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March 9, 2021

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

2020AP1323-CRNM State of Wisconsin v. Reginald Bennett (L.C. # 2018CF5263)

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

Reginald Bennett appeals from a judgment of conviction for operating a motor vehicle with a restricted controlled substance in his blood, as a sixth offense, and with a minor child in the vehicle. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32

(2017-18),¹ and *Anders v. California*, 386 U.S. 738 (1967). Bennett submitted three separate short responses to the no-merit report, appellate counsel filed a very short supplemental no-merit report, and Bennett, without leave of the court, filed a short reply to counsel's supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, as mandated by *Anders*, 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.

Bennett was operating a motor vehicle and became involved in a four car accident. Bennett's four-year-old grandson was in the vehicle at the time. The police officer who interviewed Bennett about the accident noticed that Bennett had slurred and stumbling speech, a light odor of alcohol on his breath, and difficulty standing still. Bennett told the officer he had consumed two shots of vodka. Field sobriety tests were performed. Bennett was arrested and taken to a hospital for a blood draw. Bennett was charged with operating a motor vehicle while intoxicated, as a fifth or sixth offense, and with a minor child in the vehicle. After results of the blood test were available, Bennett was charged with operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood (metabolite of cocaine) and operating with a prohibited blood alcohol content, both as a sixth offense and with a minor child in the vehicle. The prosecutor dismissed the original charge of operating while intoxicated.

Bennett filed a pretrial motion to suppress the results of field sobriety tests, his statements to the officer at the accident scene, and blood test results on the ground that his arrest was illegal and not supported by probable cause. The motion was denied. The trial court found that the

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

officer's observation that Bennett's breath smelled of alcohol, Bennett's admission that he had two shots of vodka, the reports of others at the accident scene that Bennett seemed alcohol impaired, and the fact that a crash had occurred, was enough to supply probable cause for an arrest.

Before Bennett's jury trial started, a *Daubert*² hearing was held to determine whether Bennett's toxicology expert witness would be allowed to testify about the effect a heartburn medication Bennett claimed to have taken on the day of the accident had in potentially increasing his blood alcohol level. The expert was also prepared to testify that it could not be determined from the blood test result when Bennett might have ingested a substance that caused the cocaine metabolite to be in his blood. The trial court excluded all testimony concerning the effects of the heartburn medication because the evidence of what effect the medication had was speculative³ and based on Bennett's self-report that he had taken the medication. The trial court also prohibited the expert from giving any testimony about the cocaine metabolite found in Bennett's blood because the expert could not scientifically determine how and when the substance was ingested.

At trial, on Bennett's motion, and because the operating under the influence charge had been dismissed, the trial court did not allow the prosecutor to present evidence of how Bennett performed on the field sobriety tests or play the video of that performance. The officer was allowed to testify that an investigation was done and as a result of the investigation, Bennett's blood sample was drawn. The state crime lab experts testified that the blood test result was .064, and that a

² *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (under FED. R. EVID. 702, the federal equivalent to WIS. STAT. § 907.02, the trial court serves as a gatekeeper to ensure that scientific testimony is both relevant and reliable).

³ During the *Daubert* hearing, the expert indicated that he could not make a successful extrapolation curve because the heartburn medication affects how alcohol is metabolized and does so differently for different individuals.

cocaine metabolite was detected. A stipulation that Bennett's blood alcohol level was restricted to .02 was read to the jury. Bennett's expert testified that according to an antegrade extrapolation, Bennett's blood alcohol level at the time of driving was likely .016. Bennett did not testify. A defense motion for a mistrial based on the trial court's bias against Bennett was made and denied just before the jury heard closing arguments.

The jury found Bennett guilty of both counts. Bennett was sentenced only on the conviction for operating with a detectable level of a controlled substance. *See* WIS. STAT. § 346.63(1)(c). He was sentenced to four years of initial confinement and four years of extended supervision.

The no-merit report addresses jury selection, opening and closing arguments, trial objections, jury instructions, sufficiency of the evidence, and whether the sentence imposed by the trial court was an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit, and this court will not discuss them further except as necessary to address Bennett's response to the no-merit report. Additionally, we have reviewed the colloquy with Bennett on his election to not testify and because the colloquy established that Bennett's choice was freely and knowingly made, we need not discuss it further.

The no-merit report fails to address, however, whether any arguably meritorious appellate issue exists from the trial court's denial of the motion for mistrial. Bennett moved for a mistrial on the ground that the trial judge had a perceived bias against Bennett as demonstrated by

comments the judge made when making evidentiary rulings.⁴ “The decision whether to grant a motion for a mistrial lies within the sound discretion of the trial court. The trial court must determine, in light of the whole proceeding, whether the [claimed error was] sufficiently prejudicial to warrant a new trial.” *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995) (citation omitted). The deference which we accord the trial court’s mistrial ruling depends on the reason for the request and where, as here, a mistrial is sought on grounds not related to the prosecution’s conduct, we give the trial court’s ruling great deference. *Id.* at 507.

In denying the motion for a mistrial, the trial court observed that nearly ninety percent of the comments Bennett had cited were made outside the presence of the jury. The court also noted that while it may have said Bennett would have one minute to decide to testify, Bennett in fact had more than adequate time to make this decision. The court noted that both sides were admonished to move along. Finally, the court recognized that the jury would be instructed to disregard any opinion it might think the judge has about the case. Accordingly, the trial court properly exercised its discretion in denying the motion for a mistrial, and no issue of arguable merit arises from the denial of the motion.

The no-merit report also fails to address whether there is any arguable merit to a claim that the trial court erred in denying Bennett’s motion to suppress the blood draw evidence because there was no probable cause for Bennett’s arrest.

Probable cause to arrest for operating while under the influence of an intoxicant refers to that quantum of evidence within the arresting

⁴ In support of the motion, Bennett’s trial counsel pointed to the judge’s comment on the second day of the jury trial that Bennett’s assertion that he had two drinks was bunk and that everyone says that they have had two drinks. Trial counsel also cited instances in which the judge pushed the parties to move along and commented in front of the jury that both sides were taking too long. Other examples were discussed by trial counsel in support of the motion.

officer's knowledge at the time of the arrest that would lead a reasonable law enforcement officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant.

...In determining whether there is probable cause, the court applies an objective standard, considering the information available to the officer and the officer's training and experience.

State v. Lange, 2009 WI 49, ¶¶19, 20, 317 Wis. 2d 383, 766 N.W.2d 551 (footnotes omitted).

Bennett's trial counsel did an effective job at the suppression hearing in suggesting that the field sobriety tests were not administered with exacting skill and that Bennett's performance on those tests was hampered by Bennett's bad feet. However, the field sobriety tests were not the only indicators of intoxication on which the officer relied. As the trial court observed, the officer's observation that Bennett's breath smelled of alcohol, Bennett's admission that he had two shots of vodka, the reports of others at the accident scene that Bennett seemed alcohol impaired, and the fact that a crash had occurred supplied probable cause for an arrest. There is no arguable merit to a challenge to the denial of the suppression motion.

The no-merit report does not fully analyze the trial court's decision to exclude parts of expert testimony that Bennett sought to present. Rather, the report merely concludes that the ruling to exclude that testimony was harmless because the testimony would not have any effect on the operating with a restricted controlled substance conviction, a strict liability offense. We agree that it is not necessary to consider the evidentiary ruling bearing on the operating with a prohibited blood concentration conviction because Bennett was not sentenced on that conviction. For this

same reason, the suggestions within Bennett's responses to the no-merit report of error relating to the absence of evidence about his heartburn medication do not present issues of arguable merit.⁵

With respect to his conviction for operating with a restricted controlled substance, Bennett asserts that the existence of the cocaine metabolite was a false positive. Although Bennett asserts it was a false positive and he had no use of cocaine, he explains that the metabolite might have been in a home remedy pain pill that he took the night before the accident which he got from his cousin and was made from products purchased at a GNC store. He offers this as proof of involuntary ingestion and a lack of knowledge in operating with a restricted controlled substance. As appointed appellate counsel points out, the controlled substance offense is a strict liability offense and it does not require that the driver knowingly operates with a restricted controlled substance or that any impairment be shown. *See* WIS JI—CRIMINAL 2664B. There is no arguable merit to any claim challenging the driving with a restricted controlled substance conviction.

⁵ Bennett asserts in his responses his belief that his blood alcohol level was raised by the heartburn medication and that the trial court improperly viewed Bennett's self-report that he took the medication as mere "hearsay." At no point did the trial court characterize Bennett's report of the medications he took as "hearsay." Rather, the trial court observed that it would be improper for the expert to testify that Bennett's blood alcohol level was elevated by the heartburn medication if there was no evidence that Bennett took the medication other than what Bennett told the police, and later his expert. Even if it was error for the trial court to not allow the jury to hear the evidence and decide for itself whether Bennett's self-report was truthful, the expert's testimony was properly excluded because the effects of the heartburn medication vary and the expert could not say with scientific certainty what effect it had on Bennett's blood alcohol level.

Bennett also claims that his trial counsel was ineffective for not hiring an expert that would have retested his blood sample and tested for the presence of the heartburn medication. Bennett asks this court to order the testing of his blood sample to garner proof that he had the heartburn medication in his system and that it caused his blood alcohol level to be abnormally high. Bennett does not seek retesting in relation to the operating with a restricted controlled substance conviction.

Our review of the record discloses no other potential meritorious issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Bennett 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 Mitchell Barrock is relieved from further representing Reginald Bennett 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