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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

April 29, 2015

To:

Hon. Patrick C. Haughney
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Susan Lee Opper
Assistant District Attorney
515 W. Moreland Blvd., Rm. G-72
Waukesha, WI 53188-2486

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Jefren E. Olsen
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Michael T. Muns
735 Glacier Rd.
Pewaukee, WI 53072

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

2013AP2290-CRNM State of Wisconsin v. Michael T. Muns (L.C. #2011CF1222)

Before Brown, C.J., Reilly and Gundrum, JJ.

Jefren E. Olsen, counsel for Michael T. Muns, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967) concluding that no grounds exist to challenge Muns's conviction for fifth-offense operating while intoxicated (OWI). Muns was advised of his right to file a response but has not done so. Upon consideration of the no-merit report and an independent review of the record as mandated by

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

Anders and RULE 809.32, we conclude that there is no arguable merit to any issue that could be raised on appeal. The judgment and order denying Muns's postconviction motion are summarily affirmed. *See* WIS. STAT. RULE 809.21.

Muns was charged with OWI, fifth or sixth offense, and operating with a prohibited alcohol content (PAC), fifth or sixth offense, after he allegedly drove a car that went into a ditch. Police officer Robert Hagen testified to the following. Just before 10:00 p.m. on December 11, 2011, he came upon car in a ditch, its headlights on, and rocking back and forth. Muns got out of the driver's seat and said he thought he could get the car out of the ditch. He admitted he had been driving. He displayed slurred speech, poor balance, and an odor of intoxicants. Dispatch indicated he had four prior OWI convictions. A woman, Koren Muehlbauer, who was outside of the car, said Muns was her "ride." Sheriff's deputy Michael Pavlovich, who also responded, testified that Muns performed poorly on field sobriety tests and that Muehlbauer told him Muns had driven despite her telling Muns not to. Muns's blood alcohol concentration (BAC) in a blood draw done shortly before midnight was 0.193.

Muns's trial defense was that he was not the driver. Muehlbauer testified that the actual driver was someone she knew only as "Matt," a patron at the bar and grill where she worked; that she rode in the passenger seat and Muns was in the back, nearly passed out; that the car hit a patch of ice, "360'd," and went into the ditch after Matt swerved to miss two deer; and that Matt then "took off" on foot. Muehlbauer testified that she did not mention Matt to the police or in her written statement because she was embarrassed to admit she was going home with someone she had met only that evening. The jury found Muns guilty. Muns received a total prison sentence of four years, six months, bifurcated as one year and six months' confinement plus three years' extended supervision. Fines, assessments, and surcharges totaled $2,207.

After filing a no-merit notice of appeal, one of Muns's prior postconviction counsels moved to dismiss the appeal and extend the time for filing a postconviction motion. The postconviction motion sought a new trial on grounds that the post-arrest blood draw, done without a warrant and in the absence of exigent circumstances, violated the Fourth Amendment under the newly decided ***Missouri v. McNeely***, ___ U.S. ___, 133 S. Ct. 1552 (2013). The court denied the motion after a hearing.

Current counsel ultimately was appointed. This no-merit appeal followed.[2] The comprehensive no-merit report examines seven potential grounds for an appeal. We agree with counsel's thorough analysis and well-supported conclusions that none present issues of arguable appellate merit.

The report first considers whether the blood test results should have been suppressed. Muns was arrested in 2011. At that time, Wisconsin law was that the natural dissipation of alcohol in the bloodstream created a per se exigency allowing for a warrantless, nonconsensual search. ***State v. Bohling***, 173 Wis. 2d 529, 533-34, 494 N.W.2d 399 (1993), *abrogated by* ***McNeely***, 133 S. Ct. at 1563. ***McNeely*** abolished the categorical exigency. ***McNeely***, 133 S. Ct. at 1563. Although ***McNeely*** applies retroactively, the good-faith exception to the exclusionary rule precludes suppression here because Pavlovich's testimony regarding the exigency due to

