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DISTRICT IV

April 2, 2015

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

2013AP2697-CRNM State of Wisconsin v. Clayton L. Broesch, Jr. (L.C. # 2011CT242)

Before Kloppenburg, J.[1]

Attorney Steven Grunder, appointed counsel for Clayton Broesch, Jr., has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) the sufficiency of the evidence to support the jury verdict; (2) whether there would be arguable merit to a motion for a new trial; and (3) whether there would be arguable merit to a challenge to the sentence imposed

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

by the circuit court. Broesch was provided a copy of the no-merit 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.

Broesch was charged with operating a motor vehicle while intoxicated and operating with a detectable amount of a restricted controlled substance in his blood, both as a fourth offense. Following trial, the jury found Broesch not guilty of operating while intoxicated, and guilty of operating with a detectable amount of a restricted controlled substance. The circuit court entered a judgment of conviction with a withheld sentence, and placed Broesch on probation for three years. The court imposed four months of conditional jail time, with good time but no Huber privileges.

The no-merit report addresses whether the evidence was sufficient to support the conviction. 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. At trial, the State presented testimony by a police officer that the officer arrested Broesch after observing Broesch operate a vehicle in a gas station parking lot, and that Broesch was then transported to a hospital where he gave a blood sample. The State also presented expert testimony that Broesch's blood sample had been subjected to testing and that the blood contained a detectable amount of THC. This evidence, if deemed

credible by the jury, was sufficient to support the conviction for operating with a detectable amount of a restricted controlled substance.

Next, the no-merit report addresses whether there would be arguable merit to a motion for a new trial based on a claim of trial error. We agree with counsel's assessment that the record reveals no error in the trial process that would support an arguably meritorious motion for a new trial.

Finally, the no-merit report addresses whether a challenge to Broesch's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] 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, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Broesch'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 withheld sentence and imposed three years of probation, with four months of conditional jail time. The sentence was within the maximum sentence Broesch 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* WIS. STAT. §§ 346.65(2)(am)4. and 973.09(2)(am) and (4)(a) (operating with a detectable amount of a restricted controlled substance, fourth offense, is punishable by up to three years of probation, with up to one year in the county jail); ***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)). The court granted Broesch two days of sentence credit, on counsel's stipulation. 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 Grunder is relieved of any further representation of Broesch in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals