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DISTRICT IV

February 5, 2018

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

2016AP1592-CRNM State of Wisconsin v. Gerald M. Erpelding (L.C. # 2015CF596)

Before Blanchard, 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).

Gerald Erpelding appeals judgments convicting him, following a jury trial, of a fifth offense of operating a motor vehicle with a prohibited alcohol concentration (PAC-5th) and of violating a harassment injunction.[1] Attorney Vicki Zick has filed a no-merit report seeking to

[1] Although the notice of appeal refers to a judgment in the singular, we note that the circuit court entered separate judgments for the felony and misdemeanor counts.

withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);[2] ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***State ex rel. McCoy v. Wisconsin 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 whether there was probable cause to arrest Erpelding; whether the circuit court issued a coercive jury instruction to resolve a hung jury; the sufficiency of the evidence; and the sentences. Erpelding was sent a copy of the report and has filed a response asserting that the arresting officer lacked probable cause to administer a preliminary breath test and to arrest him. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

Pretrial Issues

There do not appear to have been any irregularities at the initial appearance or preliminary hearing. In any event, a valid conviction cures any defects relating to bindover unless they were preserved by an interlocutory appeal. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). The record does not include a speedy trial demand or show any unwarranted delays attributable to the State. The record shows that the court dismissed three potential jurors for cause, and Erpelding does not allege that any of the jurors chosen were biased.

Erpelding contends that there was no probable cause to administer a breath test to him or to arrest him for operating a motor vehicle while intoxicated because the arresting officer testified at Erpelding's jury trial that he did not believe that Erpelding was intoxicated or that his

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

ability to operate a motor vehicle was impaired. Consequently, Erpelding argues that the results of a blood alcohol test administered after his arrest should have been suppressed. This argument fails for two reasons.

First, the issue is not preserved because Erpelding never filed a suppression motion.

Second, even if the issue were reframed as a claim of ineffective assistance of counsel for failing to file a suppression motion, the record does not provide a factual basis for the claim. The probable cause affidavit filed with the court shows that Erpelding was arrested for disorderly conduct, violating a restraining order, and PAC-5th—not for operating a motor vehicle under the influence of an intoxicant (OWI). According to the probable cause affidavit and the probable cause portion of the complaint, the arresting offer was aware that there was a harassment injunction against Erpelding and that Erpelding was subject to a 0.02 PAC limit; the officer observed Erpelding leaving the residence of the woman protected by the injunction who had called police and pulled him over to investigate the complaint; the officer detected the odor of intoxicants from Erpelding; and Erpelding admitted both that he had been at the residence and that he had had one beer. In short, it was not necessary for the arresting officer to believe that Erpelding had sufficient alcohol in his system to impair his ability to drive in order to administer a preliminary alcohol test based upon probable cause to believe that Erpelding had a prohibited PAC, or to subsequently arrest him for PAC and violating a harassment injunction. Therefore, counsel had no grounds to file a suppression motion.

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether the evidence, viewed most favorably to the State and the conviction, is so lacking 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. *See* ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)); *see also* WIS. STAT. § 805.15(1).

Erpelding stipulated that he had prior OWI convictions that subjected him to the lower blood alcohol limit. To prove the defendant guilty of operating a motor vehicle with a prohibited alcohol level, the State needed to provide evidence that the defendant drove on a public road with a concentration of more than 0.02 grams of alcohol per 100 milliliters of his blood. WIS. STAT. § 346.63(1)(b) and WIS JI—CRIMINAL 2660C. Fitchburg Police Officer Lucas Hale testified that he observed Erpelding driving on a city street and pulled him over to investigate a dispatch call. Hale ultimately arrested Erpelding and turned him over to another officer who took him to a hospital for a blood draw. The lab results showed that Erpelding had a concentration of 0.089 grams of ethanol per 100 milliliters of blood.

To prove the defendant guilty of violating a harassment injunction, the State needed to provide evidence that an injunction had been entered against Erpelding in favor of S.L.L., that Erpelding committed an act that violated the order, and that Erpelding knew that the order had been issued and that his act violated it. WIS. STAT. § 813.125 and WIS JI—CRIMINAL 2040. The State introduced a copy of a harassment injunction ordering Erpelding to avoid having contact that harasses S.L.L. and to avoid S.L.L.'s residence. S.L.L. testified that she called the police when Erpelding showed up at her house and began peeking through windows on March 22, 2015. Lyle Tomlinson, who was present in S.L.L.'s house, testified that he stepped outside and told Erpelding that he was not supposed to be there. After Tomlinson went back inside, Erpelding began banging on the patio doors. Upon being questioned, Erpelding admitted to

Officer Hale that he had been at the residence trying to see his daughter, and asserted that he did not care if there was a restraining order or not. Erpelding indicated that he believed the restraining order was in effect until April, which would have been the following month.

The above evidence was sufficient to satisfy the elements of both charges.

Jury Instruction on Continued Deliberation

After they were sent out to deliberate, the jury sent the judge a note asking, "What happens if we cannot find unanimity (on 1 charge)?" The court then brought the jury back in and gave them the instruction for WIS JI—CRIMINAL 520. However, the court also made some additional comments, stating:

> And all I can do at this point is simply ask you to try a little bit more, and we will see how it goes. I realize it's late. I don't want to keep you super late. But, by the same token, I—if, you know, if you—if it's possible to come to an agreement, a reasonable agreement that you all can live with, I would like to see that happen. But I'm not going to keep you here all night or anything like that.
>
> It would be possible to come back tomorrow, but that would depend on whether you think more time would give you a chance to actually resolve whatever disagreement that you are finding yourselves in. But for right now, please go give it a try.

The jury subsequently returned verdicts of not guilty on charges of OWI and disorderly conduct, and guilty on charges of PAC and violating a harassment injunction.

We agree with counsel's assessment that the circuit court's additional comments were not coercive because they indicated that the court would not keep the jurors "super late" or "anything like" all night, and would not necessarily make them return the following day. The court's comments were consistent with the jury instruction urging the jury to be open-minded and make

an honest effort to come to a conclusion, which was approved in ***Kelly v. State***, 51 Wis. 2d 641, 646-47, 187 N.W.2d 810 (1971).

Sentences

A challenge to Erpelding's sentences would also lack arguable merit. Our 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). The record here shows that Erpelding was afforded the opportunity to address the court prior to sentencing. The court considered the standard sentencing factors and explained their application to this case in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court then withheld sentence on the PAC charge and imposed a three-year term of probation, subject to nine months of jail time. The court imposed a three-month sentence for the violation of the harassment injunction to be served concurrently with the conditional jail time. The court also imposed a fine of $600 on the PAC charge, ordered that Erpelding's driver's license be revoked for thirty-six months, and awarded twelve days of sentence credit on both counts. The judgments of conviction show that Erpelding was assessed a DNA surcharge on the felony, but not the misdemeanor.

The term of probation and sentence imposed were within the applicable penalty ranges and were not excessive or unduly harsh. *See* WIS. STAT. §§ 346.63(1)(b) and 346.65(2)(am)5. (classifying PAC-5th committed before January 1, 2017, as a Class G felony); 939.50(3)(g) (providing maximum imprisonment term of ten years for Class G felonies); 973.09(2)(b)1. (providing probation term of not less than one year and not more than the greater of three years

or the maximum term of confinement); and 813.125(7) (providing penalty of up to nine months for violating an injunction).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the term of probation and sentence imposed here were not "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." ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoting ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983).

Conclusion

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction. We 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 judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved of any further representation of Gerald Erpelding in this matter. *See* 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