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DISTRICT IIII

April 18, 2023

To:

Hon. John Zakowski
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
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Christopher Eric Generose
W9029 Dow Dam Road
Amberg, WI 54102

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

2021AP747-CRNM State of Wisconsin v. Christopher Eric Generose
(L. C. No. 2018CF1635)

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).

Christopher Generose appeals from a judgment convicting him, following a second jury trial, of third-offense operating a motor vehicle under the influence of an intoxicant, with a passenger under the age of sixteen (OWI), and a third offense of operating a motor vehicle with a prohibited blood alcohol concentration, with a passenger under the age of sixteen (PAC).[1]

[1] Although the judgment of conviction lists both counts, the counts are merged by operation of statute under WIS. STAT. § 346.63(1)(c) (2021-22). Because the circuit court sentenced Generose only on the OWI count, we direct the clerk of the circuit court to amend the judgment of conviction to remove the PAC count.

(continued)

Attorney Luca Fagundes has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2021-22). The no-merit report sets forth the procedural history of the case and addresses: (1) whether there were grounds for Generose's traffic stop; (2) whether there were grounds to arrest Generose and draw his blood; (3) whether the prosecutor intentionally caused a mistrial at Generose's first trial; (4) whether the second trial was held in violation of Generose's speedy trial rights; (5) whether the State fabricated evidence related to the handling of Generose's blood sample that was presented at the second trial; (6) whether conflicting evidence produced at the second trial was sufficient to support the verdicts; (7) whether Generose's trial counsel provided ineffective assistance; (8) whether Generose knowingly and voluntarily waived his right to testify; and (9) whether Generose has any basis to challenge his sentences.[2]

Generose has filed a response with more than a dozen arguments that expand upon on the potential issues identified by counsel. In addition, Generose contends that his appellate counsel filed the no-merit report against his wishes; that Generose erroneously "was told" (presumably by either trial counsel or appellate counsel) that he had no right to have a DNA test done on the blood sample attributed to him; and that the prosecutor failed to "fix" Department of Motor Vehicles (DMV) records on Generose's behalf. Having independently reviewed the entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we find no issue of

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All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] For clarity, we have reorganized the potential issues identified by counsel into chronological order, and we will incorporate Generose's additional arguments—as well as the facts relevant to each issue—into that framework.

arguable merit, we conclude that counsel will be allowed to withdraw, and we order that the judgment shall be summarily affirmed.

Filing of the No-Merit Report

As a threshold matter, Generose claims that he never consented to have Fagundes file a no-merit report. Generose asserts that he told Fagundes that he was likely going to fire Fagundes and proceed pro se, but that Generose needed to discuss his options with his wife before reaching a decision. Then Generose's house burned down, Generose never informed Fagundes of his final decision, and Fagundes filed the no-merit report without making any further contact with Generose.

Pursuant to WIS. STAT. RULE 809.32(1)(a), an attorney appointed in a criminal case who concludes that an appeal would be frivolous *shall* file a no-merit report unless the defendant either agrees to have the attorney close the file or waives the right to further representation by counsel. Appointed counsel does not need the defendant's consent to file a no-merit report. Here, because Generose admittedly did not agree either to have Fagundes close the file or to waive the right to counsel, Fagundes was *required* to file a no-merit report.

Grounds for the Traffic Stop

Generose moved to suppress all evidence derived from his traffic stop on the grounds that the police lacked reasonable suspicion to make the stop under ***Terry v. Ohio***, 392 U.S. 1, 21-22 (1968). At the suppression hearing, Brown County Sheriff's Deputy Joseph Kazik testified that on the evening of September 11, 2016, a citizen called to report a small white pickup truck driving recklessly as it came into the Village of Suamico. The caller turned on his or her hazard

lights and followed the pickup truck. Kazik spotted what he believed to be the caller's vehicle and pulled over Generose's white pickup truck after personally observing the truck weaving within its lane as well as touching and crossing the centerline and fog line.

Generose now asserts that details about the location of the vehicle described on the 911 call "prove" that his pickup truck could not have been the same one reported by the caller. We note that the 911 call log was not introduced at the suppression hearing, and therefore it was not before the circuit court when it ruled on the suppression motion. In any event, it was reasonable for Kazik to believe that the white pickup truck being followed by a car with flashing hazard lights matched the description provided by dispatch of the reported vehicle in the same general vicinity. Moreover, the State also introduced a squad car video that showed Generose's pickup truck weaving within its lane and crossing the centerline. The erratic driving depicted on the squad car video was sufficient, in and of itself, to provide reasonable suspicion for the traffic stop.

Grounds for the Arrest

In the alternative, Generose moved to suppress the results of his preliminary breath test and subsequent blood alcohol test on the grounds that the police lacked probable cause to arrest him. Kazik testified at the suppression hearing that he detected an odor of alcohol when he approached Generose's pickup truck and he also observed that Generose's eyes were bloodshot and glassy. Generose admitted to having drunk one beer prior to the Packers game about eight hours earlier. Kazik returned to his squad car, ran a check on Generose's driving record, and requested a backup officer to assist with administering field sobriety tests.

Kazik subsequently administered the horizontal gaze nystagmus test to Generose and observed all six possible indicators of intoxication, which statistically indicated an eighty-eight percent chance that Generose was impaired. Kazik also administered the vertical gaze nystagmus test and observed vertical nystagmus, which generally indicates that an individual has exceeded his or her "tolerance" level of alcohol or a drug. Kazik next administered the walk-and-turn test, during which he observed one of a possible eight indicators of impairment. Finally, Kazik administered the one-leg-stand test and observed one of a possible four indicators of impairment.

Based upon his observations to that point, Kazik determined that he was going to arrest Generose for OWI. Kazik proceeded to administer a preliminary breath test (PBT), which showed that Generose had a blood alcohol concentration (BAC) above the legal limit of 0.08%. Kazik then placed Generose under arrest and transported him to a hospital for a blood draw.

Generose notes that the squad car video confirms that he told Kazik that he was legally blind in one eye and had prior back surgery, which could have affected his performance on the field sobriety tests. When competing reasonable inferences may be drawn, however, the officer is entitled to rely on the one justifying arrest. ***State v. Kutz***, 2003 WI App 205, ¶12, 267 Wis. 2d 531, 671 N.W.2d 660.

Generose also contends that Kazik's testimony was not credible because it conflicted in several respects with the squad car video (largely with respect to what Generose told Kazik and the order in which some events occurred) and because Generose believes no one could have detected the odor of intoxicants over the smell of McDonald's food in Generose's pickup truck. When acting as a fact finder, however, the circuit court is the "ultimate arbiter" for credibility

determinations, and we will defer to its resolution of discrepancies or disputes in the testimony and its determinations of what weight to give to particular testimony. ***Joseph Hirschberg Revocable Living Tr. v. City of Milwaukee***, 2014 WI App 91, 356 Wis. 2d 730, 855 N.W.2d 699. In addition, "a trial court may choose to believe some assertions of the witness and disbelieve others." ***State v. Kimbrough***, 2001 WI App 138, ¶29, 246 Wis. 2d 648, 630 N.W.2d 752. In short, the court was entitled to rely on those portions of Kazik's testimony that were not contradicted by the squad car video.

At the suppression hearing, the following facts were uncontroverted: that a citizen reported a white pickup truck in the vicinity being driven erratically; that Kazik observed (and squad car video captured) Generose's vehicle crossing the centerline; that Kazik detected an odor of intoxicants coming from Generose's vehicle; that Generose's eyes were bloodshot and glassy and displayed nystagmus clues; that Generose demonstrated a few balance problems during the field sobriety tests (again captured by the squad car video); and that the PBT showed Generose had a BAC above the legal limit. The totality of these circumstances was sufficient to lead a reasonable officer to believe that Generose had been driving under the influence of alcohol and thus provided proper grounds for the arrest. *See generally* ***State v. Blatterman***, 2015 WI 46, ¶¶34-36, 362 Wis. 2d 138, 864 N.W.2d 26.

Prosecutor's Conduct Leading to Mistrial

During Generose's first jury trial, the State played a portion of the squad car video containing a reference to Generose's two prior OWI convictions. In response, the circuit court granted Generose's motion for a mistrial. The court determined that the mistrial would be without prejudice because playing the inadmissible portion of the video had been an "honest

mistake" and not the result of prosecutorial misconduct. Generose now asserts that the prosecutor deliberately caused the mistrial. However, he provides no evidence that would show the court's finding of an honest mistake was clearly erroneous.

Speedy Trial and Due Process Rights

Three years after his arrest, Generose moved to dismiss this case with prejudice based upon an alleged violation of his right to a speedy trial. The circuit court expressly considered the four factors set forth in ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). First, the court agreed with Generose that the three-year delay while charges had been pending against Generose (which included a prior dismissal and reissuance of the charges based on the unavailability of a State's witness, as well as the mistrial) was presumptively prejudicial. Second, the court found that many of the other delays in the case were attributable to Generose's own requests for adjournment, were the result of alleged violations of the alcohol-monitoring conditions of Generose's bond, or were not attributable to either party. Third, the court noted that Generose had never made a formal speedy trial demand. Fourth, the court acknowledged that Generose suffered anxiety and alcohol-monitoring expenses while awaiting trial, but it noted that Generose had not been in custody while the case was pending and there was no indication that Generose's ability to defend the case had been impeded. Considering all of the factors together, the court concluded that there was no constitutional speedy trial violation warranting dismissal of the case with prejudice.

Generose now appears to advance a combination of speedy trial, prosecutorial misconduct, and due process claims in support of a contention that his case should have been dismissed with prejudice. Generose assigns bad-faith motives to the State's dismissal and

reissuance of the charges and its playing of the inadmissible excerpt from the squad car video. Generose further argues that he was prejudiced by: (1) the State being alerted to the defense strategy of challenging the chain of custody during the first trial, thus allowing it to better prepare for the second trial; (2) the thousands of dollars Generose spent on an alcohol-monitoring device (called SCRAM) while out on bond; and (3) the State's failure to take any action to correct inaccurate DMV records showing that Generose has been convicted of OWI three times (apparently generated as a result of the dismissal and reissuance of the charges).

Based on the circuit court's findings about the prosecutor's conduct in response to Generose's motions for a mistrial and for dismissal of the case, we see no factual basis for any claim that Generose's case should have been dismissed with prejudice due to prosecutorial misconduct. We are also satisfied that the court properly exercised its discretion in evaluating the speedy trial factors, and we note that it was in the best position to evaluate the State's playing of the inadmissible portion of the squad car video. In addition, the court reasonably observed that any chain of custody issues could be challenged through cross-examination (which they were) and were therefore favorable to the defense. The court explained that the reason the SCRAM condition remained in effect so long was that Generose kept having potential violations, and that the requirement was lifted prior to the second trial. Finally, the status of Generose's DMV records has no bearing on the validity of his convictions in this case or on whether he was entitled to have the case dismissed with prejudice.

Chain of Custody of Blood Sample

At Generose's second trial, the State introduced a Property List and a Property History showing when and where the Brown County Sheriff's Office had stored Generose's blood

sample during the pendency of this case. Generose believes that the Property History form was fabricated because: (1) an "Entry Dttm" notation on the Property List (with a date of January 18, 2017, in its upper right-hand corner) shows that Generose's blood sample was logged into evidence at 20:09 (i.e., 8:09 p.m.), just one minute after Kazik's report says he pulled over Generose's truck, well before Generose's blood had even been drawn; (2) a notation on the Property History (with a date of September 23, 2017, in its upper right-hand corner) shows that the blood sample was "Sent To Property Room" at 22:26 (i.e., 10:26 p.m.), which was when Kazik testified that he actually placed the sample into evidence; and (3) the sheriff's department did not provide the Property History in response to discovery requests Generose made before his first trial.

As to the first two points, Kazik testified that the time at which the Property List appears to indicate that the blood sample was placed into evidence was actually the time at which the dispatch call was made, and that the different notations on the two forms were automatically generated by the department's record management system. Kazik acknowledged that the notation on the Property List was inaccurate. Kazik explained that the dates on the upper right-hand corners of the documents indicated when the forms were generated. Appellate counsel consulted with the software maker for the sheriff's department's record management system and verified that the dates on the upper right-hand corner would have been computer generated when each report was run, not when the data was entered into the record management system.

The discrepancies between the two documents do not render the documents inadmissible; they merely affect what weight the jury might give to them. In other words, it was for the jury to decide whether the inaccuracy on the Property List or the discrepancy between the Property List

and Property History undermined Kazik's testimony as to when he placed Generose's blood sample into evidence.

As to the third point, Generose's allegations regarding discovery matters have not been the subject of an evidentiary hearing. We will assume for the purpose of this no-merit report that the allegations could be proven true, which would be consistent with the fact that the Property History form was not generated until after the mistrial. Again, however, it was for the jury to decide what, if any, significance to place on the delayed generation of the Property History form when evaluating the chain of custody of the blood sample. It was not a discovery violation for the State to fail to turn over a document that had not yet been generated prior to the first trial.

Conflicting Evidence and Credibility Issues

Generose asserts that Kazik's testimony at the second trial was not credible because of multiple inconsistencies with the squad car video and with Kazik's own prior testimony at the suppression hearing and first trial. Generose also challenges the credibility of the phlebotomist, who testified at the second trial that she followed standard procedures when she drew Generose's blood and sealed and labeled the tubes containing the blood. Generose asserts that no one could recall a specific blood draw three years later. Once again, however, the credibility of the witnesses was for the jury to decide and does not provide an appealable issue.

When reviewing the sufficiency of the evidence to support the verdict, "we give great deference to the trier-of-fact and do not substitute our judgment unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no reasonable fact-finder could have found guilt beyond a reasonable doubt." ***State v. Routon***, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530. In this context, "we consider all of the evidence

produced at trial, including evidence that the defendant challenges as being improperly admitted." ***State v. LaCount***, 2007 WI App 116, ¶22, 301 Wis. 2d 472, 732 N.W.2d 29.

Here, the combined testimony of Kazik who arrested Generose, the phlebotomist who drew his blood, and a State Crime Laboratory technician who testified that the BAC of Generose's blood sample was 0.113—in conjunction with the video showing the last few moments of Generose's driving before the traffic stop and the administration of field sobriety tests—was more than sufficient to support the guilty verdicts the jury returned on both the OWI and PAC counts.

Trial Counsel's Performance

Generose alleges that his trial counsel performed deficiently at his first trial by revealing the defense strategy of challenging the chain of custody for his blood sample. However, trial counsel could not have known while she was questioning Kazik whether the circuit court ultimately would grant the defense motion for mistrial and, if so, whether the dismissal would be with or without prejudice.

Generose also alleges that his trial counsel performed deficiently at his second trial due to a migraine headache for which trial counsel took medication the morning of his trial. Generose does not, however, identify any meritorious objections he believes his trial counsel should have raised, any specific questions she should have asked, any additional evidence she could have produced, or any additional arguments she could have made had she not taken the migraine medication. Having reviewed the transcript, we agree with Fagundes' assessment that Generose's trial counsel took reasonable and adequate steps to challenge the credibility of Kazik and the phlebotomist, and to point out the discrepancies in the chain of custody documents.

Right to Testify

Generose does not allege that his decision not to testify was uninformed, and we agree with counsel's analysis that the circuit court's colloquy was adequate.

Sentence

When a person is found guilty of both OWI and PAC arising out of the same incident, "there shall be a single conviction for purposes of sentencing and for purposes of counting convictions." WIS. STAT. § 346.63(1)(c). The State asked the circuit court to impose a sentence on the high end of the applicable guideline range for a 0.113 BAC, while Generose asked the court to impose the minimum sentence under the guidelines. The court ultimately imposed the minimum sentence for one step below the applicable BAC on the OWI count. Therefore, Generose has no basis to challenge his sentence. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he or she affirmatively approved).

Additional Testing on Blood Sample

Finally, Generose asserts that he "recently learned that he did have the right to have a DNA Test done on the blood sample the [sheriff's] department claimed was [his,]" despite having been "told" that he could only have the BAC test redone. If Generose is alleging that his trial counsel should have requested a DNA test on the blood sample prior to trial, Generose would first need to have the test done to prove prejudice. If Generose is seeking a new trial based upon newly discovered evidence, he would need to seek postconviction DNA testing under

WIS. STAT. § 974.07. Such relief falls outside of the issues that could be raised on a direct appeal.

Our independent review of the record—including the sufficiency of the evidence and the sentence—discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders***. Accordingly, counsel shall be allowed to withdraw, and the judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

IT IS ORDERED that the judgment of conviction, amended as directed in this order to remove Count 2, is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Luca L. Fagundes is relieved of his obligation to further represent Christopher Generose 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