[2] On counsel's motion, this court stayed the appeal pending the Wisconsin Supreme Court's decisions in two cases addressing ***Missouri v. McNeely***, ___ U.S. ___, 133 S. Ct. 1552 (2013): ***State v. Foster***, 2014 WI 131, 360 Wis. 2d 12, 856 N.W.2d 847, and ***State v. Kennedy***, 2014 WI 132, 359 Wis. 2d 454, 856 N.W.2d 834. They, and a related case, ***State v. Tullberg***, 2014 WI 134, 359 Wis. 2d 421, 857 N.W.2d 120, all were decided on December 26, 2014.

alcohol's dissipation established that police acted in objectively reasonable reliance on "clear and settled" Wisconsin precedent. *See* ***State v. Foster***, 2014 WI 131, ¶30, 360 Wis. 2d 12, 856 N.W.2d 847, and ***State v. Kennedy***, 2014 WI 132, ¶¶33, 35-37, 359 Wis. 2d 454, 856 N.W.2d 834. There is no arguable basis to claim otherwise.

The report also analyzes the court's denial of Muns's motion to preclude the State from presenting retrograde-extrapolation evidence without a hearing pursuant to ***Daubert v. Merrell Dow Pharms., Inc.***, 509 U.S. 579 (1993). A challenge would be meritless. Test results of blood drawn within three hours of driving are given prima facie effect "without requiring any expert testimony as to its effect." WIS. STAT. § 885.235(1g). The test results here were for the purpose of multiplying the fine, *see* WIS. STAT. § 346.65(2)(g)., not as prima facie evidence that Muns's BAC was precisely 0.193 at the time of driving. Jurors were instructed that if they found Muns guilty, they had to answer "yes" or "no" as to whether his BAC was 0.17 or above, and that to answer "yes," they first had to "be satisfied beyond a reasonable doubt that the alcohol concentration stated in the question was proved." WIS JI—CRIMINAL 2663C. There is no arguable merit to a challenge to the denial of Muns's motion.

Next, the report looks at whether a meritorious challenge could be raised regarding evidence of Muns's prior OWI convictions. Muns chose not to stipulate to his prior OWI convictions or to object to references made to them during trial. The defense strategy was to show that, once law enforcement learned of his priors, they jumped to the conclusion that he was the driver without properly investigating. A reviewing court will not second-guess a reasonable trial strategy. ***State v. Felton***, 110 Wis. 2d 485, 503, 329 N.W.2d 161 (1983). In addition, the jury was instructed that it could consider evidence of prior convictions solely for deciding the status of his driving record, not as evidence he drove with a PAC in this instance. *See* WIS JI—

CRIMINAL 2660C. Jurors are presumed to follow the court's instructions. ***State v. Smith***, 170 Wis. 2d 701, 719, 490 N.W.2d 40 (Ct. App. 1992).

Muns objected to the State proving his priors with a certified copy of his Department of Transportation (DOT) driving record. He claimed a copy had not been provided to him and that a driving record is akin to the "certificates of analysis" identifying controlled substances found to violate the confrontation clause in ***Melendez-Diaz v. Massachusetts***, 557 U.S. 305 (2009).

The record conclusively establishes, however, that a certified copy of his driving record was introduced at the preliminary hearing, with a copy provided to defense counsel. Also, unlike the certificates in ***Melendez-Diaz***, deemed "quite plainly affidavits" and "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'" ***id.*** at 310-11 (citation omitted), a certified driving record contains no analysis, opinions, or conclusions and was not specially prepared for use as proof at Muns's trial. A certified driving record, as a public record the DOT is required to maintain, is admissible as an exception to the hearsay rule. *See* WIS. STAT. §§ 343.23(2) and 908.03(8); *see also* ***State v. Van Riper***, 2003 WI App 237, ¶¶16-17, 267 Wis. 2d 759, 672 N.W.2d 156. There is no arguable basis for claiming the DOT record should not have been admitted.

The next consideration involves Muns's mistrial motions. At the end of day one of trial, Muns moved for a mistrial after the prosecutor asked Pavlovich if Muns ever denied driving on the date in question and Pavlovich answered "No," on grounds that the question infringed on his right to remain silent. The court agreed the question was improper, but denied the motion, finding the answer not prejudicial in light of the rest of the evidence. The court advised the jury the question was improper and instructed it to disregard the question and answer. Muns

unsuccessfully renewed the motion the next morning. The court gave an additional curative instruction Mun's counsel prepared.

