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**DISTRICT IV**

January 22, 2018

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

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2017AP109-CRNM State of Wisconsin v. John E. Paul (L.C. # 2015CT336)

Before Kloppenburg, J.[1]

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Attorney Steven Zaleski, appointed counsel for John E. Paul, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***,

[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.

386 U.S. 738, 744 (1967). The no-merit report discusses whether there would be arguable merit to a challenge to: (1) the circuit court's decision denying Paul's suppression motion; (2) the court's decision denying Paul's motion to strike three potential jurors for cause; (3) the court's decision denying Paul's motion for a mistrial; (4) the sufficiency of the evidence to support the jury verdicts; (5) trial counsel's performance; or (6) Paul's sentence. Paul has responded to the no-merit report, arguing that his trial counsel was ineffective and that he was denied the right to an impartial jury. Upon my independent review of the record, as well as the no-merit report and response, I conclude that the no-merit report does not establish that it would be wholly frivolous to challenge the court's decision to deny Paul's motion for a mistrial. Accordingly, I reject the no-merit report.

Paul was charged with operating a motor vehicle while intoxicated and operating a motor vehicle with a prohibited blood alcohol concentration (BAC), both as a fourth offense. Paul moved to suppress evidence obtained pursuant to a blood draw, arguing that the warrant authorizing the blood draw was insufficient because it was based on false statements. The circuit court denied the motion without an evidentiary hearing, finding that the affidavit was sufficient even if the challenged statements were excised. The case then proceeded to a jury trial.

During jury voir dire, the State inquired of the potential jurors:

> Now, the other thing is the prohibited alcohol concentration in this particular case is .02. Now, many of you may have heard of the .08, but in this instance, the prohibited alcohol concentration is .02. Now, is there any person here who thinks it's unfair that somebody could be prosecuted or convicted of the offense of operating a motor vehicle with a prohibited alcohol concentration of .02 …? So it's a .02 standard. Is there any person here who thinks that would be unfair?

Paul moved for a mistrial, arguing that the jury pool had been biased by the State's highlighting that the usual BAC limit is .08, but that Paul was subject to a lowered limit of .02. The State opposed the motion, arguing that the jury would have to be informed that Paul's BAC limit in this case was .02, and that "the .08 standard has been engrained in everybody's mind, any adult's mind. They all know that the level is .08." The circuit court denied the motion, stating that it is "fairly well known" that the standard is .08, that the State did not "belabor the point," and that the average juror would not know why the standard was lowered to .02 in this case. Paul then also moved for a mistrial based on the court's decision denying Paul's motion to strike three potential jurors for cause after those potential jurors expressed reservations as to their abilities to be impartial due to their own experiences with drunk driving accidents.[2] The court denied that motion as well.

The State then informed the circuit court that the parties had reached a stipulation that Paul had prior convictions supporting the charges in this case as fourth offenses, so that there would be no need to prove the three prior offenses to the jury. During the court's inquiry to Paul personally as to whether he agreed to the stipulation, Paul stated that he felt that the State had already revealed to the jurors that he had prior offenses. The court noted Paul's concerns and stated that defense counsel had made a record of the issue, and then confirmed that Paul still personally wished to stipulate to his prior offenses.

During trial, the parties reached a further stipulation that the blood draw was properly conducted and that the result of the BAC testing was .292. Paul objected, however, to the State's

[2] Paul used peremptory strikes to remove the three potential jurors he had moved to strike for cause.

expert testimony as to the amount of drinks necessary for Paul to reach that BAC level. Paul argued that the State's notice of its intent to use expert testimony did not disclose that the expert would testify as to that issue. The State argued that its notice was sufficient. The circuit court allowed the testimony, and Paul moved for a mistrial, which the court again denied.

Following trial, Paul was convicted of both counts. The circuit court sentenced Paul to nine months in jail and imposed a $1,300 fine.

The no-merit report concludes that there would be no arguable merit to a challenge to the circuit court's decision denying Paul's motion for a mistrial after the State informed the potential jurors that Paul was subject to a lowered BAC limit. No-merit counsel notes that whether to grant or deny a mistrial motion is within the circuit court's discretion. *See* ***State v. Ross***, 2003 WI App 27, ¶47, 260 Wis. 2d 291, 659 N.W.2d 122. No-merit counsel then opines that the court properly exercised its discretion because: (1) there was not necessarily any prejudice to Paul from the State's comment, since there are various reasons that a person would be subject to a lowered BAC level; and (2) even if the comment were prejudicial, the court found it was not "enough" to warrant a mistrial. *See* ***id.*** ("The [circuit] court must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial.").

I am not persuaded that it would be wholly frivolous to argue that the circuit court erroneously exercised its discretion by denying Paul's motion for a mistrial after the State disclosed to the potential jurors that Paul was subject to a lowered BAC level. The discussion in the no-merit report does not establish lack of at least arguable merit to a contention that: (1) the average potential juror may not have known that the standard BAC limit is .08 and regardless, once the State highlighted that Paul was subject to a lowered limit, would have inferred that

Paul's lowered limit was due to prior drunk driving offenses; and (2) revealing to the potential jurors that Paul was subject to a lowered BAC limit was sufficiently prejudicial to warrant a mistrial because it implied that he had prior drunk driving offenses and that he was therefore more likely to be guilty in this case. I therefore reject the no-merit report. While I have only specifically identified one non-frivolous issue, appointed counsel is not precluded from raising any other issue in postconviction proceedings or on appeal that counsel now concludes has arguable merit.

Therefore,

IT IS ORDERED that the no-merit report is rejected.

IT IS FURTHER ORDERED that the time to file a postconviction motion or notice of appeal is extended to sixty days from the date of this opinion and order.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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