant's due process rights 'if the police: (1) failed to preserve … evidence that is apparently exculpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory.'" (quoted source omitted)). Patrisio argued that the squad videos recording the construction zone as the responding officers travelled to the scene of the crash was apparently exculpatory because it supported Patrisio's defense that the crash would have occurred even if he had not been intoxicated.

At a motion hearing, a police officer testified that he had reviewed the squad video footage and that he did not think anything on the footage was relevant. The officer explained that, because the squad videos were not marked as having evidentiary value, police followed their procedure of holding the videos for a period of 120 to 180 days and then destroying them after no request for the videos was received. Patrisio conceded that there was no evidence of bad faith by police, but argued that evidence of the road conditions was apparently exculpatory based on the potential defense that the accident would have occurred despite Patrisio's intoxication. *See* ***id.***, ¶21 (in absence of bad faith, a claim of a due process violation based on destruction of evidence must show that "the evidence destroyed 'possess[ed] an exculpatory value that was apparent to those who had custody of the evidence … before the evidence was destroyed,' and

… the evidence is 'of such a nature that the defendant [is] unable to obtain comparable evidence by other reasonably available means'" (quoted source omitted)).

The circuit court determined that police did not act in bad faith by destroying the videos; that the squad videos would not have been apparently exculpatory merely because they showed the construction zone leading to the crash scene; and that comparable evidence of the road conditions was available to the defense both because the construction continued for months following the accident and the squad videos were available upon request. We agree with counsel that a challenge to the court's determination would lack arguable merit.

The no-merit report also addresses whether there would be arguable merit to a challenge to the circuit court decision denying Patrisio's motion to suppress statements Patrisio made to police at the hospital following the crash. Patrisio argued that he was in custody at the hospital when police questioned him, and thus his statements were obtained in violation of ***Miranda***.[2] He argued that police waited for medical personnel to leave the room before questioning Patrisio while he was secured to the bed, distinguishing his case from ***State v. Clappes***, 117 Wis. 2d 277, 285-87, 344 N.W.2d 141 (1984) (no ***Miranda*** violation where the defendant made statements to police while being treated in an emergency room, because "the conditions of custody or otherwise deprivation of freedom requiring ***Miranda*** warnings [are] those caused or created by the authorities"). Patrisio argues that the ***Clappes*** court relied on the fact that multiple medical persons were present during questioning in finding that ***Miranda***'s safeguards were unnecessary to avoid a coercive police atmosphere. *See* ***id.*** at 286-87 (circumstances at time of questioning,

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

which included the presence of medical staff, did not require ***Miranda*** warnings; ***Miranda*** safeguards against coercive atmosphere "'caused by isolation of a suspect in police custody'" (quoted source omitted)).

At the suppression hearing, the investigating officer testified that he followed Patrisio to the hospital and waited in the emergency room while medical staff treated Patrisio for about ten minutes. The officer approached Patrisio when there was a break in the treatment. There was at least one nurse entering and exiting the room, but no one was treating Patrisio at that point; the officer did not take any steps to prevent medical professionals from entering the room. Patrisio was wearing a neck brace and could not move. The officer was the only officer in the room, and spoke with Patrisio for only a few minutes.[3] We agree with counsel's assessment that there would be no arguable merit to a challenge to the circuit court's determination that ***Miranda*** warnings were not required before police questioned Patrisio. *See* ***id.*** at 287 (no ***Miranda*** warnings required when defendant "was not deprived of his freedom by the authorities in any significant way" at the time of questioning).

Finally, the no-merit report addresses whether a challenge to Patrisio's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336,

[3] The information the officer obtained from Patrisio in the hospital room, and which the officer testified to at trial, was the following: Patrisio confirmed his address; Patrisio provided only the first three digits of his phone number and then told the officer that the officer could get the rest; Patrisio stated that, prior to the accident, he had been picking up a friend; when the officer asked the friend's name, Patrisio answered, "you know the story"; when the officer asked how much Patrisio had to drink, Patrisio stated, "you tell me"; and the officer attempted to have Patrisio perform the horizontal gaze nystagmus test, but Patrisio closed his eyes.

351 N.W.2d 738 (Ct. App. 1984). The record establishes that Patrisio was afforded the opportunity to address the court prior to sentencing. The court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Patrisio's character and criminal history, the seriousness of the offense, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Patrisio to four years of initial confinement and five years of extended supervision. The sentence was within the maximum Patrisio faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances'" (quoted source omitted)). 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 affirmed pursuant to WIS. STAT. RULE 809.21.

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

Diane M. Fremgen
Clerk of Court of Appeals