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February 21, 2018

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

2017AP117-CRNM State of Wisconsin v. Kirsten R. Wojcehowicz
(L.C. # 2015CM953)

Before Blanchard, 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).

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

Kirsten Wojcehowicz appeals a judgment convicting her, following a jury trial, of a second offense of operating a motor vehicle while intoxicated.[2] Attorney Diane Lowe has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967); ***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 the sufficiency of the evidence and Wojcehowicz's sentence. Wojcehowicz was sent a copy of the report, and has filed a response asserting her innocence, complaining about police conduct, and disputing additional charges that have been filed against her. Upon reviewing the entire record, as well as the no-merit report, I conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

I begin by addressing whether there is any non-frivolous basis to challenge the sufficiency of the evidence, both because discussing the evidence produced at trial places other potential issues in context, and because a successful claim on that issue would result in a vacation of the conviction and directed verdict for acquittal, rather than a retrial.

The general test for sufficiency of the evidence is whether the evidence 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

[2] The jury also found Wojcehowicz guilty of operating a motor vehicle with a restricted controlled substance in her blood, but that charge is not before this court because the circuit court did not sentence Wojcehowicz on it, and therefore, it is not included in the judgment of conviction.

493, 507, 451 N.W.2d 752 (1990)). With respect to the OWI charge in this case, the State needed to prove that: Wojcehowicz drove a motor vehicle—that is, exercised physical control over its speed and direction—on a public road, while under the influence of alcohol, a controlled substance, a drug, or any combination thereof, to a degree that rendered her incapable of safely driving. WIS. STAT. § 346.63(1) and WIS JI—CRIMINAL 2666.

City of La Crosse Police Officer Nicholas Raddant testified that he was on patrol on the evening of July 25, 2015, when someone waved him down to report a traffic accident. Raddant proceeded to the scene and made contact with both drivers involved in the accident, one of whom was Wojcehowicz. Raddant's interaction with Wojcehowicz was captured on a squad car video, which was introduced into evidence and played for the jury.

Wojcehowicz told Raddant that she had been moving her car from one side of the street to the other when the other car had hit her. Raddant testified that pulling out from a parking lane on the side of the road into a traffic lane without yielding to a car that was already traveling in the traffic lane was a traffic violation.

As Raddant spoke with Wojcehowicz, he observed that her eyes were red and glassy, that her speech was slurred, that she was staggering slightly, and that there was a light odor of intoxicants on her breath. Wojcehowicz became increasingly adversarial and disorderly toward Raddant throughout the contact. She eventually admitted to having consumed one Mike's Hard Lemonade a couple of hours before the stop.

Raddant administered a series of sobriety tests to Wojcehowicz. On the horizontal gaze nystagmus test, Raddant observed all six out of a possible six clues of intoxication, with only four clues being needed to indicate possible impairment. On the walk and turn test, Raddant

observed six out of a possible eight clues of intoxication, with only two clues being needed to indicate possible impairment. On the one leg stand test, Raddant observed two out of a possible four clues of intoxication before Wojcehowicz refused to continue the test, which was the number needed to indicate possible impairment.

After Wojcehowicz failed all three sobriety tests, Raddant placed her under arrest. Raddant read the Informing the Accused form to Wojcehowicz and Wojcehowicz refused to voluntarily give a blood sample, so Raddant obtained a warrant for a blood draw.

Kayla Neuman, a chemist in the forensic toxicology section at the Wisconsin State Laboratory of Hygiene, testified that an initial screen of Wojcehowicz's blood testified positive for alcohol, tetrahydrocannibols, and a benzodiazepine category drug. Additional testing showed a concentration of 0.023 grams of ethanol per one hundred milliliters and 2.6 nanograms per milliliter of Delta 9 THC in Wojcehowicz's blood. Once the lab had the Delta 9 THC test results, it cancelled testing for benzodiazepine drugs as unnecessary. However, Neuman noted that the initial screen results would be consistent with Wojcehowicz having clonazepam in her system.

Neuman testified that both alcohol and benzodiazepine drugs like clonazepam are central nervous system depressants that cause nystagmus, slow reaction times, sleepiness, and balance problems. People taking clonazepam are commonly advised not to take it with alcohol because the effects would be magnified. Neuman further explained that Delta 9 THC is the main active ingredient of marijuana that causes impairment, and that it typically remains in the blood for two to six hours. Effects of Delta 9 THC could include confusion, a deluded sense of reality,

temporal or spatial disorientation, poor muscle control and balance, difficulty performing divided attention tasks, and delayed reaction time.

The jury reasonably could conclude from Wojcehowicz's own statement that she drove on a public road when she attempted to move her car from one side of the street to the other; could conclude from Wojcehowicz's accident and poor performance on the sobriety tests immediately afterward that she was impaired at the time she drove to the point that she could not safely drive; and could conclude from the lab results that Wojcehowicz's impairment was caused by the combination of alcohol, marijuana, and clonazepam in her system. In addition, the State introduced a certified copy of Wojcehowicz's driving record to prove for sentencing purposes that she had a prior OWI conviction. In sum, there are no arguable grounds to challenge the sufficiency of the evidence.

Actual Innocence

In her response to the no-merit report, Wojcehowicz alleges facts outside the record in support of a claim that her accident was the result of distraction, not intoxication. She also denies that she smoked marijuana that day. This is not newly discovered evidence, however. Wojcehowicz could have testified, but chose not to, and defense counsel did aggressively cross-examine the lab analyst about ways the test results could have been contaminated.

Moreover, I note that being distracted is in no way inconsistent with being impaired. Rather, it is a symptom of impairment. I see no reason to believe there would have been any different outcome at trial if Wojcehowicz had testified about what she believed caused the accident and had denied smoking marijuana, given that the jury could observe the video of Wojcehowicz failing the sobriety tests for itself.

Other Charges

Wojcehowicz complains that the State had now issued additional charges of theft and illegally obtaining a prescription drug, arising out of the same incident. Such complaints are outside the scope of this appeal, which is limited to the single offense in the judgment of conviction. Wojcehowicz also contends that imposing penalties for her refusal to submit to a blood test was unfair, but she has not provided any legal basis to challenge the determination that her refusal was unjustified.

Sentence

A challenge to Wojcehowicz's sentence would also lack arguable merit. A review of the 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. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

Here, the record shows that the parties agreed to proceed to sentencing immediately after the trial. Wojcehowicz had the opportunity to address the court both by counsel and personally. As to Wojcehowicz's character, the court acknowledged that Wojcehowicz was coping with disability, childhood trauma, and mental health issues. As to the severity of the crime, the court noted that it had watched the video of the incident and taking marijuana as a form of self-medication actually made Wojcehowicz's behavior much worse.

The court followed the guidelines and sentenced Wojcehowicz to fifteen days in jail, imposed a $350 forfeiture plus costs totaling $1,429 and a $25 blood draw fee, and ordered twelve months of license revocation, twelve months of ignition interlock, and an assessment as to

whether Wojcehowicz was an appropriate candidate for the OWI court. It also awarded 2 days of sentence credit and set a payment plan of $25 per month.

The penalties imposed were all authorized by statute. WIS. STAT. §§ 346.63(1)(a), 346.65(2)(am)2., 343.30(1q)(b)3., 343.301(1g)(am)1., and 343.301(2m)(a) (penalties for OWI-2nd include fine of not less than $350 and not more than $1,100 and imprisonment of not less than 5 days and not more than 6 months, license revocation for no less than one year and no more than eighteen months, and ignition interlock for not less than one year and not more than the maximum period of operating privilege revocation).

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here was near the minimum and certainly 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted source omitted).

Upon an independent review of the record, I 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. I 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 counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals