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DISTRICT III

March 31, 2015

To:

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

2014AP2166-CRNM State of Wisconsin v. Mark E. Johnson (L. C. No. 2013CF219)

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

Counsel for Mark Johnson filed a no-merit report concluding there is no arguable basis for Johnson to challenge a judgment convicting him of attempting to elude a traffic officer (WIS. STAT. § 346.04(3)); resisting an officer (WIS. STAT. § 946.41(1)); and misdemeanor bail jumping (WIS. STAT. § 946.49(1)(a)) (2013-14).¹ Johnson was advised of his right to respond to the

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

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 record establishes no arguable basis for Johnson to challenge the jury's verdict convicting him of all three charges. The only witness at Johnson's trial was the arresting officer, Jon Fick. Fick testified he observed Johnson operating a motorcycle without a helmet, and he believed from prior contacts that Johnson had a learner's permit. After confirming with the dispatcher that Johnson had only a learner's permit, meaning he was required to wear a helmet under WIS. STAT. § 347.485(1)(a), Fick attempted to stop Johnson and issue a citation. After Fick activated his emergency lights, Johnson turned a corner, looked over his shoulder at Fick's squad car, and rapidly accelerated. After traveling several additional blocks and making turns, Johnson slowed at a stop sign, but did not come to a complete stop. As Fick was opening his car door to make contact with Johnson, Johnson again accelerated. Johnson came to a complete stop at the next stop sign and placed both feet on the ground. Fick then exited his squad car, at which point "Mr. Johnson raised his right hand, which would be his throttle hand and flipped [him] off." Johnson then accelerated, and Fick resumed his pursuit until Johnson stopped at his father's residence.

Fick advised Johnson he was under arrest for felony fleeing and instructed him to place his hands behind his back. Johnson refused, and only acquiesced after Fick twice threatened to "tase" him. During the arrest, Johnson was swearing at Fick and pulled away when Fick performed a search incident to the arrest. The parties stipulated that Johnson was released on bond in a misdemeanor case at the time of this incident.

Although Johnson did not testify, his attorney's cross-examination and closing argument suggested that Johnson's hand gesture was merely an invitation for Fick to follow him. Fick testified that was not possible, "unless he was indicating with his middle finger." Johnson's counsel suggested that Johnson wanted Fick to follow him to his father's house so Johnson could park the motorcycle there rather than having it towed. However, Fick testified Johnson did not use the shortest route to his father's house. Fick's testimony and the stipulation that Johnson was released on bail at the time of the incident constitute sufficient evidence to support the jury's verdicts.

The court conducted a proper colloquy regarding Johnson's decision not to testify. Johnson indicated he understood his constitutional right to testify or not, and the decision was his alone. He indicated no promises or threats had been made regarding the decision, and he had enough time to discuss the decision with his attorney.

The record discloses no arguable basis for challenging the sentencing court's discretion. The court withheld sentence and placed Johnson on two years' probation with a condition that he serve thirty days in the county jail with six days of sentence credit. The court could have imposed consecutive sentences totaling five years' imprisonment and \$30,000 in fines. The court appropriately considered the seriousness of the offense, Johnson's character and the need to protect the public. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court noted Johnson was fifty-four years old, did not take responsibility for the offenses, and had many prior convictions. The court considered no improper factors and the sentence is not arguably so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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 Frederick Bechtold is relieved of his
obligation to further represent Johnson in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals