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December 16, 2015

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

2015AP1045-CRNM State of Wisconsin v. Paul E. Ayala (L.C. # 2011CT984)

Before Hagedorn, J.¹

Paul E. Ayala appeals from a judgment convicting him of operating a motor vehicle while intoxicated (OWI) as a second offense and operating after revocation (OAR).² Ayala's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v.*

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

² Ayala was also convicted of operating with a prohibited alcohol concentration as a second offense. Pursuant to WIS. STAT. § 346.63(6)(b), no sentence was imposed for that offense, as it involved the same set of facts giving rise to the OWI conviction.

California, 386 U.S. 738 (1967). Ayala filed a response. Counsel then filed a supplemental no-merit report. After reviewing the record, counsel's reports, and Ayala's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

In the early morning hours of April 24, 2011, Officer Jeremy Fadness observed a vehicle driven by Ayala deviate from its designated lane by driving over the solid yellow center line with the passenger-side tires. Fadness stopped the vehicle and detected an odor of intoxicants emanating from Ayala's breath. He noted that Ayala had slow, slurred speech and red glassy eyes. Additionally, he learned from his squad car's computer that Ayala's driving privileges had been revoked.

Fadness had Ayala perform a number of field sobriety tests. Ayala was unable to correctly recite the alphabet or the months of the year. Likewise, he was unable to maintain his balance during the walk-and-turn test and the one-leg stand test. Ayala also failed to pass the Horizontal Gaze Nystagmus (HGN) test.

Based upon his observations, Fadness placed Ayala under arrest for OWI and OAR. He then transported him to the police station, where Ayala voluntarily submitted to an Intoximeter test of his breath. The test revealed an alcohol concentration of 0.11. The State issued a criminal complaint against Ayala in May 2011. Eventually, after much delay,³ the matter proceeded to trial, and a jury found Ayala guilty of the charged offenses. On the OWI charge, the circuit court

³ The delay was due primarily to changes in defense counsel and an earlier plea/sentencing that the circuit court vacated upon Ayala's request.

sentenced Ayala to thirty days in the House of Corrections and imposed a fine of \$350. On the OAR charge, the court imposed a fine of \$250. In addition, the court ordered Ayala to pay two DNA surcharges.

Ayala subsequently filed a postconviction motion seeking an order amending the judgment of conviction to: (1) reflect that he was entitled to thirteen days of sentence credit, (2) vacate the two DNA surcharges, and (3) reflect that Ayala had pled not guilty to the OWI charge. The circuit court entered an order granting the motion in its entirety. This no-merit appeal follows.

The no-merit report addresses the following appellate issues: (1) whether the jury was properly selected and instructed, (2) whether there were procedural or evidentiary errors that entitle Ayala to a new trial, (3) whether the evidence was sufficient to support the verdicts, and (4) whether the circuit court properly exercised its discretion at sentencing.

With respect to the first issue, it does not appear there were any errors in the jury selection process, nor was there any indication that any jurors who ultimately served could not be fair and impartial. The jurors were thoroughly vetted, and neither party objected to the panel that was chosen.⁴ As to the jury instructions, the court utilized largely pattern instructions, and the parties largely agreed to the instructions proposed. Defense counsel did object to one special

⁴ Later at sentencing, Ayala complained that he knew one of the jurors who served on his case. He identified the person as juror number fourteen and said that he recognized him from a tavern where he picks up dinner on Wednesdays. As an initial matter, we note that juror number fourteen did not serve on Ayala's case. He was excused for cause because his grandmother had passed away the day before, and he was not sure when the funeral would be. Even if the person Ayala described did serve on the jury, there is no indication that he would be incapable of judging the case in a fair and impartial manner.

instruction regarding the combination of medication and alcohol.⁵ Reviewing that instruction, we are satisfied that it informed the jury of the applicable law, as the evidence presented at trial suggested that Ayala took prescription medication along with alcohol in this case. Accordingly, we agree with counsel that any challenge to the jury selection process or the jury instructions would lack arguable merit.

With respect to the second issue, it does not appear that there were any procedural or evidentiary errors that would entitle Ayala to a new trial. Prior to trial, Ayala expressed frustration that his attorney had not retained a toxicologist as an expert witness to corroborate his claim that he was not under the influence of alcohol at the time of his arrest. However, defense counsel informed the court that he had, in fact, consulted with a toxicologist. The toxicologist was simply unable to offer an opinion that was helpful to the defense. Consequently, we see no error with the circuit court electing to proceed with trial as opposed to adjourn the case so that Ayala could pursue such a witness. Likewise, we see no error in the court's actions at trial, as evidentiary objections were relatively few in number and properly ruled on. We agree with

⁵ The instruction, which drew its language from the case of *City of Waukesha v. Godfrey*, 41 Wis. 2d 401, 406-07, 164 N.W.2d 314 (1969), was as follows:

A person who consumes an intoxicant along with medication does so at his own peril. If liquor shares its influence with another influence, and is still the activating cause of the condition which the statute denounces, it can truthfully be said the driver was under the influence of liquor.

