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March 2, 2017

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

2016AP808-CRNM State of Wisconsin v. Marcos Moreno (L.C. # 2012CT377)

Before Kloppenburg, P.J.[1]

Attorney Michelle Velasquez, appointed counsel for Marcos Moreno, 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 there would be arguable merit to a challenge to the sufficiency of the evidence to support the jury verdicts, a motion for a new trial, or a challenge to the sentence imposed by the circuit court. Moreno was

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

provided a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, I agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, I affirm.

In November 2012, Moreno was charged with operating while intoxicated (OWI) and operating with a prohibited alcohol concentration (PAC).[2] According to the complaint, on October 22, 2012, around 1:00 a.m., police responded to a report that four men had been asked to leave a bar and had attempted to re-enter. Police were also informed that a vehicle associated with the incident was a work-style blue and silver Dodge pickup truck, with an orange ladder on a ladder rack and plywood in the back. While speaking to an individual outside of the bar, an officer observed a pickup truck similar in appearance to that description driving without its headlights on. The officer conducted a traffic stop of the vehicle and made contact with the driver, Moreno. The officer observed that Moreno smelled of intoxicants, and Moreno admitted he had just come from the nearby bar. The officer then had Moreno perform field sobriety tests, during which the officer observed signs that Moreno was intoxicated. The officer arrested Moreno for OWI. Moreno submitted to a chemical breath test that indicated that Moreno had .09 grams of alcohol per 210 liters of breath.

Moreno moved to suppress evidence obtained following the traffic stop. Moreno argued that police lacked reasonable suspicion to support the stop or to detain Moreno for an OWI

[2] The State charged the OWI and PAC as third offenses. Moreno moved to disallow use of a prior OWI conviction for counting purposes on grounds that Moreno had not validly waived his right to counsel during the proceedings in the prior case. The court granted the motion and the State filed an amended complaint charging Moreno with OWI and PAC as second offenses.

investigation, and lacked probable cause for the arrest. After a suppression hearing, the circuit court denied the motion.

Moreno also challenged the admissibility of evidence obtained when the arresting officer conducted the Horizontal Gaze Nystagmus (HGN) test on Moreno. The circuit court held that the HGN results would be admissible if the State established the officer's qualifications to administer the test. The State confirmed that the officer was certified to perform the test.

After trial, the jury returned guilty verdicts on both counts. The circuit court sentenced Moreno to five days of jail and a $400 fine on the first count, for OWI, second offense.[3]

The no-merit report addresses whether 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). I agree with counsel's assessment that it would be wholly frivolous to argue that that standard could be met here. The trial evidence, including testimony by the arresting officer and a state chemical test coordinator, was sufficient to support the jury verdicts.

The no-merit report also addresses whether there would be arguable merit to a claim that the circuit court erred by denying Moreno's motion to suppress.[4] I agree that, in light of the

[3] The circuit court stayed the sentence pending appeal.

evidence set forth at the suppression hearing, it would be wholly frivolous to argue that the circuit court erred by denying the motion.

The arresting officer testified that he received a report of a recent disturbance at a bar and a description of a pickup truck connected with the incident, and then observed a truck similar in appearance to that description driving in the vicinity of the bar, at 1:00 a.m., with its headlights off. Those facts established reasonable suspicion for the initial stop. *See* WIS. STAT. § 347.12(1) ("Whenever a motor vehicle is being operated on a highway during hours of darkness … , the operator shall use a distribution of light or composite beam directed high enough and of sufficient intensity to reveal a person or vehicle at a safe distance in advance of the vehicle …."); ***State v. Iverson***, 2015 WI 101, ¶44, 365 Wis. 2d 302, 871 N.W.2d 661 ("A traffic stop is generally reasonable if the officers have probable cause to believe that a traffic violation has occurred, or have grounds to reasonably suspect a violation has been or will be committed."); ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (reasonable suspicion for a stop requires that police are able to "'point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' the intrusion of the stop" (quoted source omitted)).

After the officer made contact with Moreno, the officer observed that Moreno smelled of intoxicants and Moreno admitted he had just come from the bar where the disturbance had occurred. Those additional facts supported a continued seizure for an OWI investigation. *See*

[4] The no-merit report states that there was reasonable suspicion for the initial stop and continuation, but does not set forth the applicable legal standards or apply them to the facts from the suppression hearing. The no-merit report does not address whether there was probable cause for the arrest.

State v. Colstad, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (reasonable suspicion to detain further for OWI investigation established when "the officer discovered information subsequent to the initial stop which, when combined with information already acquired, provided reasonable suspicion that [the defendant] was driving while under the influence of an intoxicant").

Finally, those additional facts, together with the officer's observations during Moreno's performance of field sobriety tests, established probable cause for the arrest. *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.").

The no-merit report also concludes that there would be no arguable merit to a challenge to the circuit court's decision denying Moreno's motion to disallow evidence as to the results of the HGN test. Prior to trial, Moreno sought to preclude the State from using evidence from the HGN test on grounds that the State had not established that the arresting officer was qualified to administer the HGN test. The circuit court held that the officer would be allowed to testify as to the HGN test if he testified that he was certified to perform the test, and the State confirmed the officer was certified to perform the test. At trial, the officer testified as to his qualifications. I agree with counsel that further proceedings as to this issue would be wholly frivolous.

The no-merit report concludes that there would be no arguable merit to any issues based on jury selection, the parties' observation that one juror appeared to close his eyes at one point

during trial, or opening or closing statements. I agree with counsel's assessment that there would be no arguable merit to further proceedings as to any of those issues.

The no-merit report also concludes that the circuit court's colloquy with Moreno as to Moreno's decision not to testify established that Moreno validly waived his right to testify. *See* ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485 (to establish valid waiver of right to testify, circuit court should conduct colloquy with defendant to determine that: "(1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel"). I agree with counsel's assessment that further proceedings as to this issue would lack arguable merit.

The no-merit report also states that the jury instructions were proper and that the circuit court properly exercised its discretion by declining to omit language from a jury instruction.[5] My review of the record indicates that further proceedings on this issue would be wholly frivolous. At the jury instruction conference, Moreno objected to the portion of a standard jury instruction that allows the jury to find that a defendant was under the influence or had a PAC at the time of driving if the jury found that there was .08 grams or more of alcohol in 210 liters of the defendant's breath when the breath test was taken. *See* WIS JI—CRIMINAL 2669. Defense counsel argued that the instruction was not warranted because the chemical test coordinator had testified that she had insufficient facts to place Moreno on the blood alcohol curve at the time the test was taken. *See* ***id.*** at 4 (directing that the instruction should be given when "there is no issue

[5] The no-merit report does not provide any explanation as to what jury instruction language was in dispute, nor does it explain why no-merit counsel concludes that it would be wholly frivolous to challenge the circuit court's decision.

relating to the defendant's position on the 'blood-alcohol curve'"). I determine that it would be wholly frivolous to argue that the circuit court erroneously exercised its discretion by allowing the standard jury instruction. *See* ***State v. Vick***, 104 Wis. 2d 678, 693-95, 312 N.W.2d 489 (1981) (holding that language in WIS JI—CRIMINAL 2669 creates a permissive presumption, which is invalid only where no rational connection existed between the proven facts and the inferred facts; the test is whether it can be said with substantial assurance that the inferred fact more likely than not flowed from the proven fact).

Lastly, the no-merit report addresses the sentence imposed by the circuit court. I agree with counsel's assessment that there would be no arguable merit to a challenge to the sentence imposed by the circuit court. My review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Moreno's success on bond while the case was pending, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Moreno to five days in jail and a $400 fine. The sentence was within the maximum Moreno faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "only where the sentence is 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" (quoting another source)). I discern no erroneous exercise of the court's sentencing discretion.

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 Michelle Velasquez is relieved of any further representation of Marcos Moreno in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals