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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 II/IV

March 3, 2016

To:

Hon. Anthony G. Milisauskas
Circuit Court Judge
Kenosha County Courthouse
912 56th St
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th Street
Kenosha, WI 53140

John Richard Breffeilh
Assistant State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202-4105

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

Robert D. Zapf
District Attorney
Molinaro Bldg
912 56th Street
Kenosha, WI 53140-3747

Daniel D. Mecum Jr. 606113
Oakhill Corr. Inst.
P.O. Box 938
Oregon, WI 53575-0938

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

2014AP1768-CRNM State of Wisconsin v. Daniel D. Mecum, Jr. (L.C. #2011CM1345)

Before Higginbotham, J.[1]

Daniel Mecum, Jr. appeals a judgment convicting him, following a jury trial, of a third offense of operating a motor vehicle while under the influence of an intoxicant (OWI-3rd), in conjunction with one count of possession of tetrahydrocannabinols (THC), to which he entered a plea. Attorney John Breffeilh has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex***

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

rel. McCoy v. Wisconsin Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the validity of the plea on the THC count, the sufficiency of the evidence, voir dire and jury instructions on the OWI-3rd, and the sentences on both counts. Mecum was sent a copy of the report, and has filed several responses, all of which center upon the results of his blood tests. Upon reviewing the entire record, as well as the no-merit report and responses, we conclude that there are no arguably meritorious appellate issues.

First, Mecum entered his plea on the THC count as a tactical decision, and he does not contest that conviction on this appeal. Additionally, the record shows that Mecum submitted a signed plea questionnaire and the circuit court conducted a standard plea colloquy, inquiring into the defendant's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring the defendant's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). We see no other grounds in the record that would raise an issue of manifest injustice with respect to the THC plea. *See generally* ***Bangert***, 131 Wis. 2d at 283; ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991).

We next address whether there is any non-frivolous basis to challenge the sufficiency of the evidence on the OWI count. The general test for sufficiency of the evidence is whether the evidence 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. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). With respect to the charge in this case, the elements the State needed to prove were

that: (1) Mecum operated a motor vehicle—meaning that he exercised physical control over its speed or direction or manipulated any of the controls necessary to put it in motion; and (2) that at the time he operated the vehicle, Mecum was under the influence of THC to a degree that rendered him incapable of safely driving. WIS. STAT. § 961.41(3g)(e) and WIS JI—CRIMINAL 2666.

The arresting officer, Deputy Chriss Peck, testified that he pulled over Mecum after he received a tip about a possible drunk driver in a green car, and also personally observed the green car traveling fifteen to twenty miles below the speed limit, with an expired registration. When Peck approached Mecum, he observed that Mecum had red and watery eyes with constricted pupils, that he was slurring his words, and that he appeared confused. Mecum at first said he was going to work in Mount Pleasant, which was in the opposite direction, or on either Highway 158 or 168. Upon additional questioning, Peck ascertained that Mecum actually worked in Pleasant Prairie on Highway 165.

Peck next asked Mecum to recite the alphabet, which he was unable to do on two separate attempts. Peck then asked Mecum to exit the vehicle and noticed a large bulge in his right front pants pocket. Mecum said that he had his wallet in his pocket, but Peck could see Mecum's wallet inside the vehicle. Mecum then said that he had some medication in his pocket, but Peck believed that the bulge was larger than the typical pill bottle would be. At that point, Peck searched Mecum, first with a patdown and then by reaching into his pocket, and discovered a marijuana pipe and baggie of marijuana. When Peck asked Mecum about the marijuana, Mecum admitted that he had smoked a joint earlier.

Deputy Tyrone Johnson, who was dispatched as backup to the traffic stop, corroborated Peck's account that Mecum had glossy eyes and slurred speech, that he twice failed to correctly recite the alphabet, and that he admitted to smoking marijuana earlier. Later, during additional questioning at the jail after being read his ***Miranda***[2] rights, Mecum again admitted that he had been using marijuana and that he might be "a little" under the influence.

After Mecum's initial admission, Peck arrested Mecum on suspicion of OWI and transported him to the hospital for a blood draw. Phlebotomist Dawn Torris drew the blood, labeled it, and turned the samples back over to Peck, who in turn gave them to Deputy Paul Studrawa to transport to the State Crime Laboratory for testing.

Dr. Carlton Cowie testified that he tested Mecum's blood samples for alcohol and THC. The first results came back negative, so Cowie sent the samples back to the sheriff's department. The sheriff's department subsequently resubmitted the samples for retesting, and a second test showed hydroxy and carboxy metabolites of THC in Mecum's blood. Cowie noted that properly stored blood samples do not deteriorate and that the amount used for testing is very small. Cowie opined that the most likely reason for the initial negative result was that there was an error transferring the small sample size to the screening plate because the sample was too small.

Mecum insists that the evidence was insufficient to convict him of OWI because it is inherently suspicious that his first test result was negative, and then several months later, suddenly the result was positive. However, the jury was fully informed about both test results, and defense counsel vigorously examined the State's witnesses about the chain of custody of the

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

samples and the procedures used to test them. It was for the jury to decide which of the two tests was more reliable, not an issue for appellate review.

Furthermore, even if the conflicting blood tests were deemed inconclusive, the remaining evidence—which included two admissions by Mecum that he had ingested marijuana prior to the traffic stop, as well as the observations of two deputies as to Mecum's condition at the time of the stop, the recovery of marijuana and a pipe from Mecum's person, and a tip from a citizen regarding Mecum's driving prior to the stop—was sufficient in and of itself for the jury to rely upon in determining that the elements of OWI had been proved beyond a reasonable doubt.

A challenge to the defendant's sentences would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that the defendant was afforded an opportunity to address the court before each sentence was imposed. Although the court's comments were brief, they touched upon the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

The court sentenced Mecum to ninety days in jail on the OWI count, which carried a mandatory minimum sentence of forty-five days and maximum of one year; and to five months on the THC count, which carried a maximum sentence of six months. The court also awarded thirty-seven days of sentence credit and imposed two years of ignition interlock.

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentences imposed here were not "so excessive and unusual and so

disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction.[3] *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.

Accordingly,

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

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[3] We agree with counsel's assessment that there is no basis to challenge the impartiality of the jury because the trial court excused three problematic potential jurors for cause, and the defense did not object to any of the panel members who were ultimately chosen for the jury. We also agree that the parties appropriately agreed upon using pattern jury instructions. Additionally, we see no prejudicial adverse evidentiary rulings or any basis to challenge counsel's assistance.