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January 2, 2020

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

2018AP1961-CRNM State of Wisconsin v. Jason Graham (L.C. # 2016CF2433)

Before Brash, P.J., Kessler and Dugan, 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).

Jason Graham appeals from a judgment of conviction for knowingly operating a motor vehicle while his operating privilege was suspended and causing death, in violation of WIS. STAT. §§ 343.44(1)(a) and (2)(ag)3. (2017-18).¹ His appellate counsel has filed a no-merit report

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

pursuant to WIS. STAT. Rule 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Graham received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, the judgment is summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. Rule 809.21.

Graham was driving a motorcycle with his girlfriend seated behind him. The motorcycle collided with a car crossing the road at an intersection. Graham's girlfriend was thrown from the motorcycle and died as a result of her injuries. Graham was charged with homicide by use of a vehicle with a detectable amount of a controlled substance in his blood and knowingly operating a motor vehicle while his operating privilege was suspended and causing death.

At the jury trial, Graham stipulated that his operating privileges were suspended on the date of the accident and that he knew it. There was evidence from which the jury could conclude that Graham was operating his motorcycle at a speed at least fifteen miles per hour over the posted speed limit. The theory of defense was that Graham's conduct did not cause the accident and that the sole cause of the accident was that the driver of the car failed to stop at a stop sign. The jury found Graham guilty of the operating while his operating privilege was suspended and causing death offense. Graham was acquitted of the controlled substance homicide charge. Graham was sentenced to thirty-two months of initial confinement and twenty-eight months of extended supervision.

The no-merit report addresses the sufficiency of the evidence and potential issues of whether trial counsel provided ineffective assistance of counsel by allowing the stipulation that Graham knew his license was suspended, whether the sentence was the result of an erroneous

exercise of discretion, and whether the sentence, the near maximum, was unduly harsh or excessive. This court is satisfied that the no-merit report properly analyzes these issues as being without merit, and this court will not discuss them further.

The no-merit report also concludes, in two sentences, that the trial court did not commit any reversible error. The report is inadequate on this point because it fails to identify and discuss the specific contested rulings the trial court made during the trial: denial of the defense's motions to strike two potential jurors for cause, overruling the defense's evidentiary objections or sustaining objections by the prosecution, and the denial of the defense's request to instruct the jury that the affirmative defense applicable to the controlled substance homicide charge also applied to the operating after revocation charge. While we ultimately agree with appellate counsel's no-merit conclusion, appellate counsel's two sentence conclusion, devoid of case law and facts, offers no base of authority helpful to this court's independent evaluation. *See State ex rel. McCoy v. Wisconsin Court of Appeals, Dist. 1*, 137 Wis. 2d 90, 100, 103, 403 N.W.2d 449 (1987). A no-merit report which complies with Wisconsin's discussion requirement serves to assure us that appellate counsel has discharged the obligations of representation competently and professionally, and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. *See id.* at 100-01. We address the potential issues not mentioned in the no-merit report to demonstrate that the no-merit procedure has been followed. *See State v. Allen*, 2010 WI 89, ¶82, 328 Wis. 2d 1, 786 N.W.2d 124 (stating that it is difficult to know the nature and extent of the court of appeals' examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion).

During jury selection, the parties agreed to strike several potential jurors for cause. Notably, two defense motions to strike potential jurors for cause were denied. The record reflects that the trial court properly exercised its discretion in denying the defense's request to strike those two jurors.² See *State v. Gesch*, 167 Wis. 2d 660, 666, 482 N.W.2d 99 (1992) (stating that “[t]he question of whether a prospective juror is biased and should be dismissed from the jury panel for cause is a matter of the [trial] court’s discretion.”) (quoting *State v. Louis*, 156 Wis. 2d 470, 478, 457 N.W.2d 484 (1990)).

Numerous evidentiary objections were made by the defense during the trial on the grounds that certain questions lacked an adequate foundation, were improper in form or misstated facts, and were beyond the scope of redirect examination. Also, the trial court sustained some of the prosecutor’s hearsay and other objections to questions asked by the defense. An appellate court reviews a trial court’s evidentiary rulings according to the erroneous exercise of discretion standard. See *State v. Payano*, 2009 WI 86, ¶4, 320 Wis. 2d 348, 768 N.W.2d 832. Having reviewed each of the evidentiary rulings, we conclude the trial court properly exercised its discretion in accord with the facts of record and under proper legal standards. No issues of arguable merit arise from the trial court’s evidentiary rulings.

