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DISTRICT III

September 26, 2023

To:

Hon. Daniel J. Tolan
Circuit Court Judge
Electronic Notice

Sharon Jorgenson
Clerk of Circuit Court
Polk County Justice Center
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Nathan Michael Jurowski
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James A. Lynch
1963 110th Avenue
Dresser, WI 54009

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

2023AP649-CRNM State of Wisconsin v. James A. Lynch (L. C. No. 2020CT77)

Before Gill, J.[1]

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 James Lynch has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding that no grounds exist to challenge Lynch's conviction for operating a motor vehicle while intoxicated (OWI), as a third offense. Lynch has filed a response to the no-merit report raising eleven issues, and counsel has filed a supplemental no-merit report. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

(1967), we conclude that 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.

The State charged Lynch with third-offense OWI, possession of a firearm while intoxicated, third-offense operating a motor vehicle with a prohibited alcohol concentration (PAC), and third-offense operating a motor vehicle with a restricted controlled substance in the blood. At Lynch's jury trial, the State introduced evidence that on August 29, 2020, at approximately 2:39 a.m., officers responded to multiple calls regarding a motor vehicle driving through residential yards and crashing into trees and a mailbox. When officers arrived at the scene, they located the vehicle, which was registered to Lynch, lodged against a tree. There were no occupants inside the vehicle, which was still running and in "drive." The driver's side door of the vehicle was partially ajar, and a white baseball cap was stuck in the ceiling of the vehicle above the driver's seat. When an officer entered the vehicle to turn it off, he noticed that the driver's seat was "quite a ways back," indicating that someone taller than him was driving. The officer testified that Lynch is taller than him, and Lynch conceded at trial that he is six feet, two inches tall.

Officers and the owner of the property where Lynch's vehicle was located observed a single set of footprints in the dewy grass leading from the driver's side door of the vehicle to a children's playset in the property's backyard. The officers followed the footprints and found a man, who was later identified as Lynch, lying face down underneath the playset. When the officers made contact with Lynch, they observed a strong odor of intoxicants coming from his person and noticed that his speech was slurred. A subsequent blood test showed that Lynch had a blood alcohol concentration of 0.152 and had a detectable amount of THC in his blood. After

Lynch was taken into custody, the officers found a loaded firearm in the center console of his vehicle.

When speaking with the officers, Lynch denied that he was driving his vehicle on the night in question. He reported that a woman he met at a nearby bar had been driving. Initially, Lynch told the officers that the woman's name was Ashley, but he subsequently stated that her name was "Cassie-something" and later said that her name was Angela. He also stated that the woman was approximately five feet, six inches or five feet, seven inches tall.

To support Lynch's identification as the driver of the vehicle, the State presented testimony from two eyewitnesses who observed the vehicle traveling through their neighborhood. One witness, T.H., testified that he saw "a rather large gentlem[a]n driving the vehicle." T.H. testified that he could see the vehicle's passenger seat and back seat clearly, and the driver was the only occupant of the vehicle. The second eyewitness, K.H., similarly testified that she saw only one person in the vehicle—the driver. Although K.H. could not specifically tell whether the driver was male or female, she described the driver as having "a little bit more of a stalkier build and broad shoulders."

Following a colloquy with the circuit court regarding his right to testify at trial and his corresponding right not to testify, Lynch elected to testify in his own defense. Lynch denied driving his vehicle on the night in question. He testified that he had paid a woman named "Angie Castille or Castillo" $40 to drive him home from a bar. He claimed that after his vehicle struck a tree, the woman climbed out the driver's side window and ran away. Lynch testified that he then climbed into the driver's seat and exited the vehicle through the driver's side door, but he did not turn off the engine because he did not want to contaminate any evidence by

touching the keys or shifter. He testified that he ran after the woman, following in approximately the same "track" or "line" where she was running, and then tried to take a shortcut through a yard to cut her off. He claimed that he then collided with a children's playset and "went unconscious." To rebut Lynch's claim that he and the driver of the vehicle ran in the same direction, the State introduced body camera footage from the hospital after the incident, during which Lynch stated that he and the driver ran in different directions.

During their deliberations, the jurors informed the circuit court that they were at an impasse, and the court read them WIS JI—CRIMINAL 520 (2001), the supplemental instruction on agreement. The jury subsequently found Lynch guilty of OWI, PAC, and operating a motor vehicle with a restricted controlled substance in his blood, but not guilty of the firearm possession charge. The PAC and restricted controlled substance charges were dismissed by operation of law. Lynch was convicted of the OWI charge only, and the court later sentenced him to 150 days in jail on that charge.

