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DISTRICT III

May 27, 2020

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Jay J. Rogstad
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You are hereby notified that the Court has entered the following opinion and order:

2019AP61-CRNM State of Wisconsin v. Jay J. Rogstad (L. C. No. 2016CT65)

Before Hruz, 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).

Counsel for Jay Rogstad has filed a no-merit report concluding there is no basis to challenge Rogstad's conviction, following a jury trial, for operating a motor vehicle while

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

intoxicated, fourth offense. Rogstad was advised of his right to respond to the no-merit report and he has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no merit to any issue that could be raised on appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

Law enforcement was dispatched to a bar in Minong in response to a bar fight. While en route, deputies were advised that all parties involved in the fight had left the bar. The deputies continued to the scene and made contact with witnesses who stated Rogstad had been in a fist fight with another patron. A female patron stated that Rogstad told her he would be returning to the bar "and putting an end to all of the happenings on this evening."

Deputies positioned themselves in the parking lot awaiting Rogstad's possible return. Shortly thereafter, they observed a vehicle that "flew right past us" and then parked in front of the bar. The deputies then approached the vehicle. The lone occupant of the vehicle was Rogstad, who was slouched down in the driver's seat talking on his cell phone. An open can of beer was observed in plain view in the center console, and a strong odor of intoxicants was coming from the vehicle. Rogstad's nose had some blood on it. Rogstad admitted that he had consumed five or six beers prior to his arrival, and the deputies noticed his speech was slurred.

Rogstad was eventually charged with fourth-offense operating a motor vehicle while intoxicated. Testimony at trial established that Rogstad consented to field sobriety tests, but he "caught himself on the door" when exiting his vehicle. He also "required the assistance of leaning on the vehicle in its entirety all the way back for balance." Rogstad was unable to stand on his own, and upon commencing the nine-step walk-and-turn test, he fell into the vehicle and stated that he would not be completing any further testing. The deputies then arrested Rogstad.

He was read the Informing the Accused form, and he refused to provide a blood sample for chemical analysis.

The bartender testified at trial that Rogstad was in the bar on the date in question for "a couple hours, maybe three." The bartender served him five or six beers and "a couple shots of Fireball whiskey." Another individual testified that he went to the bar with Rogstad and his girlfriend as the designated driver, and that he drove Rogstad and his girlfriend home after the bar fight. He further testified that Rogstad's condition at that time was "[i]ntoxicated, angry." He testified that Rogstad "sulked around a little bit, was upset over what happened. Upset over what happened in the tavern and decided to go back." The individual advised Rogstad not to go back to the bar, as "[i]t just was not a good choice."

Rogstad testified in his own defense that he had been the victim of a "beating and choking" earlier at the bar, and that he was "disoriented" when the deputy asked him to perform the field sobriety tests. Rogstad denied drinking any whiskey shots, and he testified he was not intoxicated at any point during that day. He admitted that he was angry when he left the bar and went home, but he testified he grabbed the keys to the vehicle and returned to the bar to retrieve a "check card" he left with the bartender as collateral for an open bar tab. Rogstad further testified that when he arrived back at the bar, "I had a can of … beer, and I opened that and took a drink of it. … I was hurting." He also testified he refused to provide a blood sample because "I thought it was just a right I had. … [W]hen he asked me … I said no."

During deliberations, the jury asked: "Is refusal of a blood test or breathalyzer an admission of guilt?" Without objection from either party, the circuit court re-read WIS JI—CRIMINAL 235. The jury resumed deliberations and found Rogstad guilty of the charged offense.

The court imposed a sentence consisting of 330 days' jail, a fine of $3264, and a thirty-three-month revocation of operating privileges.

The no-merit report addresses potential issues regarding the sufficiency of the evidence; whether it was proper for the circuit court to read WIS JI—CRIMINAL 235 to the jury in response to its question during deliberations;[2] whether the court properly exercised its sentencing discretion; and whether Rogstad's trial counsel was ineffective for not raising suppression or other evidentiary motions, or for failing to address Rogstad's alleged offer to take a urine analysis or breathalyzer test at the jail, after his refusal of the blood test.[3] Upon our independent review of the record, we agree with counsel's description, analysis, and conclusion that any challenge to these issues would lack arguable merit, and we will not further address them.

Our independent review of the record also discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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[2] This issue was waived by the lack of an objection at trial. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980). In any event, WIS JI—CRIMINAL 235, as read by the circuit court in response to the jury question stated: "Testimony has been received that the defendant refused to furnish a blood sample for chemical analysis. You should consider this evidence along with all the other evidence in the case giving to it the weight you believe it is entitled to receive." Any arguments that the circuit court erroneously exercised its discretion by re-reading this jury instruction in response to the jury's question, or that Rogstad's trial counsel was ineffective for failing to object, would lack arguable merit.

[3] During sentencing, Rogstad stated to the circuit court: "I did offer and mention that I'd take a urine test or a breath test at the jail, and I was never offered either of those." The no-merit report states that Rogstad complains that his trial attorney "did not address his offer to take a urine or breath test after the initial refusal."

IT IS FURTHER ORDERED that attorney Richard Yonko is relieved of further representing Rogstad in this matter. 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