During the jury instruction conference, the parties agreed that Graham was entitled to have the jury consider the affirmative defense set forth in WIS. STAT. § 940.09(2)(a), on the controlled substance homicide charge; that is, whether Graham had established by a preponderance of the evidence that the death would have occurred even if Graham had been

² Neither juror that the defense sought to strike served on the jury.

exercising due care and did not have a detectable amount of a restricted controlled substance in his blood. The defense requested that the jury be instructed to consider that same affirmative defense on the knowingly operating while his operating privilege was suspended charge. The defense argued that both crimes had the same causal element, both were “pretty much” strict liability crimes, and that some form “of an out” is required in strict liability situations. The trial court denied the request to make the affirmative defense applicable to the operating after suspension charge because the affirmative defense is written into the statute defining the controlled substance homicide crime, but is not similarly written into the operating after suspension statute.

When we examine jury instructions given by the trial court, we consider whether the court properly exercised its discretion and gave instructions, which “fully and fairly inform[ed] the jury of the rules of law applicable to the case.” *State v. Vick*, 104 Wis. 2d 678, 690, 312 N.W.2d 489 (1981). There is no legal authority to support the defense’s view that the statutory affirmative defense was applicable to the operating after suspension crime. Further, the defense’s view that a strict liability crime must have an affirmative defense available is not a per se rule. *See State v. Cissell*, 127 Wis. 2d 205, 226-27, 378 N.W.2d 691 (1985) (stating that a strict liability crime is not per se a violation of due process). Even if a per se rule exists, operating after revocation causing death is not a true strict liability offense since it requires proof of the operator’s knowledge that his or her license has been suspended. *See Staples v. United States*, 511 U.S. 600, 607-08 n.3 (1994) (explaining that “strict liability” is a misnomer where the crime actually requires proof of knowledge). There is no arguable merit to a claim that the trial court erroneously exercised its discretion in denying the defense’s request for a jury

instruction that would have made the statutory affirmative defense applicable to the operating after suspension charge.³

We have examined the other components of the jury trial which might give rise to potential appellate issues: the colloquy used to confirm that Graham's election to testify was knowingly made, use of proper jury instructions, and propriety of opening statements and closing arguments. No potential appellate issues exist from these parts of the trial.

As to sentencing, we observe that Graham objected to Judge Jeffrey Wagner sitting in place of Judge Carolina Stark on the day of sentencing.⁴ Not only had Graham already exercised his right to judicial substitution at the start of the case, but that portion of WIS. STAT. § 971.20(5), dealing with a defendant's right to substitute a newly assigned judge at trial, does not extend that right to sentencing hearings. *State v. Wisith*, 2009 WI App 53, ¶14, 317 Wis. 2d 719, 766 N.W. 2d 781. There is no arguably meritorious challenge to Judge Wagner presiding at sentencing.

³ We also considered whether there could be a meritorious claim that the jury's acquittal on the controlled substance homicide charge required acquittal on the operating after suspension causing death charge. Both crimes have the identical causal requirement—that the defendant's operation of the vehicle caused the death, meaning that the defendant's act was a substantial factor in producing death. However, the statutory affirmative defense and the jury's acceptance of that defense on the controlled substance homicide charge explains what might otherwise have appeared to be inconsistent verdicts.

⁴ The jury trial was heard by Judge M. Joseph Donald and it concluded just a few weeks before Judge Donald was scheduled to rotate out of criminal court. Although Graham asked Judge Donald to retain the case for sentencing which would occur several weeks after judicial rotation, Graham did not have an absolute right to be sentenced by the judge who adjudicated guilt. *See State v. Garner*, 54 Wis. 2d 100, 103, 194 N.W. 2d 649 (1972). Graham's case was subsequently assigned to Judge Carolina Stark, but she was not available on the day of sentencing.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Graham further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. Rule 809.21.

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved from further representing Jason Graham in this appeal. *See* 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