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DISTRICT IV

April 20, 2015

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

2013AP2704-CRNM State of Wisconsin v. Brendon D. Collins (L.C. # 2012CF1047)

Before Lundsten, Higginbotham and Sherman, JJ.

Attorney Donna Hintze, appointed counsel for Brendon Collins, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit to any challenge to: (1) the circuit court's decision denying Collins's motion to suppress the results of a blood draw; (2) the sufficiency of the evidence to support the

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

jury verdicts; or (3) the sentence imposed by the circuit court. Collins 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.

Collins was charged with operating a motor vehicle while intoxicated, fourth offense; operating with a prohibited alcohol concentration, fourth offense; operating while intoxicated, causing injury; and second-degree reckless endangerment. Following a jury trial, the jury found Collins not guilty of second-degree reckless endangerment, but guilty of all other charges. The circuit court entered judgments of conviction for operating while intoxicated, fourth offense, and operating while intoxicated, causing injury. The court sentenced Collins to a total of two and one-half years of initial confinement and three years of extended supervision.

The no-merit report addresses whether the circuit court erred by denying Collins's pretrial motion to suppress the results of a blood draw taken from Collins at a hospital after Collins was injured in a motor vehicle accident. Collins moved to suppress the evidence on grounds that: (1) the sample was not taken within three hours of the event, as required under WIS. STAT. § 885.235(1g); and (2) Collins did not validly consent to the blood draw because he had lost consciousness after the accident and was not able to give consent while receiving care at the hospital, *see* WIS. STAT. § 343.305.[2] The State responded that it intended to present evidence that the blood sample was taken within two and one-half hours of the accident. The State also

[2] Collins filed the motion to suppress pro se, but his counsel argued the motion on the first day of trial. In addition to the arguments asserted by counsel, Collins argued in his pro se motion that he was not lawfully arrested and that the blood draw was not taken in a reasonable manner under ***State v. Thorstad***, (continued)

stated its intent to present expert testimony to support admission of the results even if the sample had been taken outside the three-hour window. *See* WIS. STAT. § 885.235(3). Finally, the State made an offer of proof in the form of police testimony as to the circumstances of the blood draw, indicating that Collins was conscious when the investigating officer made contact with Collins at the hospital; that the officer detected the odor of intoxicants on Collins; that the officer read Collins the Informing the Accused form; and that Collins consented to the blood draw. *See* WIS. STAT. § 343.305(3)(ar)1. The testimony at trial was consistent with the State's arguments and offer of proof. We agree with counsel's assessment that a challenge to the admission of the results of the blood draw would lack arguable merit.

The no-merit report also 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. State's witness H.G. testified that she left a bar with Collins in a car that Collins drove; that Collins consumed alcohol before and while driving; and that Collins crashed the car. The investigating officer testified that he made contact with H.G. following the accident, and that H.G.'s right hand and arm had been cut and were bleeding. Additionally, the State presented evidence that Collins's blood was drawn following the

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2000 WI App 199, 238 Wis. 2d 666, 618 N.W.2d 240. We have also considered Collins's additional pro se arguments, and discern no arguable merit to those contentions.

accident, and that an analysis of the blood indicated that Collins's blood alcohol concentration would have been approximately .22 at the time of the crash. This evidence, if deemed credible by the jury, was sufficient to support the convictions for operating while intoxicated and operating while intoxicated causing injury.

Finally, the no-merit report addresses whether a challenge to Collins'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, 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 the gravity of the offense, Collins's character, 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 Collins to two and one-half years of initial confinement and three years of extended supervision. The sentence was within the maximum Collins 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. ***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" (quoting another source)). The court ultimately granted Collins 118 days of sentence credit, following Collins's motions seeking additional sentence credit. We discern no erroneous exercise of the court's sentencing discretion.

Additionally, our review of the record indicates that Collins twice moved for a mistrial. First, Collins argued that he could not have a fair trial after H.G. identified Collins during her

direct testimony as wearing a "pretty jumpsuit, gray colored." Second, Collins argued that the State deprived him of a fair trial by commenting during closing on the fact that the defense had not presented any evidence. We discern no arguable merit to a claim that the circuit court erroneously exercised its discretion by denying the motions. *See* ***State v. Hampton***, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998) ("Whether to declare a mistrial is directed to the [circuit] court's discretion…. The [circuit] court must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial as to warrant a mistrial." (citations omitted)). The court found, as to the first motion, that Collins was wearing a gray sweater, and that the jury was able to view for itself what Collins was wearing. As to the second motion, the court agreed with the State that the State had not actually commented on Collins's right to remain silent by arguing that the jury did not hear any evidence consistent with a finding of not guilty. The court also noted that the jury was presumed to follow the instructions it received as to what evidence to consider and Collins's constitutional rights. We conclude that any challenge to the court's decisions would be wholly frivolous.

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 Hintze is relieved of any further representation of Collins in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals