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DISTRICT II

August 9, 2023

To:

Hon. J. Arthur Melvin III
Circuit Court Judge
Electronic Notice

Monica Paz
Clerk of Circuit Court
Waukesha County Courthouse
Electronic Notice

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Leonard D. Kachinsky
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Susan Lee Opper
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Daniel P. Nowak
N72W24090 Good Hope Road
Sussex, WI 53089

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

2021AP662-CRNM State of Wisconsin v. Daniel P. Nowak (L.C. #2020CF355)

Before Gundrum, P.J., Neubauer and Grogan, 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).

Daniel P. Nowak appeals from a judgment, following a jury trial, convicting him of operating while intoxicated as a fourth offense. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Nowak filed a response, and counsel filed a supplemental no-merit report. After reviewing the Record, counsel's reports, and Nowak's response, we conclude that there are no issues with

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

arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

The State charged Nowak with operating while intoxicated and operating with a prohibited alcohol concentration, both as a fourth offense. At trial, officers testified that at approximately 11:00 a.m., they were dispatched to respond to a report of a possible intoxicated driver. Dispatch advised a caller reported that an intoxicated individual was observed leaving a bar called Belfast Station and driving to Rumors, which is a bar across the street. The caller advised that the individual was driving a blue Toyota and provided a license plate number.

Officers found a blue Toyota with a similar license plate number (one digit was incorrect) sitting in the parking lot of Rumors. The vehicle was turned off, and Nowak was sitting in the driver's seat. Officers asked Nowak if he had driven from Belfast Station to Rumors. Nowak initially denied driving but, when asked again, admitted to officers that he had driven from Belfast Station to Rumors approximately ten minutes before. He also told officers he had been drinking alcohol. Nowak smelled of intoxicants, had slurred speech, and had bloodshot/glassy eyes. He exhibited clues of impairment on the field sobriety tests and was arrested for operating while intoxicated. A warrant was issued for a blood draw, and Nowak stipulated that his blood alcohol concentration (BAC) was .262 grams of alcohol per 100 milliliters of blood. Nowak did not testify. The jury convicted Nowak on both counts, and the court sentenced him to two years' initital confinement and two years' extended supervision on the operating while intoxicated offense.[2]

[2] The operating with a prohibited blood alcohol concentration count was dismissed.

The no-merit report addresses whether the trial court erred in any of its procedural rulings, whether trial counsel was ineffective, whether the evidence was sufficient to support Nowak's conviction, and whether the circuit court properly exercised its discretion at sentencing. This court is satisfied that the no-merit report properly analyzes the issues it raises as without arguable merit. We will, however, briefly address two of the issues from the no-merit report.

First, as to whether the evidence was sufficient to support Nowak's conviction, when reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcript persuades us that the State produced sufficient evidence to convict Nowak—officers found Nowak in the driver's seat of his vehicle, Nowak admitted to officers that he drove to the bar from another bar ten minutes before the officers' arrival, and Nowak told officers he had been drinking alcohol and stipulated at trial that his BAC was .262. We agree with counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

Second, in regard to the circuit court's sentencing discretion, our review of the Record confirms that the court appropriately considered the relevant sentencing objectives and factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The resulting sentence was within the maximum authorized by law. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. The sentence was not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Therefore, we agree there would be no arguable merit to a challenge to the court's sentencing discretion.

Nowak filed a response to the no-merit report raising numerous issues he believes have arguable merit. Appellate counsel filed a supplemental response addressing these issues. We agree with counsel that these issues lack arguable merit.

Nowak first lists numerous reasons why he believes he received ineffective assistance of trial counsel. Nowak asserts counsel was ineffective for failing to pursue their agreed-upon defense that Nowak did not drive. Our review of the Record confirms counsel pursued that defense. During closing argument, counsel argued to the jury that the State had not proven beyond a reasonable doubt that Nowak operated a motor vehicle—counsel suggested that perhaps Nowak walked across the street, emphasized that he originally told officers he was not driving, emphasized that no one saw Nowak driving, and faulted the State for failing to call as a witness the 911 caller who purportedly observed him driving.

Nowak next asserts counsel was ineffective for failing to move to suppress statements made by the 911 caller. The 911 caller did not testify. At trial, references to the caller's statements were not offered for the truth of the matter asserted, *see* WIS. STAT. § 908.01(3), and both officers readily testified that they did not know if what the 911 caller reported was true, which was why they went to investigate. Counsel was not ineffective in regard to the 911 caller.

Nowak also contends counsel was ineffective because she: (1) failed to use a private investigator (but he does not identify what the investigator should have investigated); (2) failed to ask for an occupational license at sentencing (given the number of convictions and the time

between them, Nowak is not eligible for an occupational license[3]); (3) failed to argue at sentencing that his BAC could have been less[4] (he stipulated at trial that his BAC was .262); and (4) erroneously listed Jefferson County instead of Waukesha County on his Notice of Intent to Pursue Postconviction Relief form (Nowak, however, still received his direct appeal). We conclude Nowak has failed to identify any issue of arguable merit regarding counsel's representation.

Nowak then lists reasons why the evidence was insufficient to support his conviction. He contends the officers' testimony was not true and did not make sense. He points out the 911 caller did not provide dispatch with his exact license plate number. He faults the officers for not testifying on whether they touched the hood of his vehicle to determine if it was warm and had been recently driven. Nowak also argues he was never at Belfast Station, had only been drinking at Rumors, has a receipt to prove this, and therefore did not drive. However, the jury as factfinder was free to give the weight to the testimony it desired. *See* ***Poellinger***, 153 Wis. 2d at 507. Further, Nowak's alternative version was not presented to the jury and overlooks that officers testified Nowak told them he had driven from Belfast Station to Rumors ten minutes prior to the officers' arrival. *See* ***id.*** As stated previously, we agree with counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

[3] The Amended Information provides, in part: "invoking the provisions of sec. 343.31(1m)(b) WIS. STATS, the department shall revoke the defendant's operating privilege permanently. *The person is not eligible for an occupational license under s. 343.10.* After 10 years of the revocation period have elapsed, the person may apply for reinstatement under s. 343.38." (Emphasis added).

[4] The report from the Wisconsin State Crime Laboratory indicated Nowak's BAC was .262 grams of alcohol per 100 milliliters of blood with an uncertainty of plus or minus .016 grams of alcohol per 100 milliliters of blood.

Nowak then lists objections to discovery and his arrest. Nowak objects to statements the officers made in their police reports. The police reports, however, were not admitted into evidence and therefore were not considered by the jury. Nowak contends he was not provided with all of the recordings in this case. Counsel advises this court that he specifically confirmed with the Waukesha County District Attorney's office that the only recording was of the 911 call, which was provided. Nowak then challenges his conviction on the basis that police denied his request to speak to a lawyer after police obtained the warrant for his blood draw but before his blood was drawn. The right to an attorney under ***Miranda***[5] safeguards a defendant's right to remain silent. ***Miranda***, however, does not prevent law enforcement from executing a warrant. We conclude Nowak has failed to identify any issue of arguable merit regarding discovery or his arrest.

Nowak argues the circuit court was biased against him because it denied his motion to dismiss at the close of the State's case and therefore improperly determined he was guilty. The circuit court, however, did not determine Nowak was guilty. By denying his motion to dismiss, the circuit court simply determined that, at that moment of the case, there was sufficient evidence for a jury to determine guilt beyond a reasonable doubt. *See* ***State v. Duda***, 60 Wis. 2d 431, 439, 210 N.W.2d 763 (1973). This does not show bias and is not an issue of arguable merit for appeal.

Finally, Nowak objects to the fact that he did not receive all of his "good time" credit on his judgment of conviction. WISCONSIN STAT. § 973.03(3)(a) provides a formula for awarding

[5] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

"good time" if a person is required to perform community service work while serving a term of imprisonment in a jail. Nowak asserts he earned fifty-five days and eleven hours of "good time" under this statute because he worked in the Waukesha County Jail's kitchen during his presentence incarceration. However, as counsel previously explained to Nowak, he did not receive any "good time" credit for this work because the circuit court, in its discretion, sentenced Nowak to prison as opposed to jail. Section 973.03(3)(a) applies only to jail sentences. *See* § 973.03(3)(a) ("If a court sentences a defendant to imprisonment in the county jail, the court may provide that the defendant perform community service work[.]"). There is no arguable merit to challenge the court's sentence on this basis.

Our independent review of the Record does not disclose any potentially meritorious issue for appeal.[6] Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Leonard D. Kachinsky of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved from further representing Daniel P. Nowak in this appeal. *See* WIS. STAT. RULE 809.32(3).

[6] To the extent Nowak's response includes assertions not specifically addressed in this opinion, we have considered those assertions and conclude they would not support any issues of arguable merit.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals