



OFFICE OF THE CLERK
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 III

September 20, 2016

To:

Hon. Kenneth L. Kutz
Circuit Court Judge
Burnett County Government Center
7410 County Rd K, #115
Siren, WI 54872

Trudy Schmidt
Clerk of Circuit Court
Burnett County Courthouse
7410 County Rd. K, #115
Siren, WI 54872

Frederick A. Bechtold
Attorney At Law, LLC
490 Colby St.
Taylors Falls, MN 55084

William L. Norine
District Attorney
7410 County Road K #113
Siren, WI 54872

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Russell E. Towle 456971
Oshkosh Corr. Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2016AP985-CRNM State of Wisconsin v. Russell E. Towle (L. C. # 2012CF102)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Russell Towle has filed a no-merit report concluding there is no arguable basis for Towle to challenge his convictions and sentences for ninth-offense driving while intoxicated, fleeing or eluding an officer, operating a vehicle after revocation, and possession of drug paraphernalia. Towle was advised of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

At Towle's jury trial, Deputy Trevor Theix testified he was dispatched to the Grantsburg airport at approximately 12:30 a.m. to investigate a car that pulled into the driveway and was playing loud music. He arrived at the airport around 1:00 a.m. and pulled up behind the vehicle. Theix activated his emergency lights, which also activated the dashboard camera. As he approached the vehicle, Theix could hear loud music and observed several beer cans inside the vehicle, and one person sitting behind the steering wheel, whom he identified as Towle. The vehicle was still running, although Towle appeared to be asleep. Officer Joel Klatt arrived at the scene and attempted to awaken Towle by knocking on the window. Theix observed Towle "fumbling" with the car door and window. He described Towle's demeanor as agitated, his language foul, and his reactions slowed. Towle opened the door, but then shut it and reached for the shift lever. The officers struggled with Towle, trying to get him out of the car. Eventually Towle prevailed in the struggle and drove away.

Theix testified Towle drove down the runways, and eventually onto a county road, at speeds up to eighty miles per hour. After about a mile, Towle slowed down and drifted over the center line into the opposite lane and came to a stop. There, he exited the vehicle, crossed a water-filled ditch and lay in the grass.

Theix testified he did not perform any field sobriety test because he regarded Towle as a flight risk and considered him to be highly intoxicated based on observation. The officers placed Towle in Klatt's vehicle, and Theix followed them to a medical center where a blood sample was taken. Towle did not consent to the blood draw, but did not physically resist. The blood test showed a blood alcohol content of .218 grams/ml, ten times the applicable legal limit.

Officer Klatt testified, corroborating Theix's testimony. He testified Towle was unable to walk straight, had trouble with his balance, and required the assistance of two officers when he was apprehended. During the trip to the hospital, Towle was vocally belligerent and began trying to kick the rear window out of the squad car.

The registered nurse who drew Towle's blood testified Towle appeared to be highly intoxicated. The nurse also established a chain of custody for the blood sample that was ultimately sent to the State Hygiene Laboratory. A chemist supervisor for the forensic toxicology section of the laboratory testified he was not the analyst who performed the actual testing, but he conducted a complete technical review of the data created by another analyst and formed his own independent opinion as to Towle's blood alcohol content. His testimony and reports were received into evidence without objection.

The Village of Grantsburg police chief, Jeff Schinzing, was the third officer who arrived at the scene. He observed damage to the airport gate, and correlated that damage to damage he observed on Towle's vehicle. He conducted an inventory search of the vehicle and found a silver pipe of the type used for smoking marijuana and a bag with a green leafy substance, which appeared to be marijuana.

The State showed the jury the video recording of Towle's actions. It also entered into evidence Towle's driving record, which reflected that his driver's license was revoked. The record also indicated at least eight prior OWI convictions. Towle's postconviction counsel states he investigated the court records, which revealed Towle was represented by counsel in each of the prior cases.

Towle represented himself at the trial, and called no witnesses other than himself. He testified he was drinking in the back of the van, not behind the steering wheel. He said police snuck up on him, and tried to make him get behind the wheel. Towle said, “I didn’t want to get behind the wheel. But after that all didn’t work out, then my judgment and error and everything took over so I left, and that’s about what you see on the tape there.”

On cross-examination, Towle admitted that: his license was revoked at the time of the incident; he was driving the vehicle; and he had been drinking that evening. He testified the officers told him to get into his vehicle. He also admitted he fled because he did not want a ticket for operating while intoxicated.

The jury convicted Towle of the four offenses. The circuit court imposed consecutive and concurrent sentences totaling four years’ initial confinement and seven years’ extended supervision, with sixty-three days’ of jail credit.

Near the end of the sentencing hearing, Towle stated he believed the dashcam video supported his testimony. The court responded that the video was admitted into evidence as exhibit 10 and the jury had the opportunity to see it. Towle then explained that he believes another dashcam video existed from Sergeant Thad Osborne’s vehicle, which “drove up on the airport driveway and then left while we were all outside of the vehicles.” Towle stated, “That’s what I’m basing my appeal on.” Towle’s postconviction counsel filed a discovery motion seeking any dashcam video from that night from officer Osborne’s vehicle. After making that inquiry, counsel is convinced no such video exists.

The no-merit report addresses whether Towle knowingly, freely and voluntarily waived his right to counsel. *See State v. Klessig*, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). At a

pretrial conference, the court conducted a colloquy with Towle as to whether he intended to represent himself at trial. The court reminded Towle of the severity of the charges, the maximum penalties, and the ability of counsel to find defenses of which Towle may not be aware. Towle confirmed he gave up his right to counsel without any threats or promises. The state public defender subsequently appointed counsel for Towle. As the trial date approached, Towle's counsel withdrew with Towle's consent and the state public defender appointed replacement counsel. That counsel also moved to withdraw based on a fundamental disagreement as to how the case should be handled, centering on the appropriateness of motions Towle wished his counsel to file on his behalf. Towle stated he was not willing to accept counsel's judgment. When asked whether he was willing to let counsel do her job, Towle responded, "I'd have to go on my own." The court then allowed replacement counsel to withdraw, but to remain as standby counsel for Towle. The record shows no arguable basis for challenging Towle's waiver of his right to counsel.

The record also discloses no arguable basis for challenging the jury's verdict. As the arbiter of the witnesses' credibility, *State v. Bauer*, 2010 WI App 93, ¶17, 327 Wis. 2d 765, 787 N.W.2d 412, the jury could reasonably accept the officers' testimony, confirmed by the video recording, that Towle drove on a public road while intoxicated, after revocation of his license, fleeing from officers, and while in possession of drug paraphernalia.

The record also establishes no arguable basis for challenging the sentencing court's discretion. The court could have imposed consecutive sentences totaling fourteen years and seven months' and fines totaling \$37,500. The court appropriately considered the gravity of the offenses, Towle's character, and the need to protect the public. See *State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court noted the high speed chase occurred on well-

traveled roads, risking the lives of any member of the public traveling on the roads. The court also noted Towle's criminal history in the presentence investigation report ran for two full pages and included previous incarceration in prison. The court considered no improper factors, and the sentences are not arguably so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgments of conviction are summarily affirmed. WIS. STAT. RULE 809.21 (2013-14).

IT IS FURTHER ORDERED that attorney Frederick Bechtold is relieved of his obligation to further represent Towle in this matter. WIS. STAT. RULE 809.32(3) (2013-14).

Diane M. Fremgen
Clerk of Court of Appeals