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DISTRICT III

May 17, 2022

To:

Hon. Timothy A. Hinkfuss
Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Brown County Courthouse
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Sky C. Sparks
N4574 Wyant Avenue
Merrill, WI 54452

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

2020AP1787-CRNM State of Wisconsin v. Sky C. Sparks
(L. C. Case No. 2014CF1597)

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 Sky Sparks has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),¹ concluding that no grounds exist to challenge Sparks' convictions for operating a motor vehicle while intoxicated (OWI) and operating after revocation (OAR), both as fifth offenses. Sparks was informed of his right to file a response to the no-merit report, and he has not responded. Upon our independent review of the record as mandated by *Anders v.*

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

California, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. See WIS. STAT. RULE 809.21.

Following a car accident in November 2014, Sparks was charged with OWI, OAR, and operating with a prohibited alcohol concentration (PAC), all as fifth offenses. In addition, the State alleged that because Sparks' blood alcohol concentration (BAC) was .249 at the time of driving, the alcohol fine enhancer in WIS. STAT. § 346.65(2)(g)2. applied to the OWI and PAC charges.²

In June 2018, Sparks entered a no-contest plea to the OWI charge, pursuant to a plea agreement. In exchange for Sparks' plea, the State moved to dismiss the alcohol fine enhancer on the OWI charge, to dismiss and read in the OAR charge, and to dismiss the PAC charge outright. The parties agreed to jointly recommend a sentence of two years' initial confinement and three years' extended supervision, concurrent to another sentence that Sparks was then serving. The circuit court initially accepted Sparks' plea to the OWI charge. However, the court subsequently made comments indicating that it would not be willing to follow the joint sentence recommendation. Based on those comments, the court permitted Sparks to withdraw his plea to the OWI charge, and the case proceeded to a jury trial on all three charges.

At trial, evidence was presented that on November 21, 2014, a car registered to Sparks' then-girlfriend crashed into the backyard of a residence in the Village of Howard. Following the

² The complaint also alleged that following Sparks' arrest, a deputy read him the "Informing the Accused" form, and Sparks refused to consent to an evidentiary chemical test of his blood. Sparks' refusal is not at issue in this no-merit appeal.

accident, three individuals—who were later identified as Sparks, Guy Martin, and Patricia Sanchez-Sanchez—fled from the vehicle but were soon apprehended by police. It was undisputed at trial that Sparks was intoxicated at the time of the accident, that his BAC was .249, and that his operating privilege was revoked.³ The only disputed issue was whether Sparks or Martin was driving at the time of the accident.

A sheriff's deputy testified that while he was speaking to Martin at the accident scene, Martin told him that Sparks had been driving the vehicle. The deputy examined the vehicle and saw that its driver's side windows had been smashed inward. The deputy observed glass in "the driver's seat area and the rear passenger area" on the driver's side. The deputy testified that Sparks had glass shards in his hair at the accident scene, but neither Martin nor Sanchez-Sanchez had glass on their persons. The deputy also noticed that the driver's seat was pushed back and there was a case of beer wedged between the driver's seat and the back seat of the vehicle. Given the location of the case of beer, the deputy concluded it was "highly unlikely that there was a passenger in the rear driver's side passenger seat at the time of the crash."

The deputy also observed that the vehicle's key was stuck in the ignition, and there was a "a large amount of blood around the ignition area on the dash[board]." The deputy testified that he believed the blood had been transferred to the dashboard when the vehicle's driver tried to remove the key from the ignition. When speaking with Sparks at the accident scene, the deputy

³ The parties stipulated that Sparks' blood was properly drawn within three hours of the alleged driving; that the blood sample was properly tested using accurate machinery and methods; and that Sparks' BAC was found to be .249. The parties also stipulated that Sparks' operating privilege was revoked at the time of the accident and that Sparks knew his operating privilege was revoked. In addition, Sparks conceded during his trial testimony that he had been drinking at various bars for "[m]any hours" before the accident. Furthermore, the parties stipulated that Sparks had four prior countable offenses for purposes of the OWI/PAC charges and four prior countable offenses for purposes of the OAR charge.

noticed that Sparks had dried blood on his face and hands. Because Sparks was the only one of the vehicle's occupants with injuries that had produced blood and was the only occupant with glass on his person, the deputy concluded that Sparks had most likely been driving the vehicle at the time of the accident. The deputy later took a sample of the blood found on the vehicle's dashboard. The parties stipulated that the blood sample was properly tested by an analyst at the Wisconsin State Crime Laboratory and matched Sparks' DNA.

An eyewitness from the accident scene testified that she saw two men and a smaller person, whom she initially believed to be a child, exit the vehicle following the accident. The witness testified that the "taller" man was the driver of the vehicle. The State introduced evidence showing that Martin is five feet, nine inches tall, while Sparks is five feet, eleven inches tall. The eyewitness also testified that the driver was wearing a black hooded sweatshirt with white writing on it. Sparks was wearing a black fleece jacket without a hood that night. When Martin was received at the jail following the accident, no black hooded sweatshirt—or any type of coat or jacket—was recorded on his inmate inventory sheet.

Martin and Sparks both testified at trial that Martin, not Sparks, was driving at the time of the accident. Sanchez-Sanchez did not testify at trial. At the accident scene, a deputy asked Sanchez-Sanchez who was driving, and she responded that she did not know.

The jury found Sparks guilty of all three charges. The circuit court subsequently sentenced Sparks to three years' initial confinement and three years' extended supervision on the OWI count. The court sentenced Sparks to one year in jail on the OAR count. These sentences were to run concurrent to one another, but consecutive to any other sentence that Sparks was

serving. Pursuant to WIS. STAT. § 346.63(1)(c), the court did not sentence Sparks on the PAC count.

The no-merit report addresses whether the evidence was sufficient to support the jury's verdicts; whether the circuit court erroneously exercised its sentencing discretion; whether any new factors would support a motion to modify Sparks' sentences; whether Sparks was denied his right to a speedy trial; and whether there would be any basis to assert that Sparks' trial attorney was constitutionally ineffective. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit, and we therefore do not address them further.

The no-merit report does not address whether the circuit court erred in ruling on the State's motions in limine; whether any errors occurred during jury selection; whether the court erred when ruling on any objections at trial; whether Sparks validly waived his right to remain silent before testifying; whether the court properly instructed the jury; whether any improprieties occurred during the parties' opening statements or closing arguments; and whether the court appropriately responded to the jury's request to view certain exhibits during its deliberations. Having independently reviewed the record, however, we conclude that any challenge to Sparks' convictions on these grounds would lack arguable merit.

The no-merit report also fails to address whether there would be any arguable merit to a claim that the circuit court demonstrated objective bias when it initially stated that it was unwilling to follow the parties' joint sentence recommendation. "The right to an impartial judge is fundamental to our notion of due process." *State v. Goodson*, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. "[A] judge who has prejudged the facts or the law cannot decide a case consistent with due process." *State v. Gudgeon*, 2006 WI App 143, ¶25, 295 Wis. 2d 189,

720 N.W.2d 114. Comments indicating that a judge has prejudged a defendant's sentence can give rise to objective bias. *State v. Marcotte*, 2020 WI App 28, ¶20, 392 Wis. 2d 183, 943 N.W.2d 911.

During the plea hearing, the parties informed the circuit court that they would be recommending a sentence of two years' initial confinement and three years' extended supervision, concurrent to another sentence that Sparks was then serving. The court stated, however:

I'm not going to do two in and three out, I can tell everybody that right now. I mean, this is his fifth time and he blew the bond in this case. And he was at .2 something. No. We're not going to do that. I'm not going to do that.

During the final pretrial hearing the following day, the circuit court permitted Sparks to withdraw his plea to the OWI charge, based on the court's comments regarding the joint recommendation. The court then clarified, however, that its comments during the plea hearing did not mean that the court would necessarily impose a sentence in excess of the joint recommendation. The court asked Sparks, "Do you understand that after I hear [the attorneys' sentencing arguments], I may agree to the joint recommendation[?] We did not hear entirely yesterday, we just heard bits and pieces of it. Do you understand that?" Sparks responded, "Yes, sir."

The circuit court further stated:

I just want to make sure that you understand cause I don't want to hear on post-conviction motion I accepted this offer but you said no, Judge. That's not correct. The point is your attorney could make arguments and [the prosecutor] could make arguments on sentencing. I may or may not follow those arguments. But part of the colloquy is I don't have to accept the joint recommendation. I

didn't want you to be under the assumption because it's a joint recommendation that the court has to accept it. Do you understand what I'm saying?

Sparks responded, "Yes, sir." The court continued, "But I may accept it, I may not. It depends on the arguments of counsel. But if you're withdrawing your plea, which you have done, we're back to square one. There's no joint recommendation and there's no offer. Do you understand that?" Again, Sparks stated that he understood. The court then asked whether Sparks still wanted to withdraw his plea. After conferring with his attorney, Sparks confirmed that he wanted to proceed to trial.

Although the circuit court's comments during the plea hearing suggested that it had already decided to impose a sentence in excess of the joint recommendation, the court clarified the following day that it had not yet decided what sentence to impose. The court made it clear to Sparks that it might choose to follow the joint recommendation after hearing the attorneys' sentencing arguments, but it was not required to follow that recommendation. After providing this additional information to Sparks, the court asked whether Sparks still wanted to withdraw his plea. Sparks conferred with his attorney and then confirmed that he wanted to go to trial. On this record, there would be no arguable merit to a claim that the court's comments during the plea hearing demonstrated objective bias or that the court erred by permitting Sparks to withdraw his plea.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Philip Brehm is relieved of further representing Sky Sparks 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