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April 5, 2017

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

2016AP1551-CRNM State of Wisconsin v. Anthony E. Quinney (L.C. #2014CT214)

Before Gundrum, J.[1]

Anthony E. Quinney appeals a judgment convicting him of third-offense operating a vehicle while intoxicated (OWI), contrary to WIS. STAT. § 346.63(1)(a). Quinney's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Quinney received a copy of the report and filed a response. Upon consideration of the no-merit report, the response, and an independent review of the record

[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.

as mandated by ***Anders*** and RULE 809.32, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

A woman notified the Shawano County Sheriff's Department that an unfamiliar vehicle had been in her neighbor's driveway, its engine idling, for about forty-five minutes. The caller said she was concerned as her neighbor, James Martin, was out of state.

Sheriff's deputies found an apparently intoxicated Quinney—the sole occupant of the pickup truck—in the driver's seat. Quinney, who said he was there to see Martin, smelled strongly of intoxicants, had red, glassy eyes and slurred speech, and was unsteady on his feet. The deputies searched in vain for intoxicant containers in and around the truck and in nearby shrubbery. One of the deputies contacted Martin in Arizona and mistakenly asked if Martin knew "Anthony Quin." Martin said he did not and that the only person authorized to be there was his neighbor for snowplowing.[2]

Quinney refused all manner of sobriety testing. A blood draw, obtained pursuant to a search warrant, revealed a blood alcohol concentration (BAC) of 0.161. Using retrograde extrapolation, the state crime lab chemist who performed the BAC analysis opined that Quinney's BAC was approximately 0.18 at the time of arrest—an hour and a half before the blood draw—and approximately 0.19 when the neighbor called the sheriff's department, about an hour before Quinney's arrest.

[2] Martin testified at trial that he is acquainted with "Tony" Quinney through work Quinney had done with a contractor at Martin's residence a year or so before.

A jury found Quinney guilty of third-offense OWI.[3] The court sentenced him to two years' probation and 125 days in jail as a condition of probation, and twenty-seven months' license revocation and ignition interlock. A month later, the court granted Quinney's motion for sentence modification and ordered 190 days' jail with Huber privileges, thirty months' revocation and ignition interlock, a $3215 fine and costs, and a $50 blood-draw fee. This no-merit appeal followed.

Counsel's no-merit report first addresses the sufficiency of the evidence for the jury to find Quinney guilty of OWI. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Matters of weight and credibility are for the jury. ***Staehler v. Beuthin***, 206 Wis. 2d 610, 617, 557 N.W.2d 487 (Ct. App. 1996). If the evidence permits the drawing of multiple reasonable inferences, we must accept the one the jury draws. ***Id.*** at 617-18.

To establish a violation of WIS. STAT. § 346.63(1)(a), the State had to prove that Quinney drove or operated a motor vehicle on a highway while under the influence of an intoxicant. *See* WIS JI—CRIMINAL 2663. To establish a violation of § 346.63(1)(b), it had to prove that Quinney drove or operated a motor vehicle on a highway while having a prohibited alcohol concentration (PAC). In addition to highways, § 346.63(1)(a) and (b) apply to "all premises held out to the public for use of their motor vehicles." WIS. STAT. § 346.61.

[3] The jury also found him guilty of third-offense operating with a PAC, contrary to WIS. STAT. § 346.63(1)(b). He was convicted only of the OWI offense. *See* § 346.63(1)(c).

There was no affirmative evidence that Quinney drove his truck on a public roadway. The neighbor testified she could not say how long Quinney was parked at the Martins' before she became aware of the noise. Defense counsel argued that someone may have driven Quinney there and left, and that, if Quinney did drive there himself, without knowing how long he sat there, there is no proof he was intoxicated when driving.

A claim of insufficient evidence is without arguable merit. The Martin residence is on Maple Avenue, a public roadway. Quinney was alone in the vehicle. The deputies' search yielded no intoxicant containers in or near the truck. The neighbor called the sheriff's department at about 9:00 p.m. Quinney's BAC was 0.161 at 11:30 p.m. The jury reasonably could infer that he had drunk sometime before driving on Maple Avenue and that he was intoxicated and had a PAC when he did so. "Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted." ***Poellinger***, 153 Wis. 2d at 504 (citation omitted).

The no-merit report also touches on the propriety of the sentence. Circuit courts have significant discretion in fashioning a sentence. ***State v. Jorgensen***, 2003 WI 105, ¶22, 264 Wis. 2d 157, 667 N.W.2d 318. We review a sentencing decision for an erroneous exercise of discretion. ***State v. Travis***, 2013 WI 38, ¶16, 347 Wis. 2d 142, 832 N.W.2d 491. We will sustain it if it is based upon the facts in the record and the appropriate and applicable law. ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 434, 351 N.W.2d 758 (Ct. App. 1984). We may search the record for reasons to sustain a discretionary decision. ***State v. Thiel***, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388.

The court derived the sentence largely from local sentencing guidelines. *See* WIS. STAT. § 346.65(2m)(a). Counsel asserts that "[s]aid guidelines confirm [the court] acted within [its] authority" and that "[t]he attached guidelines show" that the court's exercise of discretion was appropriate.[4] But while the jury also found Quinney guilty of PAC under WIS. STAT. § 346.63(1)(b), he was sentenced for OWI under § 346.63(1)(a). "[U]nder the plain language of § 346.65(2m)(a)," the sentencing guidelines do not apply to § 346.63(1)(a). ***Jorgensen***, 264 Wis. 2d 157, ¶2.

Although reference to the sentencing guidelines in an OWI case does not constitute error, as considerations relevant to PAC also are relevant to OWI, it is inappropriate for a circuit court to use the guidelines as the sole basis for an OWI sentence. ***Id.***, ¶27. The court must look beyond the guidelines to the primary sentencing factors.

The three primary factors are the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Harris***, 119 Wis. 2d 612, 623-24, 350 N.W.2d 633 (1984), and the court also may consider a variety of other relevant factors, including the defendant's past record of criminal offenses, history of undesirable behavior patterns, and his or her personality and social traits, *see* ***State v. Jones***, 151 Wis. 2d 488, 495-96, 444 N.W.2d 760 (Ct. App. 1989). The weight the court gives to each is within its wide discretion. ***Id.*** at 495.

The guidelines played a prominent role in determining Quinney's sentence. Our search of the record reveals that the court implicitly considered the sentencing factors. It noted that law

[4] The guidelines counsel attaches are from the Third Judicial District. Shawano County is in the Ninth Judicial District. The two districts' guidelines are not the same.

enforcement encountered Quinney parked at the Martin residence, not as a result of a traffic violation; that, at least while there, he had not endangered others; that Quinney refused to cooperate with sobriety testing and the blood draw; that he has significant health problems; and that, while Quinney "probably has a wors[e] past record than many of the people I get for OWI thirds," it was not a record of violent behavior. The court also ordered an ignition interlock and emphasized that Quinney's legal BAC limit now is 0.02, both of which we deem to be a logical extension of the need to protect the public from drunk drivers. There is no arguable basis for a challenge to the sentence.

Quinney raises four points in his response: (1) "The dispatcher said my name wrong to Mr. Martin," (2) "the times were off," (3) "the Deputy left out evidence," and (4) "no Deputy seems to have any dashcam video." Aside from being undeveloped, none of his claims are relevant to proving the elements of the crimes for which he was on trial. We already have determined that the evidence was sufficient to convict him.

Our review of the record discloses no other potential issues for appeal.

For the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Diane C. Lowe is relieved of further representing Quinney in this matter.

Diane M. Fremgen
Clerk of Court of Appeals