COURT OF APPEALS
DECISION
DATED AND RELEASED

October 24, 1996

No. 96-0254-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

GARRY P. VAN DE VOORT,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Affirmed.*

VERGERONT, J.[1] Garry Van de Voort appeals a judgment of conviction of operating while intoxicated causing injury, contrary to § 346.63(2), STATS., and an order denying postconviction relief. He was sentenced to the county jail for eight months and fined and assessed a total of $788. His driving privileges were revoked for one year.

Van de Voort's appellate counsel has filed a no merit report pursuant to ***Anders v. California,*** 386 U.S. 738 (1967). Van de Voort has been provided a copy of the report and advised of his right to file a response. He has

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

not responded. The no merit report raises two issues: (1) whether trial counsel was ineffective for failing to investigate, and (2) whether Van de Voort was prejudiced by counsel's deficient investigation.

Inasmuch as Van de Voort was found guilty after a jury trial, this court will also evaluate the sufficiency of the evidence and whether sentencing reflects a reasonable exercise of discretion. Upon independent review of the record, this court is satisfied that the no merit report properly analyzes the ineffective assistance of counsel claim, that the evidence was sufficient and that the sentence was within the trial court's discretion. Accordingly, this court accepts the no merit report, affirms the judgment and order, and discharges Van de Voort's appellate counsel of his obligation to represent Van de Voort further in this appeal.

Van de Voort was charged with: (1) causing injury to another person by the operation of a vehicle while under the influence of an intoxicant, contrary to § 346.63(2)(a)1, STATS., and (2) causing injury to another person by the operation of a vehicle while having a prohibited alcohol concentration in excess of .10%, contrary to § 346.63(2)(a)2.

At trial, Dennis Trachte testified that Van de Voort was traveling at a minimum of fifty-five miles per hour when he went through a stop sign and collided with the Trachtes' Toyota truck at the intersection of Second and Maple Streets in the City of Marshfield. Trachte testified that he was driving, and his wife and son were sitting beside him in the front seat. When Trachte saw Van de Voort's car approaching, Trachte took evasive action but the car hit the truck's back end, flipping it over. Trachte testified that he saw just one person, the driver, in the car that hit him. Becky Trachte, Dennis' wife, testified that her hands were pinned through the sun roof. Although her hands were not broken, ligaments were torn. Her son, age eight, had a scraped knee and was taken to the hospital to have glass removed from the knee. Her husband received bruises.

Wisconsin State Trooper David Forsythe testified that several bystanders pointed out that the car that crashed into the truck was parked less than a block away. The car was registered to Van de Voort. The individual who was standing in front of the car looking at its damage identified himself with a photo driver's license as Van de Voort. Van de Voort told the officer that

he had been driving the car and the other driver had run a red light. The officer testified that there were, however, no traffic control lights at the intersection.

The officer observed that Van de Voort's balance was unsteady, his eyes red and bloodshot, and his speech was incoherent. His breath carried a very strong order of an intoxicant. Van de Voort failed field sobriety tests. Van de Voort was arrested, informed of his rights under the implied consent law and taken to the hospital. Van de Voort consented to a blood test. Blood was drawn and chain of its custody was established. Chemical testing revealed a blood ethanol content of .238%.

Van de Voort testified that he had six or seven beers and two twelve ounce Zimas that evening. He was a veteran with an ankle injury and later became disabled as a result of an auto accident. He testified that he met a gentleman at the tavern who was interested in buying his car, so he let the gentleman drive him home. Van de Voort testified that the collision occurred when this potential buyer was driving. Van de Voort did not know the man's name, and the man disappeared into the crowd of bystanders. Van de Voort testified that he did not tell the investigating officer about the man who had been driving. He never saw the driver again. The jury returned a guilty verdict on both charges, and the trial court entered a judgment convicting Van de Voort of violating § 346.63(2), STATS.

An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger,*** 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). The jury, not the appellate court, assesses the weight and credibility of the testimony. On review of jury findings of fact, viewing the evidence most favorably to the state and the conviction, this court asks only if the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. ***State v. Oimen***, 184 Wis.2d 423, 436, 516 N.W.2d 399, 405 (1994). This court is satisfied that the record fails to reveal any issue of arguable merit as to the sufficiency of the evidence.

Next, this court reviews the potential argument that trial counsel was ineffective for failing to retain an investigator to locate a witness. The first

part of the two-part test requires the defendant to show deficient performance; the second part requires that the deficient performance is prejudicial, that is, that the errors were sufficiently serious to render the resulting conviction prejudicial. ***State v. Pitsch,*** 124 Wis.2d 628, 633, 369 N.W.2d 711, 714 (1985). "[T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland v. Washington,*** 466 U.S. 668, 694 (1984). The determination of prejudice is a question of law. This court need not address the first prong if the prejudice component is not shown. ***Id.*** at 697.

At the postconviction hearing, trial counsel testified that he had insufficient information regarding witnesses to pursue any leads. The only information he had was that there may have been unknown bystanders at the scene. Van de Voort testified that he informed trial counsel that a Linda Meyer or Mason witnessed the accident. Chad Banchette, a private investigator, also testified that postconviction counsel asked him to locate Linda Meyer or other witnesses. He canvassed the entire area around the accident and interviewed approximately nineteen potential witnesses including Linda Meyer. None of the witnesses he interviewed had seen the accident, except one, who stated that he was unable to see the number of occupants of Van de Voort's car.

This court is satisfied that the record reveals no prejudice as a result of trial counsel's claimed deficient investigation. The sole controverted issue at trial was whether Van de Voort was the driver of his car at the time of the collision. After postconviction counsel retained an investigator to interview potential witnesses, no witness was identified to offer proof that Van de Voort was not the driver. Because no prejudice is shown, there is no arguable merit to any issue based upon a claim of ineffective assistance of counsel.

Finally, this court concludes that there is no arguable merit to any challenge to the exercise of the court's sentencing discretion. The penalty range is not less than thirty days nor more than one year in the county jail and a fine of not less than $300 nor more than $2,000. The trial court considered the seriousness of the offense, the need to protect the public and Van de Voort's prior driving record, which included at least one driving while intoxicated offense. These are appropriate considerations. *See* ***State v. Echols,*** 175 Wis.2d 653, 682, 499 N.W.2d 631, 640 (1993).

This court is satisfied that the record discloses no potential issues of arguable merit. Accordingly, the judgment and order are affirmed, and Attorney Cathy J. Gorst is discharged of her obligation to represent Van de Voort further in this appeal.

By the Court.—Judgment and order affirmed.