The effects of a low intolerance to intoxicants due to a person's impaired health or physical condition is that a person is chargeable not with knowledge, of an objective quantitative standard of drinking but is chargeable with the knowledge of a—of his own limitations and capacity. And if he chooses to consume intoxicants and to thereafter operate a motor vehicle, he does so at his own risk.

counsel that any assertion that Ayala is entitled to a new trial based upon procedural or evidentiary errors would lack arguable merit.

With respect to the third issue, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the convictions, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Here, the State put on a compelling case via the testimony of (1) Fadness; (2) Barbara Doyle, a chemical coordinator who had inspected the Intoximeter machine and confirmed that it was in proper working order; and (3) Officer Mark Herson, who had administered the Intoximeter test on Ayala. In addition, the State introduced a certified copy of Ayala's driving record, which showed that his license had been revoked at the time of the incident and that he had received notice of the revocation. Our review of the record persuades us that the State produced ample evidence to convict Ayala of his crimes. We agree with counsel that any challenge to the sufficiency of the evidence would lack arguable merit.

Finally, with respect to the fourth issue, the record reveals that the circuit court's sentencing decision had a "rational and explainable basis." *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to Ayala's sentences. In fashioning the sentences, the court considered the seriousness of the offenses, Ayala's character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. As both sentences were well within the maximum limits, they do not shock public sentiment and violate the judgment of

reasonable people. *State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). We agree with counsel that any challenge to Ayala's sentences would lack arguable merit.

As noted, Ayala filed a response to counsel's no-merit report. In it, he complains that the circuit court never instructed the jurors about "the rules of being a fair juror." He also accuses trial counsel of ineffective assistance for failing to retain a toxicologist as an expert and failing to do more to get out his essential defense at trial (i.e., that Ayala had consumed only one beer and appeared intoxicated due to prescription medication, poor testing conditions,⁶ and glaucoma in one eye).

We are not persuaded that Ayala's response presents any issues of arguable merit. Here, the circuit court properly instructed the jury of both its function and how it should conduct itself. Such instructions necessarily encompassed the rules of being fair.

Moreover, we see no indication of ineffective assistance of counsel.⁷ Again, trial counsel did consult with a toxicologist in this case. He ultimately elected not to retain her, as she was

⁶ Ayala testified that there were ridges and rocks on the side of the road, which made it difficult for him to maintain his balance during the field sobriety tests. Fadness denied seeing any ridges, rocks, or anything else on the side of the road that would have interfered with the field sobriety tests.

⁷ This court normally declines to address claims of ineffective assistance of counsel in the context of a no-merit review if the issue was not raised postconviction in the circuit court. However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether Ayala's claim has sufficient merit to require appointed counsel to file a postconviction motion and request a hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

unable to offer an opinion that was helpful to the defense. Counsel cannot be faulted for failing to retain a favorable expert witness if no such witness exists.⁸

Finally, counsel did present Ayala's essential defense to the jury via the testimony of Ayala and two of his friends who saw him before and after his arrest. The State effectively rebutted that defense with the Intoximeter test result, testimony about the odor of intoxicants emanating from Ayala's breath, testimony about the field sobriety tests and testing conditions, and testimony that Ayala's glaucoma would not affect the HGN test. The fact that Ayala's defense proved unsuccessful does not mean that trial counsel was ineffective in presenting it. *See State v. Maloney*, 2004 WI App 141, ¶23, 275 Wis. 2d 557, 685 N.W.2d 620.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Leon W. Todd of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

⁸ Essentially, Ayala needed an expert witness to testify that his prescription medication or medical condition requiring it could have caused a false reading on the Intoximeter. Trial counsel eventually came to the conclusion that such a witness "doesn't exist." Counsel's conclusion is supported by the testimony of Doyle, who stated that the Intoximeter only measures alcohol and that she had never heard of prescription medication affecting the result.

IT IS FURTHER ORDERED that Attorney Leon W. Todd is relieved of further representation of Ayala in this matter.

*Diane M. Fremgen
Clerk of Court of Appeals*