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 IV

December 12, 2016

To:

Hon. Todd W. Bjerke
Circuit Court Judge
La Crosse County Courthouse
333 Vine Street
La Crosse, WI 54601

Pamela Radtke
Clerk of Circuit Court
La Crosse County Courthouse
333 Vine Street, Room 1200
La Crosse, WI 54601

John W. Kellis
Asst. District Attorney
333 Vine Street, Rm. 1100
La Crosse, WI 54601

Vicki Zick
Zick Legal LLC
P.O. Box 325
Johnson Creek, WI 53038

Jason D. Berger
321 Wagon Drive #102
West Salem, WI 54669

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

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

2016AP1134-CRNM State of Wisconsin v. Jason D. Berger (L.C. # 2014CT197)

Before Sherman, J.[1]

Attorney Vicki Zick, appointed counsel for Jason Berger, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether trial counsel was ineffective by failing to call an expert witness for the defense at trial. Berger was provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record,

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

as well as the no-merit report, I agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, I affirm.

On June 3, 2014, around 6:30 p.m., a police officer initiated a traffic stop of the vehicle Berger was driving after observing Berger veer briefly over the centerline into the lane for oncoming traffic. The police report of the traffic stop indicates that, upon making contact with Berger, the officer noticed that Berger was drowsy, had bloodshot eyes, small pupils, and slow and mildly slurred speech, and smelled of intoxicants. The officer asked Berger if he had consumed alcohol, and Berger responded that he had a beer about ten minutes before driving. Berger initially stated that he had not taken any prescription or illegal drugs, but later stated that he had taken his prescription valium that morning. Based on the officer's observations and Berger's performance on standardized field sobriety tests, the officer placed Berger under arrest for operating while intoxicated (OWI), second offense.

Berger submitted to a legal blood draw at 7:36 p.m. Later, at the jail, Berger told the arresting officer that he had started drinking around 3:30 in the afternoon and had stopped drinking around 4:00 or 4:30.

Berger was charged with OWI, second offense, and operating a motor vehicle with a prohibited blood alcohol concentration (PAC), second offense.[2] Berger moved to suppress the evidence obtained as a result of his arrest, arguing that the arrest was not supported by probable cause. The court denied the motion after an evidentiary hearing.

Berger was tried to a jury. The State presented the testimony of the arresting officer and a chemist from the state hygiene laboratory. The chemist testified that Berger's blood tested positive for the presence of alcohol at the level of .074 grams per 100 milliliters of blood. He explained that, using retrograde extrapolation and assuming a .074 blood alcohol level, a blood draw at 7:36 p.m., and last alcohol consumption at 4:15 p.m., he would estimate the blood alcohol concentration around 6:30 p.m. to be .09 grams per 100 milliliters. The chemist also testified that the laboratory tests detected the presence of the prescription drugs Trazodone and Clonazepam, which the chemist opined could have intensified the affects of the alcohol. Berger testified in his own defense that he had taken his Trazodone the evening before the incident for insomnia, that he took his prescribed dosage of Clonazepam in the morning, and that he consumed one tall can of beer right before he started driving. Berger testified that he was not intoxicated when he was driving. The jury found Berger guilty of OWI and not guilty of PAC. The court sentenced Berger to the mandatory minimums.

The no-merit report addresses whether there would be arguable merit to a claim that trial counsel was ineffective by failing to present a defense expert witness to testify that the prescription drugs in Berger's system would not have impaired his ability to drive. The no-merit report opines that there would be no arguable merit to a claim that Berger was prejudiced by his trial counsel's failure to call an expert witness. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must show that counsel's performance

[2] Berger's first OWI conviction was for an offense that occurred on June 4, 2004, nine years and 364 days prior to his present offense. *See* WIS. STAT. § 346.65(2)(am)2. and (2c)(OWI or PAC is a second offense if the defendant had a prior conviction based on a violation that occurred within previous ten years).

was deficient and also that the deficient performance prejudiced the defense). Counsel points out that, even if the defense had offered expert testimony that the prescription drugs in Berger's system would not have hindered Berger's ability to drive, the evidence would still have included the following: (1) the State's expert's testimony that the prescription medications could have intensified the effects of alcohol; (2) Berger's admission that he took his medication and drank alcohol before driving; and (3) the arresting officer's opinion, based on his observation of Berger's driving, Berger's statements, and the officer's observations of Berger during the traffic stop, that Berger was intoxicated. I agree with counsel's assessment that it would be frivolous to argue that Berger was prejudiced by his counsel's failure to call an expert witness. *See* ***State v. Thiel***, 2003 WI 111, ¶20, 264 Wis. 2d 571, 665 N.W.2d 305 (to prove prejudice, defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome" (quoted source omitted)).

Although the no-merit report addresses only a potential claim of ineffective assistance of counsel, I briefly touch on several other issues as well. First, I conclude that the evidence was sufficient to support the jury verdict. 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). In light of the trial evidence, partially set forth above, there would be no arguable merit to an argument that that standard has been met here. I also conclude that there would be no arguable merit to a claim that the circuit court erred by denying Berger's motion to suppress, in light of the evidence set forth at the suppression hearing.

See ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999) ("Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." (quoted source omitted)). Finally, I conclude that there would be no arguable merit to a challenge to the sentence imposed by the circuit court. The court imposed the mandatory minimums allowed by statute. *See* WIS. STAT. §§ 346.65(2)(am)2., 343.301(1g), 343.30(1q)(b)3., and (1q)(c).

Upon my independent review of the record, I have found no other arguable basis for reversing the judgment of conviction. I 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 Vicki Zick is relieved of any further representation of Jason Berger in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals