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DISTRICT III

January 13, 2015

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

2013AP2880-CRNM State of Wisconsin v. James J. Rauen (L. C. #2011CM2062)

Before Hruz, J.[1]

Counsel for James Rauen has filed a no-merit report concluding there is no basis to challenge Rauen's conviction for third-offense operating while intoxicated (OWI). Rauen has responded. Upon our independent review of the record as mandated by ***Anders v. California***,

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

386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised and summarily affirm.

The criminal complaint alleged police received a radar reading of Rauen on his motorcycle traveling fifty-seven miles per hour in a thirty-five mile-per-hour zone. After following Rauen into a driveway, the officer noticed the odor of intoxicants coming from Rauen and conducted field sobriety tests. A prelimary breath test showed a .11 alcohol concentration and his blood subsequently tested .13. The circuit court denied a suppression motion, which motion contended that the officer improperly entered "the private property and curtilage of the defendant without probable cause or a warrant," and also that probable cause was lacking for the blood draw.

A jury found Rauen guilty of third-offense OWI and third-offense operating with a prohibited alcohol concentration (PAC). After the verdict, the court dismissed the PAC count. The court originally sentenced Rauen to ninety days' jail, but defense counsel indicated Rauen would be willing to be placed on probation, to which the State did not object. The court then withheld sentence on the OWI conviction and placed Rauen on probation for two years with ninety days' jail as a condition. Subsequently, Rauen informed the court he did not wish to be on probation any longer. The court revoked probation and sentenced Rauen to the same sentence as before he was placed on probation, ninety days' jail.

Any challenge to the sufficiency of the evidence would lack arguable merit. This court must view the evidence in the light most favorable to the guilty verdict and must sustain the verdict unless no reasonable juror could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 497, 451 N.W.2d 752 (1990).

Deputy James Toth testified he was proceeding southbound on Highway 107 approaching Little Chicago when he obtained a radar reading from a motorcycle travelling northbound going fifty-seven miles per hour in a thirty-five mile-per-hour zone. After the motorcycle passed the officer's vehicle, the motorcycle accelerated. Toth turned the squad car around and attempted to catch up to the motorcycle. Toth saw lights turn into a driveway and followed. As Toth drove up the driveway, the garage door was already closed. He saw a man, later identified as Rauen, exiting the side door. Rauen walked toward the squad car, and Toth asked if Rauen had seen him earlier. Rauen responded he did see Toth "in Little Chicago." Toth then testified he could "smell[] the odor of an intoxicating beverage." He asked Rauen if he had been drinking, and Rauen responded that he had "a couple beers."

Toth asked to see the motorcycle so he could get the registration number for a speeding citation. They went into the garage and the officer observed the motorcycle. Another officer arrived and field sobriety tests were performed, after which Rauen was placed under arrest for OWI. Rauen was transported to the hospital for a blood draw, to which he consented after having been read the Informing the Accused form. Testimony from the state hygiene lab established a .13 blood alcohol content.[2]

There is also no arguable basis to challenge the circuit court's denial of the suppression motion. Rauen accelerated his motorcycle after he passed Toth, Rauen emitted the odor of alcohol when he began talking to Toth, and Rauen admitted drinking alcohol. Toth had reasonable suspicion to conduct field sobriety tests, and the resulting .11 on the preliminary

[2] Rauen stipulated to the prior convictions.

breath test, coupled with the smell of alcohol, and admission to drinking, provided probable cause for an arrest. In addition, Rauen consented to the blood draw. The area where Toth parked in the driveway was not curtilage, and a driveway offers an implied permission to enter in any event. *See* ***State v. Edgeberg***, 188 Wis. 2d 339, 347, 524 N.W.2d 911 (Ct. App. 1994).

Rauen argues in his response to the no-merit report that Toth "is not a credible person." However, the jury is the arbiter of credibility, and this court will not overturn the jury's credibility assessments unless they are inherently or patently incredible, or in conflict with fully established or conceded facts. *See* ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). As the circuit court noted post-trial: "I would point out that the arguments that you raised about the officer's truthfulness and credibility [were] raised by you in front of the jury. The jury made a determination that the officer was credible. The jury believed the officer." Rauen also contends Toth "got all this information by coercion," but the record belies Rauen's contention in this regard.

The record also discloses no basis for challenging the court's sentencing discretion. The court considered the proper factors, including Rauen's character, the seriousness of the offense, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court originally sentenced Rauen to ninety days' jail, with Huber privileges for work, treatment, Alcoholics Anonymous meetings and child care. The court also imposed the minimum fine of $1,219. After the court imposed sentence, defense counsel requested probation with jail time as a condition. The court then withheld sentence and placed Rauen on probation for two years with ninety days' jail as a condition. This allowed Rauen to report to jail at a later date.

Subsequently, the court held a hearing on Rauen's request to no longer be on probation. The court revoked probation and sentenced Rauen again. The court then sentenced Rauen to the same sentence as before he was placed on probation, ninety days in jail. The sentence was authorized by law and not overly harsh or excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other issues of arguable merit. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Katie York is relieved of further representing Rauen in this matter.

Diane M. Fremgen
Clerk of Court of Appeals