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April 2, 2018

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

2016AP1845-CRNM State of Wisconsin v. Sandra K. Scott (L.C. # 2014CF690)

Before Sherman, 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).

Sandra Scott appeals a judgment convicting her, following a jury trial, of a fifth offense of operating a motor vehicle with a restricted controlled substance in her blood. Attorney Frances Colbert has filed a no-merit report seeking to withdraw as appellate counsel. *See*

WIS. STAT. RULE 809.32 (2013-14);[1] ***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, the assistance of counsel, and the sentence. Scott was sent a copy of the report, and has filed a response making numerous factual assertions, many of which are outside of the record, that also appear to relate to the assistance of counsel, in terms of issues that Scott believes should have been raised or evidence that should have been presented. Counsel has filed a supplemental no-merit report. Upon reviewing the entire record, as well as the no-merit report, response, and supplemental no-merit report, we conclude that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

We 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 the issues relating to the assistance of counsel 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 493, 507, 451 N.W.2d 752 (1990)). The elements of operating a motor vehicle with a restricted

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

controlled substance that the State needed to prove were that: (1) Scott 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) at the time, Scott had a detectable amount of a restricted controlled substance—specifically Delta 9 Tetrahydrocannabinols—in her blood. WIS. STAT. § 346.63(1)(am) and WIS JI—CRIMINAL 2664B (2011).

Scott stipulated that she had four prior OWI convictions.

City of La Crosse Police Officer Dale Gerbig testified that, while off duty, he observed the vehicle Scott was driving speeding, slowing down and tailgating other vehicles, then speeding up again and rapidly weaving through traffic lanes, nearly causing a collision. Because he was not in a squad car, Gerbig could not pull Scott over, but he called in a report of the erratic driving and followed Scott until she pulled into a hospital clinic and exited her vehicle.

Gerbig made contact with Scott, who admitted that she had been speeding and tailgating, and informed Gerbig that she was in a hurry because she needed to pick up medication at the clinic. Gerbig observed that Scott's speech was slow and slurred, her eyelids were droopy, and her eyes were bloodshot, which were three of the signs of impairment that he had been trained to look for to detect intoxicated motorists. Gerbig was also qualified as a Drug Recognition Expert, and throughout his subsequent interaction with Scott he observed additional symptoms such as horizontal gaze nystagmus and lower than normal body temperature and blood pressure, that led him to believe that Scott was under the influence of a central nervous system depressant.

La Crosse Police Officer Dakota Jelinski responded to the dispatch call. After Jelinski observed that Scott had slurred speech, that her eyes were blood shot and watery, and that she

was swaying back and forth, Jelinski conducted field sobriety tests. Jelinski detected all six possible clues of eye jerkiness in the horizontal gaze nystagmus test, which exceeded the four clues that would be indicative of impairment. Jelinski detected seven out of a possible eight clues of impairment when Jelinski administered the walk-and-turn test, including loss of balance, using her arms for balance, stepping off the line, and leaving too big a gap between her heel and toe. Jelinski and Gerbig had to catch Scott twice to keep her from falling during that test. Finally, Jelinski detected three out of a possible four clues of impairment when Jelinski administered the one-leg-stand test, noting that Scott had to put her foot down to regain her balance, had to use her arms to try to maintain balance, and swayed. Jelinski cut the test off before thirty seconds due to concern that Scott was going to fall.

Jelinski took Scott to the La Crosse police department, obtained a warrant for a blood draw, and then transported Scott to the hospital, where phlebotomist Audrey Rivenburg took a sample of Scott's blood.

Amy Goedert, a toxicologist from the State Crime Lab, tested the sample of Scott's blood, and testified that it contained 2.8 nanograms per liter of Delta-9 Tetrahydrocannabinols—the psychoactive part of marijuana—and 11 nanograms per liter of the prescription drug Clonazepam. Goedert stated that Delta-9 Tetrahydrocannabinols remains in the system for about two to six hours, and it can cause impairment of coordination, concentration, balance, and decision making.

This evidence was entirely sufficient to support the jury's verdict.

Assistance of Counsel

Appellate counsel reasons that any errors that may have been made by trial counsel were non-prejudicial given the strength of the State's case. We agree with that analysis. Nonetheless, we will briefly address several of the assertions made by Scott.

First, Scott asserts that her eyes were red because her father had died four months prior to the incident, as a result of which, Scott had been crying a lot and was fatigued from lack of sleep. However, it was Scott's own choice not to testify to provide the jury with any explanation for her condition on the day of the incident. Moreover, trial counsel did get Officer Gerbig to acknowledge that there could be multiple causes for bloodshot eyes. Ultimately, the decision to detain Scott and get a warrant for a blood draw was based on far more than just her red eyes alone; the results of the blood analysis rather than Scott's red eyes formed the basis for the conviction. Therefore, we do not see what more trial counsel could have done with information about alternate explanations for Scott's red eyes.

Second, Scott asserts that she had been diagnosed as bipolar, that her depression was often worse during her time of the month, that her psychiatrist had told her that she could save a few pills during the month to take extra during her time of the month, and that the incident occurred during her time of the month. Scott alleges that trial counsel should have called her psychiatrist to confirm that Scott had been authorized to take additional medication during her time of the month. However, Scott was convicted of driving with marijuana in her system, not prescription drugs. Therefore, even if Scott did have a higher than usual amount of prescription medication in her system, and even if that medication contributed to the erratic driving that led to the investigative stop, it was not ultimately the basis for her conviction. Again, there was

nothing that trial counsel could have done with testimony from Scott's psychiatrist about Scott's prescription medication that would have affected the outcome of the trial.

Third, Scott asserts that the reason that she was speeding and weaving through traffic was that she needed to get to the hospital to pick up her son's prescription. We note that counsel elicited testimony from both officers that Scott had told them why she was speeding. Again, however, the fact that there may have been alternate or multiple reasons for Scott's driving in no way negated the fact that she also had marijuana in her system.

Fourth, Scott asserts that she had been harassed by police for years, that she believes they may have been surveilling her phone, and that her detention in this case was a "set up." However, Scott herself acknowledged that she had been speeding and weaving erratically through traffic, and she does not dispute that she failed the sobriety tests. Therefore, counsel had no basis to challenge either the investigatory stop or blood draw.

Fifth, Scott challenges the factual basis for her past OWI convictions, as well as other convictions for disorderly conduct, battery, and resisting an officer. The only permissible basis for a collateral challenge to a prior conviction is ineffective assistance of counsel. Scott cannot challenge the factual basis for prior convictions in the context of this case. Furthermore, the circuit court did not refer to any of Scott's prior non-OWI convictions at sentencing, so they appear to have had no effect on this case. Scott also questions whether the present offense should count as her fifth offense given the length of time since her fourth offense. This contention appears to refer to a prior version of the statutes, which had a limited lookback period for prior offenses. The current statute has a lifetime lookback period. Also, the circuit court

discounted the prior OWI convictions at sentencing due to the length of time between the last charge and this one.

Finally, Scott alleges that the police failed to save a tape of the incident, and that counsel should have sought surveillance video from the hospital. We note that Gerbig did not take any video of Scott's erratic driving because he was not in his squad car. It appears Scott is referring to video that may have been taken from Jelinski's squad car. Again, however, the conviction was based upon the results of the toxicology report, not Scott's performance on the sobriety tests. Even assuming that police erased the tape, it appears that evidence would relate to a companion charge of operating a motor vehicle while intoxicated, which is not before us because Scott was sentenced only on the count of operating with a restricted controlled substance in her blood. Moreover, as counsel points out, it is not clear that a squad car video would have captured the sobriety tests, which were conducted in the main entrance to the clinic, and there is no reason to believe that they would have provided any exculpatory evidence.

Sentence

A challenge to Scott'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. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the parties agreed to proceed without a presentence investigation report because Scott did not want to sit in jail awaiting sentencing. Scott had the opportunity to address the court, both by counsel and personally. She acknowledged that she should not have smoked pot, particularly in combination with her medication, and apologized for speeding and weaving through traffic.

The circuit court addressed 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 observed that Scott's reckless driving was the result of poor judgment caused by the marijuana use, and that it was egregious because someone could easily have been killed. The court also noted that, unlike Scott's prior OWIs, which were alcohol related, the use of marijuana was illegal in and of itself. With respect to the defendant's character, the court commented that Scott needed to comply with treatment directives to get herself stabilized. The court concluded that probation was appropriate given the length of time since Scott's last OWI, which seemed to indicate that she had at least gotten her alcohol use under control.

The circuit court withheld sentence, and placed Scott on probation for a term of two years, with six months of conditional jail time to be served on electronic monitoring. The court also imposed a fine of $600 and a $250 DNA surcharge, imposed other standard costs and conditions of supervision, revoked Scott's driving license for twenty-four months, imposed a twenty-four month period of ignition interlock, and awarded nineteen days of jail credit. The court set an initial payment plan of $25 per month towards the fines, costs, and fees, which Scott indicated that she had the ability to pay.

The term of probation and amount of conditional jail time were within the applicable penalty ranges. *See* WIS. STAT. §§ 346.63(1)(am) and 346.65(2)(am)5. (classifying OWI-5th as a Class H felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony); 346.65(2)(am)5. (setting six month minimum term of imprisonment and minimum fine of $600 for 5th or 6th OWI); 973.09(2)(b)1. (setting term of probation for a felony at not less than one year and not

more than the greater of three years or the initial period of confinement); and 973.09(4) (allowing up to one year of jail as a condition of probation). They were also in accordance with Scott's own request for probation with conditional jail time mostly to be spent on electronic monitoring, and were in no way unduly harsh. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he or she affirmatively approved); ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (a sentence is not unduly harsh unless it is so excessive and disproportionate to the offense committed as to shock public sentiment).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We also reject without further analysis any additional arguments by Scott that were insufficiently developed to warrant an individual response. *See generally* ***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 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