OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/IV

March 26, 2013

To:

Hon. Tim A. Duket
Circuit Court Judge
Marinette County Courthouse
1926 Hall Avenue
Marinette, WI 54143

Linda Dumke-Marquardt
Clerk of Circuit Court
Marinette County Courthouse
1926 Hall Avenue
Marinette, WI 54143

Allen R. Brey
District Attorney
1926 Hall Avenue
Marinette, WI 54143-1717

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Katie R. York
Asst. State Public Defender
P. O. Box 7862
Madison, WI 53707-7862

Brenda L. Stacey
413 2nd Street
Menominee, MI 49858

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

2011AP1623-CRNM State of Wisconsin v. Brenda L. Stacey (L.C. #2010CT22)

Before Blanchard, J.[1]

Brenda Stacey appeals a judgment convicting her, following a jury trial, of a fourth offense of operating a motor vehicle while under the influence of a controlled substance (OWI-4th). Attorney Katie York has filed a no-merit report seeking to withdraw as appellate counsel. *See* ***Anders v. California***, 386 U.S. 738, 744 (1967); WIS. STAT. RULE 809.32(3); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S.

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

429 (1988). The no-merit report addresses the sufficiency of the evidence to support the verdict, the lack of any significant evidentiary or procedural errors, and the validity of the sentence. Stacey was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Voir Dire

The trial court excused two potential jurors for cause, and the defense did not object to any of the panel members who were ultimately chosen for the jury. We see no basis in the record for challenging the impartiality of the jury.

Evidentiary Rulings at Trial

Stacey did not preserve any objections to the evidence produced at trial, and we do not see anything that would amount to plain and prejudicial error.

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "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); *see also* WIS. STAT. § 805.15(1).

As the circuit court properly instructed the jury, to obtain a conviction for OWI-4th under the State's theory of the case, the State needed to provide evidence showing beyond a reasonable

doubt that Stacey drove a motor vehicle on a highway—meaning that she exercised physical control of the speed and direction of the vehicle while it was in motion—and that she was at the time of driving the vehicle under the influence of Oxycodone, Morphine, Lorazepam, Diphenhydramine and/or Doxylamine to a degree that rendered her incapable of safely driving. *See* WIS. STAT. § 346.63(1)(a); WIS JI—CRIMINAL 2666.

Here, Stacey did not dispute the State's evidence that she was driving a vehicle with Oxycodone, Morphine, Lorazepam, Diphenhydramine, and Doxylamine in her system. To the contrary, she verified in her own testimony that she was taking the drugs as part of her treatment for an illness, and that she was driving a vehicle that went over the centerline and hit another vehicle. Stacey's defense was that the accident was not caused by the drugs in her system, but rather by the facts that it was dark, that she was driving a fairly new vehicle that she was not yet accustomed to, and that she had gone over the centerline to avoid a large truck parked on her side of the road.

The State, however, produced eye-witness testimony that Stacey's vehicle was swerving in and out of her lane prior to the accident; that Stacey hit another car after she had pulled over and was attempting to park; and that immediately after the accident Stacey could hardly keep her eyes open, exhibited slurred speech and lack of balance, was giving non-responsive answers to police questions, and refused to submit to sobriety testing. In addition, Stacey herself testified that she was not even aware that she had hit the other car, until she heard its driver honking the horn. We fully agree with counsel's assessment that this evidence was sufficient to satisfy the State's burden.

Sentence

A challenge to the defendant's sentence would also lack arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984).

Here, the parties proceeded to sentencing immediately after the verdict without a PSI, and agreed to the amount of restitution. The court afforded Stacey an opportunity to personally address the court. The trial court considered relevant sentencing factors and explained their application to this case in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. With regard to the severity of the offense, the court acknowledged that Stacey was using the drugs for legitimate pain management rather than recreationally to get high, but noted that she still had the responsibility to find someone to drive for her, given her high level of impairment. The court emphasized that Stacey had hit not one but two vehicles, and the public has a right to expect that drivers are capable of safely operating their vehicles. With regard to Stacey's character, the court was concerned with her apparent attitude—expressed to both the victims at the scene, and later, police—that it did not matter what she did because she was dying of her illness. The court noted that her complete disregard for the safety of others warranted punishment, and that jail time was a necessary deterrent given that this was her fourth offense.

The court then imposed a one-year term of probation with 150 days of conditional jail time with restitution, license revocation for a period of thirty-six months, and other standard conditions. The term of probation did not exceed the statutory maximum, and was certainly not

unduly harsh. *See* WIS. STAT. §§ 346.63(1)(am) and (4), 346.65(2)(am)4., and 973.09; *see also* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

Assistance of Counsel

We see nothing in the record to suggest that counsel provided ineffective assistance, and Stacey has not made any such claim to this court.

Conclusion

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Katie York is relieved of any further representation of Brenda Stacey in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals