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DISTRICT IV

April 30, 2018

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

2017AP1974-CRNM State of Wisconsin v. James A. Holland (L.C. # 2016CF566)

Before Lundsten, P.J., Sherman 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).

James Holland appeals related judgments convicting him of operating a motor vehicle after the revocation of his license (OAR) and of a sixth offense of operating a motor vehicle with a prohibited alcohol concentration (PAC). Attorney Vicki Zick 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). The no-merit report addresses the sufficiency of the evidence, jury selection, jury instructions, Holland’s right to testify, evidentiary objections, opening and closing argument, a refusal determination, and sentencing. Holland was sent a copy of the report but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

First, we have reviewed the trial transcripts and are satisfied that the evidence was sufficient to prove all the elements of both the charged offenses. *See generally* WIS. STAT. § 343.44(1)(b) and WIS JI—CRIMINAL 2621 (setting forth the elements of OAR); WIS. STAT. § 346.63(1)(b) and WIS JI—CRIMINAL 2660C (setting forth the elements of PAC); *State v. Zimmerman*, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (discussing standard for sufficiency of the evidence). In particular, a police officer testified that he observed Holland drive a white van out of the parking lot of a bar shortly after the police had received an anonymous text tip that an individual who owned a white van was about to leave the bar and was too drunk to drive, and immediately after the officer had run the plates of the van and learned that its owner, Holland, had a revoked driver’s license. The officer immediately effectuated a traffic stop, asked Holland about his revoked license and whether he had been drinking at the bar, and observed that Holland’s eyes were glossy and Holland was emitting an odor of alcohol. The officer asked Holland to perform field sobriety tests, but he refused. After Holland also refused to submit to a chemical test of his blood, the officer placed Holland under arrest and obtained a warrant for a blood draw. A blood analyst testified that there was a concentration of

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

0.056 grams of alcohol per 100 milliliters of Holland's blood about two hours after he left the bar, well in excess of the permitted level of 0.02 grams for a person with prior OWI convictions. Holland stipulated that he had five prior OWI convictions and that his operating license was revoked at the time of the offenses due to a prior OWI offense. The jury could infer that Holland was aware that his license had been revoked from the fact that, when asked for identification, he provided an identification card rather than his driver's license.

As to the refusal determination, which resulted in an order suspending Holland's driver's license for two years, counsel observes that the record does not contain a Notice of Intent to Revoke, but concludes that any error was harmless because (as we will address below) the circuit court also suspended Holland's license for three years as part of his penalty on the PAC charge. We note that docket entries show that a Notice of Intent to Revoke was filed under a separate case number initiated for the refusal proceeding in Wood County Case No. 2016TR3402. Since Holland's notice of appeal does not mention that case number, the refusal determination is not before us on this appeal.

Next, we agree with counsel's analysis that the record shows no basis to challenge voir dire, the jury instructions, Holland's right to testify, any evidentiary rulings, or opening or closing argument.

A challenge to Holland's sentences would also lack arguable merit. On the OAR count, the court sentenced Holland to costs alone, which was a lower sentence than his request for probation with conditional county jail time, a fine and revocation. *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 affirmatively approved).

On the PAC count, the record shows that the circuit court considered relevant sentencing factors and rationally explained their application to this case, emphasizing that, with Holland's history of prior offenses, he should have been well aware that more than one drink was going to put him over his 0.02 limit, but that he continued to drink and drive, endangering the public. *See generally State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court then sentenced Holland to eighteen months of initial confinement and thirty months of extended supervision, noting that anything less than prison time would unduly depreciate the seriousness of a sixth offense. The court also imposed a fine of \$1,400, along with court costs and surcharges, ordered thirty-six months of license revocation with ignition interlock, and imposed standard costs and conditions of supervision, determined that Holland was eligible for the Substance Abuse Program, and awarded seven days of sentence credit.

The PAC sentence did not exceed the maximum available penalties. *See WIS. STAT.* §§ 346.63(1)(b) and 346.65(am)5. (classifying OWI-6th as a Class G felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony); 343.30(1q)(b)(2) (requiring revocation of not less than two years and not more than three years); 343.301(1g)(a)2.b., 343.301(1g)(am)1., and 343.301(2m)(a) (authorizing ignition interlock). Nor was the sentence unduly harsh, taking into account that it was Holland's sixth offense. *See generally State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

Although counsel does not address the issue, we also see no basis in the record to challenge trial counsel's performance. Upon an independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. 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 judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved of any further representation of James Holland 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