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**DISTRICT IV**

April 13, 2016

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:

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2014AP2723-CRNM      State of Wisconsin v. Lamont L. Weber (L.C. #2013CF171)

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

Lamont Weber appeals a judgment convicting him, following a jury trial, of an eighth offense of operating a motor vehicle under the influence of an intoxicant (OWI-8th). [31; 47; 52] Attorney David Karpe has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);<sup>1</sup> *Anders v. California*, 386 U.S. 738, 744 (1967); *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486

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<sup>1</sup> All further references in this order to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.



The State satisfied its burden on the first element through the testimony of John Marion, in conjunction with a 911 recording. Marion testified that he was smoking a cigarette outside of his house when he observed a blue pick-up pull into a neighbor's driveway and partially over the curb onto the lawn, knocking over some garbage cans. The truck sat in the driveway for a minute or two, then backed out and stopped in front of another house. After another couple of minutes, the driver, who was the sole occupant of the vehicle, got out of the truck and staggered over to pick up the garbage cans, then went back and entered the house in front of which he had parked. Marion could hear the driver talking to himself as he walked back and forth, but could not make out the words because his speech was slurred. Marion then called 911, and watched as the police arrived and made contact with Weber. Marion identified Weber in court as the driver of the pickup truck.

The State satisfied its burden on the second element through the testimony of City of Madison Police Officer Michele Walker. Walker testified that she was dispatched to the scene in response to the 911 call, where she immediately ran the plates of the pickup truck and determined that it was registered to Weber. Once Walker's backup arrived, the two officers approached the house, knocked, and contacted two men—one of whom identified himself as Weber. Walker asked Weber to step outside and wait on the stoop while she went back to her squad car and took a statement over the phone from Marion. When Walker returned to Weber, Weber asked Walker for a ride home and said to her, "You can't do anything to me because you did not see me drive." Walker then had Weber perform a series of field sobriety tests. Weber was unable to follow Walker's finger with his eyes; had difficulty standing up straight; was unable to complete the walk-and-turn test; and could not recite the alphabet. Walker then placed Weber under arrest and transported him to the hospital to conduct an Intoximeter test.

The parties stipulated that the Intoximeter test showed a blood alcohol concentration of 0.18. A blood alcohol concentration of 0.08 or higher is prima facie evidence of being under the influence. WIS. STAT. § 885.235(1g), (c). Combining the test results with Marion's observation of Weber driving, Marion's observation of Weber staggering and slurring his speech, the signs of intoxication the officer observed while conducting the sobriety tests, and Weber's own incriminatory statement, the jury had an ample basis to determine beyond a reasonable doubt that Weber had operated a motor vehicle while under the influence of an intoxicant.

Weber contends that the evidence was nonetheless insufficient to convict him because a defense witness, Michael Rohner, testified that he was the one driving the truck that evening, and Marion's credibility was undermined by the fact that the phone number he gave to 911 was one digit off. Such credibility issues do not present an appellate issue because it was solely within the jury's province to resolve any inconsistencies in the testimony of Marion and Rohner.

#### *Suppression Issues*

Weber filed a postconviction motion alleging that trial counsel provided ineffective assistance by failing to challenge Marion's identification of Weber at the scene as a constitutionally impermissible "show up" lineup. However, the circuit court made a factual finding that there was no showup because Walker never asked Marion to identify Weber. The circuit court's finding was based upon Walker's testimony denying that she had asked Marion to identify Weber, as well as Marion's testimony that he had approached officers at the scene to tell them they had the right person, rather than being asked. Again, factual findings that are based upon credibility determinations do not present a basis for appeal.

In his response to the no-merit report, Weber further contends that both trial counsel and postconviction counsel also provided ineffective assistance by failing to challenge his detention outside the house, prior to the administration of the sobriety tests. However, since the information Marion had provided to police plainly provided reasonable suspicion to believe that the pickup driver had been driving drunk, counsel had no grounds to challenge the stop.

### *Sentence*

A challenge to Weber's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Weber was afforded an opportunity to address the court both in person and by counsel. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court acknowledged that the driving itself was not horrible, but found the fact that it was an eighth offense intolerable, particularly since Weber was on supervision at the time. With respect to Weber's character, the court noted that Weber's alcoholism overshadowed everything else. The court concluded that a prison term was necessary to protect the public.

The court then sentenced Weber to four years of initial confinement and five years of extended supervision. It also ordered thirty-six months of license revocation followed by thirty-six months of ignition interlock; imposed standard costs and conditions of supervision; directed

Weber to provide a DNA sample but waived the fee; and determined that Weber was eligible for the Substance Abuse Program but not the Challenge Incarceration Program.

The components of the bifurcated sentence were within the applicable penalty ranges. *See* WIS. STAT. §§ 346.65(2)(am)6. (classifying OWI-8th as a Class G felony with a mandatory minimum initial incarceration period of three years); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony). Given Weber’s criminal history and the fact that the court did not make use of the penalty enhancer, the sentence was not “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.” *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See State v. Allen*, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*