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DISTRICT IV

January 30, 2018

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

2016AP1542-CRNM State of Wisconsin v. Steven R. Lichtie (L.C. # 2014CF309)

Before Lundsten, P.J., Kloppenburg and Fitzpatrick, JJ.

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).

Steven Lichtie appeals a judgment convicting him, following a jury trial, of a seventh offense of operating a motor vehicle while intoxicated (OWI-7th). Attorney Michael Herbert has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin***

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence to support the verdict, the denial of motions for mistrial, rulings on evidentiary issues and a request for a continuance, the circuit court's exercise of its sentencing discretion, and whether Lichtie was entitled to additional sentence credit. Lichtie was sent a copy of the report, and filed a response disputing counsel's analysis of the sentence credit issue. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

The general test for sufficiency of the evidence is whether the evidence is "'so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). With respect to the OWI charge, the elements the State needed to prove were: (1) that Lichtie either drove (that is, exercised physical control over the speed and direction of a motor vehicle) or operated (that is, physically manipulated or activated any of the controls of a motor vehicle necessary to put it in motion) a motor vehicle on a public highway; and (2) that Lichtie's ability to drive or operate the vehicle was impaired by the consumption of an alcoholic beverage at the time. *See* WIS. STAT. § 346.63(1)(a) (2013-14) and WIS JI—CRIMINAL 2663.

As to the first element, Monroe County Sheriff's Deputy Josh Jungen testified that he observed Lichtie driving a vehicle on a state highway.

As to the second element, Jungen testified that Lichtie was "veering" in his lane before being pulled over, and appeared "dazed" when Jungen made contact with him. Lichtie

subsequently admitted having consumed alcohol, and he failed several field sobriety tests. Lichtie's interaction with Jungen was captured by squad-cam video and was presented to the jury. In addition, an analyst from the State Crime Laboratory testified that the concentration of alcohol in a sample of blood taken from Lichtie was 0.160. If the jury was satisfied that Lichtie's blood alcohol concentration was above 0.08, it could find based upon that fact alone that Lichtie was under the influence of an intoxicant. Thus, there is no arguable basis for Lichtie to challenge the sufficiency of the evidence.

Continuance

Late in the afternoon, two days before jury selection, the State turned over to the defense a second squad car video that had been recorded while Lichtie was being transported to a medical facility for a blood draw. The video contained a number of statements made by Lichtie that had been included in the police report, but that counsel had been planning to challenge as inconsistent with a video that counsel previously had been provided—including a statement that Lichtie's girlfriend had told him not to drive because he had had too much to drink.

The circuit court granted a defense motion to exclude the second video, but ruled that the defense would be precluded from asserting that the challenged statements from the police report had not been recorded. Lichtie then moved for a continuance, arguing that the defense strategy had been undermined. The circuit court denied that motion, reasoning that the defense had been aware of the statements from the police reports, and that whether or not they had been recorded provided only limited probative value as to whether the statements had actually been made. However, the circuit court also ruled that Lichtie's statement about what his girlfriend had told him would be excluded on hearsay grounds.

We agree with counsel that the circuit court reasonably exercised its discretion in denying the motion for a continuance—particularly in conjunction with its rulings excluding the second video and the girlfriend's secondhand statement. Furthermore, we do not see what additional or different strategy Lichtie could have advanced, following a continuance, that would have offset the highly probative value of the blood alcohol evidence itself.

Mistrial Motion: Voir Dire

Lichtie moved for a mistrial after the prosecutor asked prospective jurors if they agreed with the 0.08 limit. Lichtie argued that the question poisoned the jury with respect to an additional charge of operating with a prohibited alcohol concentration (PAC) in excess of 0.02. However, Lichtie was not sentenced on the PAC charge based upon his conviction for OWI. Since the PAC charge is not before us, the prosecutor's comment provides no arguable issue for this appeal.

We see no other questions or responses during the voir dire that would provide an arguable basis for challenging the impartiality of the jury.

Mistrial Motion: Violation of Suppression Ruling

During his testimony, Deputy Jungen violated the pretrial suppression ruling by testifying that, while being transported to the medical facility, Lichtie had "mentioned a few different times basically saying how stupid he was for — for driving and he was told not to." Lichtie again moved for a mistrial. The circuit court denied the motion, concluding that there was minimal prejudice because the testimony was "stopped essentially mid sentence," and the officer's testimony was unlikely to be viewed as an endorsement of the truth of the hearsay statement

since the original speaker was not even mentioned. We agree with counsel that the circuit court's discussion of the issue represented a reasonable exercise of discretion and does not provide an arguable basis for an appeal. Additionally, given the strength of the State's case, we conclude that any error in this regard would be harmless.

Mistrial Motion: Comment on Silence

Lichtie made a third motion for a mistrial after Jungen testified:

> [A] … [W]hen I asked [Lichtie] if he had any injuries that would prevent him from doing that [perform the walking test], he said no.
>
> Q So he had never mentioned that ankle injury before the tests were administered?
>
> A He never — never until he knew that things weren't going good for him.
>
> ….
>
> Q And did the defendant ever provide any proof of injury or medical problem to you?
>
> A No.

Lichtie argued that the officer's testimony violated Lichtie's right to remain silent. The circuit court denied the motion, pointing out that the defense itself had elicited testimony that Lichtie made comments at the scene indicating that he may have had some sort of medical condition that prevented him from performing the tests properly. The court reasoned that commenting on a lack of documentation for that claim did not equate to a comment on Lichtie's silence. We further note that commenting upon the *timing* of an assertion that Lichtie actually made is not the same as commenting about his silence. Again, we conclude that there would be no arguable grounds for an appeal on this issue.

Sentencing Discretion

A challenge to Lichtie's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Lichtie was afforded an opportunity to comment on the PSI and to address the court. Lichtie asked the court to accept the recommendation of the PSI agent to impose the mandatory minimum amount of initial confinement, with a period of supervision. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court acknowledged that no one was injured, but that there was "a huge risk of something terrible happening" with repeated OWI offenses. With respect to Lichtie's character, the court gave Lichtie credit for an extended period of sobriety before relapsing, and for an excellent work history.

The court then adopted the recommendation of the PSI agent and defense, and sentenced Lichtie to three years of initial confinement and three years of extended supervision. The court also imposed a fine of $1,200, plus costs; ordered an AODA assessment and ordered 36 months of ignition interlock; and awarded 85 days (later amended to 86 days) of sentence credit. The judgment includes the mandatory DNA surcharge and directs Lichtie to provide a DNA sample if he has not already done so, and it further shows that Lichtie is eligible for the Substance Abuse Program, but not the Challenge Incarceration Program.

The components of the bifurcated sentence were within the applicable penalty ranges. *See* WIS. STAT. §§ 346.63(1)(a) and 346.65(2)(am)6. (classifying OWI-7th as a Class G felony, with a three-year mandatory minimum period of initial confinement); and 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony) (2013-14). Furthermore, a defendant may not challenge on appeal a sentence that he affirmatively approved. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

Sentence Credit

Lichtie contends that he is entitled to additional sentence credit for the time he spent on electronic bail monitoring. As counsel correctly points out, however, a person who has been placed on electronic monitoring by order of the circuit court, rather than pursuant to a home detention statute that would subject the defendant to an escape charge, is not entitled to sentence credit. *See* ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶¶34-35, 250 Wis. 2d 214, 640 N.W.2d 527 (2001).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Attorney Michael Herbert is relieved of any further representation of Steven Lichtie in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Diane M. Fremgen
Acting Clerk of Court of Appeals