A motion for a mistrial is addressed to the trial court's sound discretion. ***Haskins v. State***, 97 Wis. 2d 408, 419, 294 N.W.2d 25 (1980). "Any prejudicial effect [that] might have flowed from the [question and answer] was cured by the court's immediate instruction to the jury to disregard [it]." ***State v. Medrano***, 84 Wis. 2d 11, 25, 267 N.W.2d 586 (1978). Even if the second curative instruction given at Muns's request served to highlight the constitutional error, it consisted of a single question and answer, so that considering the totality of the evidence it was harmless beyond a reasonable doubt. *See* ***State v. Fencl***, 109 Wis. 2d 224, 238, 325 N.W.2d 703 (1982). The court took reasonable actions in response to the mistrial motions and gave a "reasoned and reasonable" rationale for its ruling. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981). There would be no arguable basis for a claim that the trial court clearly misused its discretion in denying the motions. *See* ***Haskins***, 97 Wis. 2d at 419.

The no-merit report examines four evidentiary issues that arose at trial. Whether to admit or exclude evidence ordinarily lies within the trial court's discretion. ***State v. Harris***, 2008 WI 15, ¶85, 307 Wis. 2d 555, 745 N.W.2d 397. Certain evidence may have been erroneously excluded. For example, the prosecutor asked Hagen if it was his opinion that Muns was driving the car the night he was arrested. Before Hagen answered, defense counsel objected and the court sustained the objection as improper opinion testimony as it was the ultimate fact for the jury to decide. Opinion evidence may embrace the ultimate issue to be decided, however. WIS. STAT. § 907.04. Thus, a new trial is not warranted because, if error, it was harmless. *See* ***Martindale v. Ripp***, 2001 WI 113, ¶30, 246 Wis. 2d 67, 629 N.W.2d 698. That is, there is no

"reasonable possibility that the error contributed to the conviction." ***State v. Williams***, 2002 WI 58, ¶50, 253 Wis. 2d 99, 644 N.W.2d 919.

Similarly, the degree of proof necessary to establish a chain of custody is a matter within the trial court's discretion. ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). Overruling Muns's objection to an asserted break in the chain was a proper exercise of discretion because an alleged gap goes to the weight of the evidence, not its admissibility. *See* ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54. A challenge on the basis of any other evidentiary issues the no-merit report identifies likewise are without arguable merit.

The report also considers the sufficiency of the evidence. The standard of review for a challenge to the sufficiency of the evidence is whether the evidence "adduced, believed and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt." ***State v. Daniels***, 117 Wis. 2d 9, 17, 343 N.W.2d 411 (Ct. App. 1983). The jury determines the weight and credibility of the testimony and resolves inconsistencies within a witness's testimony or between witnesses' testimonies. ***Id.*** "[W]e ask only if the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Oimen***, 184 Wis. 2d 423, 436, 516 N.W.2d 399 (1994). The key issue was whether Muns had operated the car. In a decision that was solely its to make, the jury clearly disbelieved the "Matt" theory in favor of the officers' testimonies. A claim of insufficient evidence is without arguable merit.

Lastly, the no-merit report addresses the sentence. A defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of to defeat the

presumption that the trial court acted reasonably. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The trial court considered the standard sentencing factors and explained their application to this case, focusing on the nature of the offense, protection of the public, and Muns's character and culpability. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197.

This was Muns's fifth OWI and the jury found that his blood alcohol exceeded 0.17. He thus faced a maximum term of six years in prison and a fine of not less than $1,200 and not more than $20,000. *See* WIS. STAT. §§ 346.65(2)(am)5., 346.65(2)(g)1., and 939.50(3)(h). The sentence imposed was within the applicable penalty range and thus is presumptively not unduly harsh or unconscionable. ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507. Nor was it "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." ***Id.***, ¶31 (citation omitted). A challenge to the trial court's exercise of its sentencing discretion is without any arguable merit.

Our independent review of the record disclosed no additional potential issues for appeal. Any further proceedings on Muns's behalf would be frivolous and without arguable merit within the meaning of ***Anders*** and WIS. STAT. RULE 809.32(1). Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jefren E. Olsen is relieved of any further representation of Michael T. Muns in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals