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DISTRICT III

December 7, 2021

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

2019AP930-CRNM State of Wisconsin v. Nathan Andrew French
(L. C. No. 2017CF1647)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Nathan French has filed a no-merit report concluding there is no basis to challenge French's convictions, following a jury trial for operating a motor vehicle while intoxicated—seventh, eighth or ninth offense; resisting or obstructing an officer; and knowingly operating a motor vehicle while revoked. French was advised of his right to respond and 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 (2019-20).¹

Although not specifically discussed in the no-merit report, the evidence was sufficient to sustain the jury verdicts. The evidence produced at French’s jury trial showed that police were dispatched at 2:41 a.m. to a single-vehicle accident in De Pere after a complainant notified law enforcement that a vehicle had struck a tree. The complainant testified that he had awoken to use the bathroom when he heard what sounded like a car losing traction in the street, and he then heard a crash. He looked outside and witnessed a vehicle with its front end directly in a tree.

While on the 911 call, the witness continued to describe what he was observing. The witness reported seeing the driver initially attempting to put the vehicle in reverse moving away from the tree “and the sounds were those of some severe drivetrain damage underneath the vehicle and the vehicle wasn’t moving.” After the driver unsuccessfully attempted to dislodge the vehicle, the driver exited the vehicle and walked around to the front of the car as though examining the damage. The driver then reentered the vehicle and attempted a second time to move the vehicle. He then again exited the vehicle to reexamine the damage. The driver eventually left the vehicle and fled on foot running north. The witness did not see any other person in the car or exit the car. The witness described the driver as a light-skinned male weighing 160 to 175 pounds and approximately five foot ten to eleven inches tall. The driver was wearing dark upper-body clothing and blue jeans.

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

An officer arrived at the scene in under two minutes after dispatch and observed a vehicle that had collided with a tree with heavy front-end damage. The officer ran the license plate number and discovered it was registered to French's mother, who lived near the scene of the accident. Law enforcement contacted French's mother, and she stated that she, her husband, or French normally drove the vehicle. French's mother also stated that French "was nowhere to be found at that point in time."

Another officer who had gone to the rear of French's mother's house observed a male matching the description of the suspect driver walking toward the officer quickly with his head down, and the officer requested that the individual "[p]lease stop." When the suspect did not respond, the officer repeatedly yelled, "Stop, police." The suspect then fled quickly and was followed by the two officers, who eventually detained the suspect following a physical struggle. The suspect was arrested and determined to be French. Officers observed no other person on the street at that time. During a search incident to arrest, keys were found dangling out of French's pocket. One of the officers took the keys to the location of the car involved in the accident, and the key fob unlocked the vehicle. The officers also took the key fob to French's mother, who confirmed the key fob was for her vehicle.

French stated that he wanted medical assistance, so he was escorted to an ambulance and taken to the hospital. Police could smell intoxicants on French's breath and observed that his eyes were glassy and his speech was slurred. Based on field sobriety tests performed at the hospital, the officers concluded that French was under the influence of alcohol. Officers asked French if he had been driving, and he responded, "I don't know what you're talking about." French also stated that he didn't know whose key it was or how it got there. Officers asked French if he had been drinking, and he responded that he had, but then declined to indicate how

much. A warrant was obtained to draw French's blood. A blood sample revealed a blood alcohol content of .179%. Police also determined that French's operating privileges had been revoked.

French's mother confirmed at trial that the vehicle was hers. She also admitted telling the police at the time of the accident that only she, her husband, and French drove that vehicle. She testified that her husband drove the car "once in a while" but "[n]ot too often." She also testified that when the officers spoke to her at the time of the accident, her husband was sleeping. She further stated that when talking to the officer, she did not know if French was home because she had been sleeping. A lab analyst testified as to French's .179% blood alcohol concentration. A redacted copy of French's driving record was also admitted into evidence by stipulation.

Here, there was more than ample circumstantial evidence from which the jury was entitled to infer that the vehicle left the roadway prior to crashing into the tree, and that at the time of the accident French was operating the vehicle while intoxicated. *See State v. Hecht*, 116 Wis. 2d 605, 623, 342 N.W.2d 721 (1984). There is also no basis to challenge the evidence that French resisted the officers and knowingly operated the vehicle while revoked.

The no-merit report represents that French "takes issue with four particular matters." First, French purportedly claims that the discovery materials contained a report or other documentation indicating that the suspect was wearing a dark hat. French's counsel states in the no-merit report that he "has found no reference to a dark hat in the discovery or other trial materials." As mentioned, French failed to respond to the no-merit report, and the issue is therefore conceded. In any event, even assuming the discovery materials referenced a dark hat, given the other evidence identifying French as the vehicle's driver, it is not reasonably possible

the jury would have reached a different verdict had French's trial attorney brought up the dark hat issue at trial, presumably to establish that someone else had driven the vehicle.

The no-merit report also states that French challenges the absence of cross-examination of his mother's testimony. His mother testified that she, her husband, and French were the only individuals who ordinarily drove the car. Apparently, French claims his trial attorney was ineffective for failing to ask his mother whether there were any other keys to the car. Again, given the other evidence, including the fact that a vehicle key fob was found in French's pocket immediately after the accident in proximity to the accident scene, it is not reasonably possible the jury would have reached a different verdict had French's mother been cross-examined on the issue. Moreover, French's trial attorney stated the following during closing arguments:

Susanne French then got on the stand. The [S]tate called her as a witness. Again, she said other people drive that vehicle, but did the [S]tate bother to ask her whether there were other keys to that vehicle? No. Is that because they didn't want that question asked? I don't know. But it's a question left unanswered. It's something that wasn't said. So there's a loose end there.

Rather than asking French's mother about other keys to the car, his trial attorney planted a seed of doubt on this issue with his closing argument. This was a reasonable trial strategy. Thus, counsel did not perform deficiently. And, the jury was not persuaded.

The no-merit report also states that French claims his resisting or obstructing an officer conviction must be vacated because the officers failed to show their badges prior to his apprehension. However, there is no reasonable doubt that French knew the officers were acting in their official capacity with lawful authority at the time. *See* WIS. STAT. § 946.41. The officers testified French fled police despite the officers yelling multiple times while uniformed, "Stop, police!" A physical altercation eventually ensued when French was apprehended. Both officers

yelled at French to stop resisting, and one officer eventually was required to tackle French and bring him to the ground. Quite simply, there is no requirement that an officer show a badge as an element of a resisting an officer conviction, and the evidence clearly showed French was on notice that law enforcement officers were pursuing him in their official capacities.

Finally, French claims that separate DNA surcharges were improper. However, separate surcharges are allowed under WIS. STAT. § 973.046.

The no-merit report also addresses whether the circuit court erroneously exercised its sentencing discretion. Following the jury convictions, the court imposed four years' initial confinement and five years' extended supervision on the OWI charge; six months consecutively on Count 2, the resisting charge; and six months concurrently on the revocation charge. The Wisconsin Department of Corrections sent a letter to the court seeking clarification regarding the sentencing terms of Count 2, and the court reaffirmed that the six-month term was to run consecutively to the OWI count.

This court is satisfied that the no-merit report properly analyzes the sentencing issue raised, and we will not further address the issue. Our independent review of the record on appeal discloses no other issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Andrew Morgan is relieved of further representing Nathan French in this matter. *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