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June 25, 2013

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Anthony N. Buttitta
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You are hereby notified that the Court has entered the following opinion and order:

2013AP98-CRNM State of Wisconsin v. Anthony N. Buttitta (L. C. #2011CT78)

Before Stark, J.¹

Counsel for Anthony Buttitta has filed a no-merit report concluding there is no basis to challenge Buttitta's conviction for operating a motor vehicle with a detectable amount of a restricted controlled substance in his blood, third offense. Buttitta was advised of his right to respond and has not responded. Upon our independent review of the record as mandated by

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.

Anders v. California, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised and summarily affirm.

According to the criminal complaint, Buttitta was stopped at approximately 11:00 p.m. on March 31, 2010, because of a suspended registration and driver's license. An odor of alcohol was detected on his breath, and he kicked an empty beer can in the vehicle's interior while reaching for his wallet. He failed one field sobriety test, refused a preliminary breath test, and became uncooperative, insisting he had not been drinking despite having seven empty beer cans in his vehicle.

An hour after his operation of the motor vehicle, Buttitta consented to a chemical test of his blood, which revealed a .073% blood alcohol content. Also present in Buttitta's blood was marijuana and relatively low levels of Valium, Nordiazepam and Alprazolam.

On February 16, 2011, a criminal complaint was filed charging Buttitta with third offense operating while intoxicated and third offense operating with a detectable amount of a restricted controlled substance in his blood. At trial, Buttitta testified his passenger was intoxicated and "he had prescription medication and marijuana on him and he said he was just going to throw it in my truck." Buttitta testified he said "forget that. I grabbed it and ate it" immediately before the police officer came to Buttitta's vehicle. Buttitta had no explanation for why his blood tested positive for the presence of alcohol, other than speculating his blood was tainted with alcohol during the drawing of his blood. On March 22, 2012, the jury convicted Buttitta of operating with a restricted controlled substance, third offense. The jury acquitted Buttitta of the operating while intoxicated charge. The circuit court imposed a sentence consisting of ten months' jail and an \$800 fine.

The no-merit report addresses whether the circuit court erroneously denied Buttitta's pro se request for substitution of judge. WISCONSIN STAT. § 971.20(4) requires a written request for substitution of judge be made before any motions to the court and before arraignment. There is no copy of a written motion for substitution of judge in the record. There is thus no potential issue concerning substitution of judge.

There is also no arguable issue regarding sufficiency of the evidence. Based upon the arresting officer's initial observations at the scene and Buttitta's performance of field sobriety tests, Buttitta was arrested for operating while intoxicated. Testimony of the officer and an expert from the Wisconsin State Laboratory of Hygiene confirmed that Buttitta operated a motor vehicle with a detectable amount of controlled substances in his blood. Buttitta stipulated to his prior convictions.

The record also discloses no basis for challenging the court's sentencing discretion. The court considered the proper factors, including Buttitta's character, the seriousness of the offenses and the need to protect the public. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court characterized Buttitta's testimony at trial as "basically incredible" The court also noted "the dangerousness with his repetitive criminal conduct here, his disregard of the law with regard to operating privileges, his willingness to place the public at risk, I think that that all is very, very serious conduct [A]nd any consideration of probation I think would be just ridiculous under the circumstances of this case." The ten-month jail sentence and \$800 fine were authorized by law and are neither overly harsh nor excessive.

The no-merit report also addresses ineffectiveness of counsel. Our review of the record discloses no deficient performance by trial counsel.

Our independent review of the record discloses no other issues of arguable merit.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Susan Roth is relieved of further representing Buttitta in this matter.

Diane M. Fremgen
Clerk of Court of Appeals