The no-merit report addresses: (1) whether the evidence was sufficient to support Lynch's conviction on the OWI charge; (2) whether the circuit court erred by reading the jury WIS JI—CRIMINAL 520 (2001); (3) whether Lynch's trial attorney was constitutionally ineffective; and (4) whether the court properly exercised its sentencing discretion. 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 any issues of arguable merit exist regarding: (1) jury selection; (2) the parties' opening statements and closing arguments; (3) the circuit court's evidentiary rulings; (4) the jury instructions; and (5) the court's colloquy

regarding Lynch's decision to testify. Nevertheless, having independently reviewed the record, we are satisfied that none of these potential issues has arguable merit.

After reviewing the record, we initially questioned whether there would be arguable merit to a claim that Lynch's OWI conviction in this case should have been for a second offense, rather than a third offense. We noted that, in ***State v. Forrett***, 2022 WI 37, ¶1, 401 Wis. 2d 678, 974 N.W.2d 422, our supreme court held that "Wisconsin's OWI graduated-penalty scheme is unconstitutional to the extent it counts prior revocations for refusing to submit to a warrantless blood draw as offenses for the purpose of increasing the criminal penalty." We further observed that, based on the charging documents, it appeared that one of Lynch's prior OWI offenses may have been a revocation for refusing to submit to a chemical test of his blood. We therefore ordered appellate counsel to file a supplemental no-merit report addressing this issue, as well as the additional issues raised in Lynch's response to the no-merit report.

In the supplemental no-merit report, appellate counsel asserts that the charging documents correctly state that Lynch was convicted of OWI in St. Croix County on July 14, 2008. While the charging documents also reference a 2008 refusal, appellate counsel asserts that Lynch was convicted of OWI a second time in Polk County in 2011. Appellate counsel notes that Lynch does not dispute that his 2008 and 2011 OWI convictions "remained in effect on the date of his conviction" in this case, and Lynch "does not intend to raise this issue on appeal here." Based on the representations in the supplemental no-merit report, we agree with appellate counsel that this issue lacks arguable merit.

As noted above, Lynch has filed a response to the no-merit report, raising eleven issues. Having independently reviewed the record and the supplemental no-merit report, we conclude that none of these potential issues has arguable merit.

First, Lynch asserts that he was "not aware" of the body camera footage until after the first day of trial; that there was "no warrant" to record him while speaking to a doctor; and that the recording was a "HIPAA violation."[2] While Lynch asserts that he was not aware of the body camera footage prior to trial, there is nothing in the record to indicate that the footage was not provided to the defense, and Lynch does not allege that the State failed to disclose this evidence. Lynch also fails to explain what difference it would have made to his defense had he, personally, been aware of the body camera footage before trial. Furthermore, while "[a] search and seizure conducted without a warrant issued pursuant to the requirements of the Fourth Amendment is presumptively unreasonable," *see* ***State v. Sveum***, 2010 WI 92, ¶18, 328 Wis. 2d 369, 787 N.W.2d 317, we are aware of no legal authority holding that a body camera recording qualifies as either a search or a seizure, such that a warrant would be required. To the extent Lynch alleges a HIPAA violation, we note that HIPAA "applies to 'covered entities,' but police officers are not listed as one of the covered entities." ***State v. Straehler***, 2008 WI App 14, ¶10, 307 Wis. 2d 360, 745 N.W.2d 431 (2007). Accordingly, HIPAA "does not control the conduct of law enforcement officers" and provides no basis to claim that the body camera footage was improperly admitted. *See* ***id.*** For these reasons, any argument that the circuit court erred by admitting the body camera footage would lack arguable merit.

[2] "HIPAA" refers to the Health Insurance Portability and Accounting Act of 1996. ***State v. Straehler***, 2008 WI App 14, ¶1 n.1, 307 Wis. 2d 360, 745 N.W.2d 431 (2007).

Second, Lynch asserts that one of the officers who testified at his trial "stated in his report that he took the key[s] out of the ignition from [Lynch's] vehicle and … put the key[s] in his pocket," but when questioned at trial, the officer "stated he did not know where [the keys] were." To the extent Lynch intends to suggest that the officer's trial testimony on this point was false, this claim lacks arguable merit. The officer testified that, at the time of trial, he was "not aware" where Lynch's keys "end[ed] up" and he could not "recall" whether the keys were found on Lynch. To the extent this testimony may have been contradicted by an earlier police report, there is nothing in the record to suggest that the officer's trial testimony was intentionally false, as opposed to being the result of the officer not remembering specific details about the keys seventeen months after the fact. Relatedly, Lynch asserts that the State "failed to produce the keys as evidence and therefor[e] withheld evidence." We agree with appellate counsel, however, that there is nothing in the record to indicate that the keys contained exculpatory evidence, "nor that the State intentionally withheld the keys following a request from the defense for their production."

Lynch's third argument relates to photographs that were introduced into evidence at trial showing footprints in the grass. The State introduced a number of printed photographs of the footprints. The defense, in turn, introduced a digital version of one of those photographs and was able to zoom in on a particular area of the photograph when questioning a witness. Thereafter, during its deliberations, the jury asked to see "the exhibits of all the footprints." The circuit court noted that the jury did not have the ability to view the digital photograph in the jury room. With the parties' agreement, the court provided the printed photographs to the jurors and informed them:

> Exhibit 200[] was a digital media photograph of footprints that was displayed on the monitors during the trial. You do not have the technology to view that Exhibit in the jury room. However, upon request, you can return to the courtroom and have that photo displayed on the monitors.

The jury did not ask to return to the courtroom to view the digital photograph.

In his response to the no-merit report, Lynch asserts that the jury "asked for closeups of the footprints, but because my trial attorney … only had digital copies, the jury was not granted the closeup photos." As the above summary shows, this assertion is incorrect. The jury asked to see "the exhibits of all the footprints," not "closeups of the footprints," as Lynch alleges. Furthermore, while the circuit court was unable to send the only digital photograph that was introduced at trial back to the jury room, it specifically informed the jurors that they could return to the courtroom to review that photograph. The jurors chose not to do so. Neither the court's response to the jury's question nor the fact that Lynch's trial attorney chose to introduce a digital photograph gives rise to an arguably meritorious basis for appeal. To the extent Lynch argues that the photographs "clearly" show "two different sets of tracks separating at the fence line," we note that it was the jury's responsibility to weigh the evidence and determine whether it believed that the photographs showed one set of footprints or two. This court cannot usurp the jury's role by reweighing the evidence. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990) (stating that the trier of fact, not an appellate court, is responsible for resolving conflicts in the testimony and weighing the evidence).

Fourth, Lynch asserts that the officers who testified at trial "blatantly lied under oath" when they stated that they found him "hiding" under the playset. There is nothing in the record—or in Lynch's response to the no-merit report—to compel a conclusion that the officers lied under oath with respect to this topic. The officers testified that they found Lynch lying on

the ground underneath the playset, and under the circumstances, it was reasonable for them to infer that he was hiding there. Although Lynch testified at trial that he was not hiding and had instead fallen to the ground after colliding with the playset, the jury was not required to accept his testimony in that regard. The mere fact that Lynch disputes the officers' characterization of his behavior as "hiding" does not show that their testimony to that effect was incredible as a matter of law, nor does it provide any basis to conclude that they lied under oath.[3]

Fifth, Lynch asserts that the hat that was stuck in the ceiling of his vehicle "could only have happened from the back[ ]seat, which is where I was thrown from initially." Lynch raised this argument at trial, and the jury rejected it. The jury could reasonably conclude, based on the evidence presented at trial, that the hat's position above the driver's seat of Lynch's vehicle supported a determination that Lynch was the driver. Again, this court cannot usurp the jury's role by reweighing the evidence. *See* ***id.***

Sixth, Lynch asserts that "[t]ext/Facebook messages were not allowed to be used/shown as evidence that I was actively looking for a sober ride, including the night of this incident." To the extent Lynch means to argue that the circuit court erroneously prevented him from introducing these text messages at trial, we cannot locate anything in the record indicating that Lynch sought to introduce the text messages at trial or that the court prevented him from doing so. In any event, any error by the court in excluding the text messages would have been harmless, as it is clear beyond a reasonable doubt that a rational jury would have found Lynch

[3] Relatedly, Lynch suggests that the officers lied when they "stated that I reached for my waist band while also laying [sic] on my stomach, [which] is not possible." We have reviewed the trial record and cannot find any reference in the officers' testimony to Lynch reaching for his waist band. Regardless, we fail to see how it would be impossible for Lynch to reach for his waist band while lying on his stomach.

guilty of the OWI charge even if the text messages had been admitted. *See* ***State v. Martin***, 2012 WI 96, ¶45, 343 Wis. 2d 278, 816 N.W.2d 270. Given the State's strong circumstantial evidence that Lynch was driving the vehicle on the night in question, evidence that Lynch had been looking for a sober ride earlier that evening would not have created a reasonable doubt as to Lynch's identity as the driver.[4]

Seventh, Lynch asserts that T.H.—the eyewitness who testified that a man was driving Lynch's vehicle—"could not possibly see the girl behind my large body as I leaned over from the passenger side to try and find … front lights that would work." Lynch also asserts that T.H.'s testimony was not credible because he testified that the vehicle's headlights were on, but other evidence showed that the headlights were "smashed out when [the vehicle] hit the first tree." Lynch raised both of these arguments at trial. As the sole arbiter of witness credibility, *see* ***State v. Below***, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95, the jury was entitled to decide whether to believe T.H.'s testimony that a man was driving the vehicle, despite any potential discrepancies in the evidence.[5]

Eighth, Lynch argues that the State has "illegally confiscated" his firearm, magazines, and ammunition and has not returned that property to him, even though he was acquitted of the

[4] Any claim that Lynch's trial attorney was constitutionally ineffective by not seeking to introduce the text messages at trial would lack arguable merit for essentially the same reason. Specifically, Lynch would be unable to establish that he was prejudiced by this alleged error because there is no reasonable probability that the result of his trial would have been different had the text messages been admitted. *See* ***Strickland v. Washington***, 466 U.S. 668, 687, 694 (1984).

[5] We further note that, contrary to Lynch's assertion, T.H. did not actually testify that the vehicle's headlights were on. Instead, when asked whether the headlights were on, T.H. responded, "I do not remember. I believe one may have been on. And the other one looks like it was part of the damage of the vehicle, I believe. But I don't solidly remember that."

firearm possession charge. As noted in the supplemental no-merit report, Lynch has a statutory right under WIS. STAT. § 968.20 to petition the Polk County Circuit Court for the return of his firearm. Any issues regarding the return of the firearm are not before us in this no-merit appeal from Lynch's judgment of conviction on the OWI charge.

Ninth, Lynch raises an issue regarding a 2008 refusal to submit to a blood draw. As discussed above, however, it is undisputed that Lynch had two prior OWI convictions, not counting the 2008 refusal. Accordingly, Lynch was properly convicted of OWI as a third offense in the instant case, and any arguments regarding the 2008 refusal proceedings do not give rise to an arguable basis to challenge Lynch's judgment of conviction. Lynch also asserts that he was "illegally stopped" in 2011 and given a "driving after revocation ticket," and that the officer who stopped him has since been convicted of a sex offense, OWI, and fraud. We cannot discern—and Lynch does not explain—why any issues regarding the 2011 stop are relevant to the present no-merit appeal.[6]

Tenth, Lynch argues that, due to his OWI-related driving history, the responding officers were biased against him and prematurely ended their investigation without following up on his claim that a woman had been driving his vehicle. This issue lacks arguable merit. Based on their observations at the scene, the officers had probable cause to believe that Lynch was the driver of the vehicle and to arrest him for OWI. *See* ***State v. Lange***, 2009 WI 49, ¶19, 317

[6] It is not clear whether the 2011 stop that Lynch references led to his 2011 OWI conviction. However, even if it did, a defendant may collaterally attack a prior OWI conviction "only when the challenge to the prior conviction is based on the denial of the offender's constitutional right to a lawyer." ***State v. Ernst***, 2005 WI 107, ¶22, 283 Wis. 2d 300, 699 N.W.2d 92 (citation omitted). Thus, Lynch's contention that he was illegally stopped in 2011 provides no basis to collaterally attack his 2011 OWI conviction.

Wis. 2d 383, 766 N.W.2d 551 (explaining that probable cause to arrest for OWI "refers to that quantum of evidence within the arresting 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"). Although Lynch claimed that a woman was driving his vehicle, "an officer is not required to draw a reasonable inference that favors innocence when there also is a reasonable inference that favors probable cause." *See* ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 738 N.W.2d 125. Furthermore, Lynch argued at trial that the officers had not sufficiently investigated his claim regarding the woman, but the jury nevertheless convicted him of OWI. As explained in the no-merit report, the evidence was sufficient to support the jury's verdict.

Finally, Lynch asks this court to "take a better look" at both his OWI conviction in this case and "the refusal." We have already concluded, for the reasons explained above, that any appellate challenge to Lynch's OWI conviction would lack arguable merit. The refusal proceedings in Polk County case No. 2020TR1235—a separate circuit court case—are not before us in this no-merit appeal.

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

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Nathan Michael Jurowski is relieved of any further representation of James Lynch in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals