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DISTRICT III

November 7, 2023

To:

Hon. Michael A. Schumacher
Circuit Court Judge
Electronic Notice

Susan Schaffer
Clerk of Circuit Court
Eau Claire County Courthouse
Electronic Notice

Angela L. Beranek
Electronic Notice

Kirk D. Henley
Electronic Notice

Reggie Lynn Thornton
1505 Harvey Street
Beloit, WI 53511

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

2023AP1159-CRNM State of Wisconsin v. Reggie Lynn Thornton
(L. C. No. 2019CT266)

Before Stark, P.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 Reggie Lynn Thornton has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding that no grounds exist to challenge Thornton's conviction for operating a motor vehicle while intoxicated (OWI), as a third offense. Thornton was informed of his right to file a response to the no-merit report, but he has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967),

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

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 Thornton with OWI, operating with a prohibited alcohol concentration (PAC), and operating with a detectable amount of a restricted controlled substance in the blood—all as third offenses. At Thornton’s jury trial, evidence showed that on July 6, 2019, at approximately 11:37 p.m., a vehicle operated by Thornton hit a light pole in the City of Eau Claire, which caused the vehicle to lose one of its front tires and become disabled in the middle of the road. When law enforcement responded to the scene, an officer noticed an odor of intoxicants coming from Thornton’s person and saw that his eyes were glassy and bloodshot. Thornton told the officer that he had consumed a single mixed drink. The officer administered field sobriety tests and observed multiple clues indicating that Thornton was impaired. The officer then placed Thornton under arrest for OWI.

Following Thornton’s arrest, the officer read Thornton the “Informing the Accused” form, and Thornton agreed to provide a sample of his blood. The sample was collected approximately one hour after the accident. Subsequent testing of the sample showed a blood alcohol concentration of 0.123 and a detectable amount of Delta 9 THC, the active ingredient in marijuana, in Thornton’s blood.

The jury found Thornton guilty of each of the crimes charged, and the circuit court proceeded directly to sentencing.² Both the State and the defense asked the court to sentence Thornton consistent with the Tenth Judicial District’s OWI sentencing guidelines, which called

² Thornton had stipulated outside the jury’s presence that he had two prior OWI convictions.

for a \$1,744 fine, sixty days in jail, revocation of Thornton's driver's license for twenty-four months, and the installation of an ignition interlock device for twenty-four months. The court complied with the parties' request and imposed a sentence consistent with the applicable guidelines. The court sentenced Thornton on the third-offense OWI charge only, and the other offenses merged with that count by operation of law. *See* WIS. STAT. § 346.63(1)(c).

The no-merit report addresses: (1) the sufficiency of the evidence to support Thornton's conviction; (2) whether the circuit court erroneously exercised its sentencing discretion; (3) whether Thornton's trial attorney was constitutionally ineffective by failing to move to suppress the results of Thornton's blood draw; and (4) whether the court erred by instructing the jury regarding circumstantial evidence. 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) the circuit court's rulings on motions in limine; (2) jury selection; (3) the parties' opening statements and closing arguments; (4) Thornton's stipulation to having two prior OWI convictions; (5) Thornton's waiver of his right to testify at trial; (6) Thornton's trial attorney's failure to object to any evidence admitted at trial; (7) the other jury instructions, aside from the instruction regarding circumstantial evidence; and (8) the court's responses to four questions posed by the jury during its deliberations. Nevertheless, having independently reviewed the record, we are satisfied that none of these potential issues has arguable merit.

First, we conclude that the circuit court properly granted the State's motions in limine, to which the defense did not object. Second, during jury selection, the court appropriately excused

four prospective jurors for cause, after those individuals indicated that they could not be impartial. There is no arguable basis to claim that the court should have excused any other prospective jurors for cause. Third, nothing improper occurred during the parties' opening statements or closing arguments. Fourth, before accepting Thornton's stipulation regarding his two prior OWI convictions, the court conducted a colloquy to ensure that the stipulation was knowing, intelligent, and voluntary. Fifth, the court also conducted an appropriate colloquy with Thornton regarding his waiver of the right to testify. Sixth, although Thornton's trial attorney did not object to any evidence introduced at trial, our review of the record does not reveal any basis for such an objection. Seventh, our review of the record confirms that the jury instructions accurately conveyed the applicable law and burden of proof.

Finally, the circuit court did not erroneously exercise its discretion when responding to the four questions that the jurors posed during their deliberations. *See State v. Simplot*, 180 Wis. 2d 383, 404, 509 N.W.2d 338 (Ct. App. 1993) (stating that a circuit court's response to questions posed by the jury during its deliberations is discretionary). Initially, the jury asked three questions: (1) "Was medical attention offered prior to the field sobriety tests?"; (2) "Was a Breathalyzer offered?"; and (3) "If no Breathalyzer offered, why wasn't it?" With the parties' agreement, the court responded: "I cannot answer any of these questions. You must decide the case based on the evidence offered and received during the trial." The court did not erroneously exercise its discretion by refusing to answer the jury's first three questions and instead directing the jury to make its decision based on the evidence presented at trial.

The jury subsequently asked:

On Count 3 [i.e., operating a motor vehicle with a detectable amount of a restricted controlled substance in the blood], are we

allowed to enter a guilty verdict on Count 3—with a clause of “Jury Nullification”—due to law being invalid, due to inability to accurately determine when Delta 9 THC was last used?

(Some capitalization omitted.) After consultation with the parties, the circuit court re-read the following portion of the opening instruction, WIS JI—CRIMINAL 100 (2000), to the jury:

It is your duty to follow all of these instructions. Regardless of any opinion you may have about what the law is [or] ought to be, you must base your verdict on the law I give you in these instructions. Apply that law to the facts in the case which have been properly proven by the evidence.

Consider only the evidence received during this trial and the law as given to you by these instructions, and from these alone guided by your soundest reason and best judgment reach your verdict.

The court then re-read the substantive instruction pertaining to Count 3. The court’s response to the jury’s final question accurately conveyed the law and did not constitute an erroneous exercise of discretion.

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 Kirk D. Henley is relieved of any further representation of Regglie Lynn Thornton in this matter. *See* 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