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January 28, 2020

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

2018AP1120-CRNM State of Wisconsin v. Carlos S. London (L.C. # 2015CF2468)

Before Kessler, Dugan and Donald, 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).

Carlos S. London appeals from a judgment of conviction for one count of operating while intoxicated (ninth offense), one count of felony bail jumping, and one count of operating while

revoked. *See* WIS. STAT. §§ 346.63(1)(a), 946.49(1)(b), and 343.44(1)(b) (2015-16).¹ London’s appellate counsel, Vicki Zick, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. London filed a response. Zick filed a supplemental no-merit report addressing the issues in London’s response. We have independently reviewed the record, the no-merit report, London’s response, and the supplemental no-merit report, as mandated by *Anders*.² We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm.

In November 2015, a Dane County sheriff’s deputy conducted a traffic stop after he observed a vehicle speeding and, while pursuing the vehicle, determined that the registered owner of the vehicle had a revoked driver’s license. After stopping the vehicle, the deputy confirmed that London, who was the registered owner of the vehicle, was driving. The deputy suspected London was intoxicated, so he conducted field sobriety tests and, ultimately, arrested London for driving while intoxicated. After London refused to submit to a chemical test of his breath or his blood, the deputy called the on-duty judge and procured a blood draw warrant.

¹ The jury also found London guilty of operating with a prohibited alcohol concentration. *See* WIS. STAT. § 346.63(1)(b). Pursuant to § 346.63(1)(c), when a person is found guilty of both operating while intoxicated and operating with a prohibited alcohol concentration, “there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30(1q) and 343.305.” In this case, the trial court opted to sentence London for operating while intoxicated.

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

² Our review of this appeal was delayed pending the Wisconsin Supreme Court’s consideration of another defendant’s appeal concerning jury instruction WIS JI—CRIMINAL 140, which was also used at London’s trial. Based on the Wisconsin Supreme Court’s resolution of that appeal, there would be no arguable merit to pursue postconviction proceedings based on the use of that jury instruction in this case. *See State v. Trammell*, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

London's blood was drawn pursuant to that warrant. Subsequent testing indicated London's blood alcohol content was .16.

London was charged with operating while intoxicated (ninth offense), operating with a prohibited alcohol concentration, operating while revoked, and felony bail jumping. The bail jumping charge stemmed from the fact that at the time London was arrested in November 2015, he was on bail for a charge of operating while intoxicated (eighth offense), and the conditions of his release included prohibitions against driving and committing new crimes.

As the no-merit report explains, there were extensive pretrial proceedings over the next two years, including changes in the attorneys representing London, challenges to the blood draw warrant and the traffic stop, motions to lower the amount of bail, and a competency evaluation.³ Ultimately, the operating while intoxicated and prohibited alcohol concentration charges were tried to a jury, and the operating while revoked and bail jumping charges were tried to the trial court. The jury and the trial court found London guilty of all charges.⁴

At sentencing, the trial court imposed three years of initial confinement—the minimum term of initial confinement permitted—and three years of extended supervision for the operating while intoxicated conviction. The trial court imposed a consecutive sentence of one year of

³ After trial counsel raised a question about London's competency, the trial court ordered an examination. The doctor opined that London was competent to proceed, and no one disputed the doctor's finding. The trial court found that London was competent to proceed. Having reviewed the report and transcripts concerning this issue, we conclude that there would be no arguable merit to challenging the competency evaluation and the trial court's finding that London was competent.

⁴ The trial court also found London guilty of operating a motor vehicle without insurance as charged in a traffic citation in Dane County Circuit Court Case No. 2015TR23863. London has not appealed that citation.

initial confinement and one year of extended supervision for the bail jumping conviction. It imposed a concurrent sentence of six months for the operating while revoked conviction. The trial court also declared London eligible for the Wisconsin Substance Abuse Program, an early release program.

The lengthy no-merit report discusses the pretrial proceedings, the jury trial, the court trial, and sentencing. It addresses numerous issues, including: (1) whether the trial court should have suppressed London's blood evidence because the arresting deputy "lacked reasonable suspicion to stop London and lacked probable cause to arrest him"; (2) whether the trial court should have granted London's motion for reconsideration concerning the suppression of the blood evidence; (3) whether the trial court should have granted London's second motion to suppress; (4) whether the trial court "committed reversible error in addressing the issues London included" in a letter to the court; (5) whether the blood draw warrant was defective; (6) whether there were any issues with the jury selection or the jury trial; (7) whether the trial court ensured that London knowingly, intelligently, and voluntarily gave up his right to testify; and (8) whether the trial court erroneously exercised its sentencing discretion.

The no-merit report thoroughly addresses each of those issues, providing citations to the record and relevant authority. This court is satisfied that the no-merit report properly analyzes the issues it raises. Based on our independent review of the record, we agree with counsel's assessment that none of those issues presents an issue of arguable merit.

In his response to the no-merit report, London identifies four issues of concern. First, he asserts that obtaining his blood sample violated his constitutional rights. Second, he argues that the trial court should have allowed London to subpoena the on-duty judge who signed the blood

draw warrant. Third, London contends that the trial court failed to properly apply the rules of evidence at several pretrial hearings. Finally, London appears to assert that the district attorney had possession of the blood draw warrant and failed to disclose it.

Appellate counsel filed a supplemental no-merit report addressing each of the issues London identified. We agree with appellate counsel's analysis of the issues, including her observation that it is unclear which pretrial rulings London is contesting. In any event, having reviewed the entire record, we are satisfied that the trial court's handling of the pretrial matters does not present an issue of arguable merit for appeal.

In summary, we agree with appellate counsel's analysis of the issues discussed in the no-merit report and the supplemental no-merit report. Further, we conclude that there would be no arguable merit to assert that the evidence, viewed most favorably to the State and the convictions, was "so insufficient 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. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Specifically, the State presented evidence that at the time London drove a vehicle, his license was revoked, he had a blood alcohol content of .16, and he was on bail for a felony. This evidence supports the verdicts on each count.

There would also be no arguable merit to challenge the trial court's exercise of its sentencing discretion. The trial court considered the requisite sentencing factors and explained its sentencing decision, consistent with the dictates of *State v. Gallion*, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Further, the trial court could have imposed seventeen years of imprisonment. The total sentence of four years of initial confinement and four years of

extended supervision was well within the maximum sentence, and we discern no erroneous exercise of discretion. *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 (“A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.”).

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

Upon the foregoing reasons,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved from further representing Carlos S. London 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