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

November 11, 2015

To:

Hon. Scott R. Needham
Circuit Court Judge
St. Croix County Courthouse
1101 Carmichael Road
Hudson, WI 54016

Kristi Severson
Clerk of Circuit Court
St. Croix County Courthouse
1101 Carmichael Road
Hudson, WI 54016

Suzanne L. Hagopian
Assistant State Public Defender
P.O. Box 7862
Madison, WI 53707

Eric G. Johnson
District Attorney
1101 Carmichael Road
Hudson, WI 54016

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

James Howard Place
1415 County Road A
New Richmond, WI 54017

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

2014AP942-CRNM State of Wisconsin v. James Howard Place (L.C. # 2011CF351)

Before Lundsten, Sherman and Blanchard, JJ.

A jury found James Howard Place guilty of operating a motor vehicle while intoxicated, fifth or sixth offense. *See* WIS. STAT. § 346.63(1)(a) (2009-10).[1] His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). In the no-merit report, counsel addresses the circuit court's denial of Place's suppression motions, the sufficiency of the evidence, and the sentence. Place was sent a copy of the report

[1] All further references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and did not file a response. Upon reviewing the entire record and counsel's report, we conclude that there are no arguably meritorious appellate issues.

Suppression Motions

Place filed several pretrial suppression motions challenging the stop, arrest, and warrantless blood draw. He also sought the suppression of statements under ***Miranda v. Arizona***, 384 U.S. 436 (1966). We agree with counsel that an appellate challenge to the circuit court's denial of those motions would lack arguable merit.

At an evidentiary hearing, the arresting officer, Justin Johnson, testified that he was dispatched to Meister's Bar to investigate the crash of a vehicle into the side of the bar building.[2] While en route, Johnson was told that Place was the driver of the crashed vehicle. Upon arriving, Johnson saw a damaged vehicle positioned against the building. Witnesses told Johnson that Place and Adam Sheets had been arguing inside the bar, and they were asked to leave. In the bar's parking lot, Place got into his truck and put it in reverse. Sheets then tried to pull Place from the truck. Sheets succeeded in pulling Place from the truck, and the vehicle, now in "drive," struck the building. Another car was struck by Place's truck before Place's truck came to rest against the building. Neither man was at the scene when Johnson arrived.

Johnson followed footprints in fresh snow to a nearby house, but did not locate Place at the house. Johnson continued to check the area by car and, while driving back to the bar, he saw

[2] The circuit court also considered a video recording of the arresting officer's encounter with Place along the highway. We may consider information beyond that presented at the suppression hearing, such as testimony given at the preliminary hearing. *See* ***State v. Begicevic***, 2004 WI App 57, ¶3 n.2, 270 Wis. 2d 675, 678 N.W.2d 293.

a man walking along the highway just north of the bar. The man was reluctant to identify himself until Johnson explained that he was investigating the crash at the bar. Place then identified himself and told Johnson that he had been "assaulted." Place told Johnson he was trying to "defuse" things by getting into his truck. When Sheets tried to pull Place from the truck, the "shifter" got moved and the truck ended up hitting the building. Place left, walked to his house, and then to a bar across the highway where he drank a "big glass of water." Place admitted drinking at Meister's earlier that night, and told Johnson that, when he drinks, he "drinks a lot." During the encounter, Place "was staggering," had "red, glossy eyes, slurring speech … [and a] strong odor of intoxicant." Johnson asked Place to do field sobriety tests, and then arrested him for OWI. Place refused to submit to chemical tests, and was subjected to a forced blood draw at a hospital. At the hospital, Place did not make any statements other than that he did not want blood taken, but he would cooperate with the blood draw. After Place was at the county jail after the blood draw, Johnson advised Place of his ***Miranda*** rights.

Upon review of a suppression decision, the circuit court's factual findings will be upheld unless those findings are clearly erroneous. *See* WIS. STAT. § 805.17(2). Whether those facts satisfy the constitutional requirement of reasonableness, however, presents a question of law that we review de novo. *See* ***State v. Jackson***, 147 Wis. 2d 824, 829, 434 N.W.2d 386 (1989).

A. The Stop

In assessing whether there is reasonable suspicion for a particular stop, we must consider all of the specific and articulable facts, taken together with the rational inferences from those facts. *See* ***State v. Dunn***, 158 Wis. 2d 138, 146, 462 N.W.2d 538 (Ct. App. 1990). The question of what constitutes reasonable suspicion supporting a stop is a common-sense test: under all of

the facts and circumstances present, was the police officer's action reasonable. *See* ***Jackson***, 147 Wis. 2d at 831. When Johnson initially stopped to question Place, he had a basis to believe that Place had left the bar on foot and that Place's truck had struck the bar. We agree with the circuit court that Johnson acted reasonably when he "stop[ped] the male pedestrian [to] determine if he was Place."

B. The Arrest

Probable cause to arrest exists when "the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Koch***, 175 Wis. 2d 684, 701, 499 N.W.2d 152 (1993). "There must be more than a possibility or suspicion that defendant committed an offense, but the evidence need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not." ***State v. Mitchell***, 167 Wis. 2d 672, 681-82, 482 N.W.2d 364 (1992).

When Johnson arrested Place, Place had admitted getting into the truck and putting it into gear. Place exhibited several physical indicia of intoxication and had admitted to Johnson that he had been drinking earlier and that, when he drinks, he drinks "a lot." We agree with the circuit court that Johnson reasonably concluded that Place had probably operated a motor vehicle while intoxicated.

C. The Blood Draw

Place was arrested on November 20, 2011. At that time, warrantless nonconsensual blood draws in an OWI context were expressly allowed by ***State v. Bohling***, 173 Wis. 2d 529,

547-48, 494 N.W.2d 399 (1993) (natural dissipation of alcohol is a per se exigency justifying a warrantless blood draw). In ***Missouri v. McNeely***, 569 U.S. __, 133 S. Ct. 1552 (2013), the United States Supreme Court "changed the landscape of warrantless blood draws" in Wisconsin when it adopted a totality of the circumstances test to determine whether exigent circumstances exist. *See* ***State v. Tullberg***, 2014 WI 134, ¶42, 359 Wis. 2d 421, 857 N.W.2d 120, *cert. denied*, 135 S. Ct. 2327 (2015). ***McNeely*** applies retroactively, and Place's blood draw violated the Fourth Amendment. *See* ***State v. Foster***, 2014 WI 131, ¶8, 360 Wis. 2d 12, 856 N.W.2d 847. However, if police acted objectively, and in reasonable reliance on ***Bohling***, exclusion of the blood draw evidence is not warranted. *See* ***Foster***, 360 Wis. 2d 12, ¶8. The circuit court applied that good faith exception to Place's suppression motion and, under ***Foster***, an appellate challenge to that ruling would lack arguable merit.

D. ***Miranda***

A challenge to the admission of Place's statements to Johnson would lack arguable merit. Protections under ***Miranda*** apply only to custodial interrogations. ***State v. Hassel***, 2005 WI App 80, ¶9, 280 Wis. 2d 637, 696 N.W.2d 270. A police officer may ask general questions as part of an investigation into possible criminal wrongdoing. *See* ***State v. Boggess***, 110 Wis. 2d 309, 317, 328 N.W.2d 878 (Ct. App. 1982) (***Miranda*** rule does not apply to general on-the-scene questions that are investigatory in nature). Based on the video of the stop, the circuit court found that Johnson questioned Place for about ten minutes before placing him under arrest for OWI. Place was not restrained during the questioning, which pertained entirely to the investigation of the crash at Meister's Bar. We concur with the circuit court's ruling that ***Miranda*** did not apply.

Sufficiency Of The Evidence

Upon a challenge to the sufficiency of the evidence to support a jury finding of guilt, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no reasonable jury could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). We will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** The jury is the sole arbiter of witness credibility. *See* ***State v. Serebin***, 119 Wis. 2d 837, 842, 350 N.W.2d 65 (1984). The jury, and not this court, resolves conflicts in the testimony, weighs the evidence, and draws reasonable inferences from basic facts to ultimate facts. ***Poellinger***, 153 Wis. 2d at 506. When the record contains facts which support more than one inference, we must accept and follow the inference drawn by the jury unless the evidence on which that inference is based is incredible as a matter of law. *See* ***id.*** at 506-07.

An appellate challenge to the sufficiency of the evidence would lack arguable merit. Place stipulated that his blood alcohol level tested at .254, in excess of the legal limit for the charged offense. Place also stipulated that the video was a true and accurate recording of the stop.[3] At trial, Johnson again testified about his encounter with Place after the crash. The video was played for the jury. Jason Caswell, the bartender at Meister's, testified that he served Place

[3] "When both the defendant and the district attorney agree that a fact is proven, the parties can stipulate to the existence of that fact. The stipulation dispenses with the need for further proof of the fact and is presented to the jury." ***State v. Warbelton***, 2009 WI 6, ¶49 n.20, 315 Wis. 2d 253, 759 N.W.2d 557. Although a defendant need not make an express personal waiver to make a stipulation valid, *see* ***State v. Benoit***, 229 Wis. 2d 630, 638, 600 N.W.2d 193 (Ct. App. 1999), the circuit court here conducted an extensive colloquy with Place before accepting the stipulations.

at least three drinks that night. Caswell testified that Place and Sheets, who Caswell characterized as a "real cocky, aggressive kind of person," began arguing. Caswell accompanied Place and Sheets outside after another patron asked that they be asked to leave. Once outside, Place walked to his truck, got in it, and put it into gear. Sheets then opened the truck's door and tried to pull Place from the truck. Caswell testified that he tried to pull Sheets away from Place. The truck's tires were spinning, and Caswell let go so he would not be hit by the truck. Sheets then grabbed Place by the hair and pulled Place from the truck. Both men fell to the ground as the truck, now in reverse, hit the building.

Place testified in his own defense.[4] He testified that Sheets had been threatening him all night. When Place left the bar, he felt his "only option" was to go to his truck because "[t]here was traffic going by." Place admitted to starting the truck while Sheets was trying to pull him out of the truck. Place's theory of defense was legal justification, namely, he was entitled to operate the truck in order to escape from Sheets. *Cf.* ***State v. Brown***, 107 Wis. 2d 44, 55-56, 318 N.W.2d 370 (1982) (defendant in speeding case may claim defense of legal justification if conduct of a law enforcement officer causes the defendant to reasonably believe violating the law is the only means of preventing bodily harm to the defendant). An instruction to that effect was given to the jury at Place's request.

Place admitted that he operated the truck, and he stipulated that his blood alcohol content exceeded the legal limit. The jury was not obligated to accept his contention that driving the

[4] Although not required to do so, the circuit court followed the recommended practice of conducting a colloquy with Place concerning his waiver of his right not to testify. *See* ***State v. Denson***, 2011 WI 70, ¶¶8, 66-67, 335 Wis. 2d 681, 799 N.W.2d 831.

truck was the only way to escape from Sheets' aggression. The inference chosen by the jury is conclusive. *See* ***Poellinger***, 153 Wis. 2d at 506-07.

Sentencing

This court next considers whether an appellate challenge to the sentence would have arguable merit. On appeal, this court's review of sentencing is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.*** When the exercise of discretion has been demonstrated, we follow "'a consistent and strong policy against interference with the discretion of the trial court in passing sentence.'" ***Id.***, ¶18 (quoted source omitted). "'[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant.'" ***Id.*** (quoted source omitted). The "'sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" ***Id.***, ¶23 (quoted source omitted).

"Circuit courts are required to specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Id.***, ¶40. Also, under truth-in-sentencing, the legislature has mandated that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant, and other aggravating or mitigating factors. ***Id.***, ¶40 n.10.

In this case, the circuit court reviewed the circumstances of the incident. The court acknowledged that, although a substantial period of time had elapsed since Place's last OWI conviction in 2001, Place's prior convictions required virtually absolute sobriety when driving. The court considered Place's character, his history of employment, and recent medical issues. The court considered the need to protect the public from additional OWI incidents. The court recognized that Place had been under supervision while this case was pending and there had been "no problems," suggesting that Place had the "ability to be rehabilitated." The court also noted that Place had successfully completed probation in the past. The court withheld sentence and imposed a two-year period of probation "to make sure that what [Place] ha[d] done [while the case was pending] and what [he had] pledged to do … is in fact true." The court imposed the minimum fine and revoked Place's driver's license for thirty months. The court imposed the minimum mandatory six-month jail sentence. The court properly exercised sentencing discretion, and an appellate challenge to the sentence would lack arguable merit.

Upon our independent review of the record, we have found no 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.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Suzanne L. Hagopian[5] is relieved of any further representation of James Place in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[5] Attorney Suzanne L. Hagopian is successor counsel to Attorney Donald T. Lang.