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DISTRICT III

February 12, 2013

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

2012AP1568-CRNM State of Wisconsin v. Steven D. Trott (L.C. # 2010CT160)

Before Mangerson, J.[1]

Counsel for Steven Trott has filed a no-merit report. Trott filed a response and his counsel filed a supplemental no-merit report. At this court's direction, counsel filed a second supplemental no-merit report addressing additional issues. Upon this court's independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), no issue of arguable merit appears.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

The jury convicted Trott of second-offense operating a vehicle while intoxicated and operating with a revoked license. The court sentenced Trott to twenty days in jail with Huber privileges and fines and court costs totaling $1,235 on the first offense, and fines and costs totaling $568 on the second offense.

The arresting officer stopped Trott's vehicle for speeding. She testified that Trott appeared to be traveling faster than the posted speed limit, although she did not utilize radar. Trott told her he had been drinking. The officer smelled intoxicants and noted that Trott's speech was slurred and his eyes were red. When the officer requested that Trott perform a field sobriety test, he put his hands behind his back with his wrists together and declined taking a field sobriety test. In a subsequent search of the car, the officer found drug paraphernalia. At trial, Trott stipulated that his driving privilege had been revoked, but did not stipulate to having knowledge that his license was revoked. However, the officer testified that withdrawal orders were mailed by first class mail from the Department of Transportation that would have notified Trott of his revocation. His license was never reinstated.

Trott filed a postconviction motion alleging ineffective assistance of counsel based on his counsel's failure to ask certain questions at the suppression hearing. The court denied the motion. The no-merit reports address whether there is any arguable basis for challenging the convictions and sentences or the order denying the postconviction motion.

THE SUPPRESSION HEARING

Trott's attorney filed a motion to suppress evidence, alleging the officer had no basis for stopping the vehicle. The officer testified she stopped the vehicle for speeding. Trott claims his counsel was ineffective for not asking whether Trott stopped for a stop sign. To establish

ineffective assistance of counsel, Trott must show deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Trott did not establish prejudice from his counsel's failure to ask about the stop sign because the court asked whether Trott stopped at the stop sign. Counsel was then allowed to follow up on the court's questions, and the officer testified that she did not know whether Trott failed to stop for the stop sign. However, she continued to express her belief that he was speeding, and the court accepted that explanation for the traffic stop.

Trott also faults his counsel for failing to prove that the officer lied about him speeding. He argues the officer was seven months pregnant and that somehow accounted for her decision to stop his car. The officer testified that she heard Trott's car accelerate, decelerate and accelerate again. She estimated the vehicle was going forty-five miles per hour in a thirty-five mile per hour zone, and she had to travel at sixty miles per hour to catch up to his vehicle. Based on her training and experience, she was qualified to estimate his speed, which provided a sufficient basis for the traffic stop. *See* ***City of Milwaukee v. Berry***, 44 Wis. 2d 321, 324, 171 N.W.2d 305 (1969).

Trott also complains that his attorney should have prevented the State from introducing into evidence the drug paraphernalia found in his car. Trott was charged with operating a vehicle while intoxicated. Under WIS. STAT. § 346.63(1) the intoxication may be the result of the use of alcohol or drugs. The drug paraphernalia was relevant to the charge and there was no basis for suppressing that evidence.

Trott also faults his attorney for failing to establish that the traffic stop was due to "profiling." He asserts he was profiled and objects to a minority being stricken from the jury

panel. It appears that Trott is a white male.[2] He does not indicate the nature of the profile the officer might have employed. Nothing in the record suggests any basis for counsel to have alleged improper profiling as the basis for the traffic stop.

THE TRIAL

Trott complains that the only minority in the jury venire, a Native American woman, was stricken for cause. The record shows that juror was dismissed without objection due to lack of candor. When asked whether any member of the panel or a member of their immediately family had ever been charged with, arrested for or convicted of operating a vehicle while intoxicated, the prospective juror said she had been stopped in 1995. She failed to inform the court that her son was also arrested on a drunk driving charge and subsequently died while incarcerated in the jail. The obvious potential prejudice and the failure to respond truthfully to voir dire questions constituted sufficient cause to discharge the juror. *See* ***State v. Williams***, 220 Wis. 2d 458, 466, 583 N.W.2d 845 (Ct. App. 1998).

The State presented sufficient evidence to support the convictions. Trott's admission that he had been drinking, the officer's observations of his slurred speech and red eyes and Trott's refusal to perform a field sobriety test allow the jury to infer that he was intoxicated. The officer's testimony regarding notification to Trott that his license was revoked and never reinstated constitutes sufficient evidence to support the conviction for driving after revocation.

Trott apparently believes that his counsel should have questioned the officer about her failure to ticket him for having open containers of alcohol in the car and about not charging him

[2] CCAP entries describe Trott as Caucasian. His postconviction counsel contends Trott is white.

with possession of drug paraphernalia or speeding. Not calling the jury's attention to the officer's leniency constitutes a reasonable strategy that cannot be second-guessed on appeal. ***Strickland***, 466 U.S. 689.

THE SENTENCES

The court imposed the sentences recommended in the Tenth Judicial District OWI Guidelines. Those guidelines are well below the maximum sentences of six months in jail and a $1,100 fine for drunk driving and one year in jail and a $2,500 fine for operating after revocation. The court appropriately considered the seriousness of the offenses, Trott's character and rehabilitative needs and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court considered no improper factors and the sentences are not arguably so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Melissa Petersen is relieved of her obligation to further represent Trott in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals