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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:

2014AP1006-CRNM State of Wisconsin v. Bert F. Roehl (L.C. # 2010CF759)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Bert F. Roehl has filed a no-merit report concluding there is no arguable basis for Roehl to challenge his conviction and sentence for fifth-offense operating a vehicle while intoxicated. Roehl was advised of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

The complaint charged Roehl with sixth-offense operating a vehicle while intoxicated. The complaint identified five previous convictions for driving while intoxicated or violating the

implied consent law. The first offense took place in Milwaukee County and the other four were in Shawano County. After being informed of his constitutional rights, the elements of the offense and the potential penalties, Roehl stipulated that he operated a vehicle on a highway with a prohibited alcohol concentration. He requested a bench trial to determine whether his prior convictions were valid, which would affect the allowable blood alcohol concentration and the potential penalty.

Applying ***State v. Hahn***, 2000 WI 118, 238 Wis. 2d 889, 618 N.W.2d 528, the trial court directed Roehl to challenge the earlier convictions in Shawano County. The Shawano County court found no defects in the 1992 and 1994 convictions, but held the 1998 conviction invalid. The Marathon County court adopted those findings. Roehl waived his rights to cross-examine and confront witnesses and to testify, and he agreed to the court deciding his guilt or innocence based on ten exhibits. Based on those exhibits, the court found Roehl guilty of fifth-offense operating with a prohibited blood alcohol concentration. The court followed the parties' joint sentence recommendation, withheld sentence and placed Roehl on probation for three years with one year in jail as a condition of probation. The court also revoked Roehl's driver's license, ordered an ignition interlock for three years, and fined Roehl $2,186.

The no-merit report discusses whether the court properly denied Roehl's collateral attacks to his 1992 and 1994 Shawano County convictions. That issue is not properly before this court. In its reconsideration of ***Hahn***, the Wisconsin Supreme Court withdrew language that suggested an offender may seek to reopen a prior conviction in an enhanced sentencing situation even after an unsuccessful challenge to the prior conviction. ***State v. Hahn***, 2001 WI 6, ¶2, 241 Wis. 2d 85, 621 N.W.2d 902. Because Roehl unsuccessfully sought to collaterally attack his 1992 and 1994 convictions in Shawano County, any alleged error arising from that decision had

to be separately appealed. The trial court in this case properly relied on the Shawano County court's decision.

In any event, the record supports the validity of the 1992 and 1994 convictions. The only ground for collateral attack of the earlier convictions would be violation of the constitutional right to a lawyer. *See* ***Hahn***, 238 Wis. 2d 889, ¶25. Court records and the 1992 judgment of conviction show Roehl was represented by an attorney at that time. With regard to the 1994 suspension for refusal, Roehl made two arguments. First, he argued he was denied effective assistance of counsel. That issue cannot be raised in a collateral attack. ***Id.*** In addition, the refusal hearing is a civil proceeding in which no constitutional right to counsel attaches. ***State v. Krause***, 2006 WI App 43, ¶¶9-12, 289 Wis. 2d 573, 712 N.W.2d 67. Roehl's second ground for challenging the 1994 refusal was the denial of his due process right under ***Apprendi v. New Jersey***, 530 U.S. 466 (2000), to have a jury determine the facts that would enhance his sentence. The court properly rejected that argument because ***Apprendi*** applied the holding in ***Jones v. United States***, 526 U.S. 227, 248 (1999), specifically exempting a prior conviction used to enhance a penalty from the matters that must be submitted to a jury. ***Apprendi***, 530 U.S. at 476.

Because there was no basis for challenging the 1992 and 1994 convictions, and Roehl did not challenge the 1990 and 2000 convictions, he was not permitted to drive with a blood alcohol content of more than 0.02 percent. *See* WIS. STAT. § 343.307(1) (2011-12).[1] A laboratory report from the Wisconsin State Laboratory of Hygiene determined his blood alcohol concentration was 0.064 percent, more than three times the maximum limit. Based on that evidence and Roehl's

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

stipulation that he operated a motor vehicle on a highway with that blood alcohol concentration, there is no basis to challenge the sufficiency of the evidence to support a conviction.

The record discloses no arguable basis for challenging the sentence. The court imposed a sentence jointly recommended by the parties. A defendant may not appeal a sentence he requested. ***State v. Sherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

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

IT IS FURTHER ORDERED that attorney Martha Askins is relieved of her obligation to further represent Roehl in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals