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DISTRICT III

March 8, 2022

To:

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Circuit Court Judge
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Clerk of Circuit Court
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Erica N. Zernia
1419 Upland Ave., Apt. D
Rhinelander, WI 54501

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

2020AP1056-CRNM State of Wisconsin v. Erica N. Zernia (L. C. No. 2017CT202)

Before Hruz, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Counsel for Erica Zernia has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding no grounds exist to challenge Zernia's conviction for operating a motor vehicle with a detectable amount of a restricted controlled substance in her blood, third offense, contrary to WIS. STAT. § 346.63(1)(am). Zernia has filed a response challenging her conviction. Upon an independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), this

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

court concludes there is no arguable merit to any issue that could be raised on appeal. Therefore, the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

The State charged Zernia with operating a motor vehicle with a detectable amount of a restricted controlled substance in her blood, and operating a motor vehicle while under the influence of a controlled substance, both as a third offense. Zernia filed a pretrial motion to suppress evidence obtained from what she alleged was an illegal stop of her vehicle. The motion was denied after a hearing.

Zernia was convicted upon a jury's verdict of both crimes charged. The count of operating while under the influence of a controlled substance was dismissed prior to sentencing on the State's motion pursuant to WIS. STAT. § 346.63(1)(c), which provides that if a person is found guilty of both offenses "for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing." Out of a maximum possible one-year sentence, the circuit court imposed the mandatory minimum forty-five day sentence and stayed the sentence pending appeal.

The no-merit report correctly identifies the denial of Zernia's pretrial suppression motion as a possible issue to discuss; however, the report identifies no legal standards and provides only a cursory analysis of this possible issue. Nevertheless, upon an independent review of the record, this court agrees that there is no arguable merit to challenge the denial of Zernia's suppression motion.

A traffic stop is constitutionally permissible when the officer has reasonable suspicion to believe a crime or traffic violation has been or will be committed. ***State v. Houghton***, 2015 WI 79, ¶21, 364 Wis. 2d 234, 868 N.W.2d 143. This standard requires that the stop be based on

"more than an officer's 'inchoate and unparticularized suspicion or hunch.'" ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoting ***Terry v. Ohio***, 392 U.S. 1, 27 (1968)). "The officer must be able to point to specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion" of the stop. ***State v. Young***, 212 Wis. 2d 417, 423-24, 569 N.W.2d 84 (Ct. App. 1997). "The question of what constitutes reasonable suspicion is a common sense test: under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience." ***Id.*** at 424. Whether there was reasonable suspicion for a traffic stop is a question of constitutional fact, to which this court applies a two-step standard of review. ***Post***, 301 Wis. 2d 1, ¶8. We uphold the circuit court's findings of historical fact unless they are clearly erroneous, but we independently review the application of those facts to constitutional principles. ***Id.***

At the suppression motion hearing, Rhinelander police officer Mark Raddatz, a ten-year veteran of law enforcement, testified that at approximately 3:45 a.m. on Friday, May 26, 2017, he observed a vehicle stopped at an intersection controlled by a flashing red light. According to Raddatz, the vehicle was "straddling" both the "turn and straight lanes" with its left turn signal on. The vehicle then proceeded straight through the intersection as the left turn signal remained engaged. When following the vehicle, Raddatz further observed that it did not head in one constant direction but, rather, seemed to drive around aimlessly. Raddatz also noted that the vehicle made "multiple stops and hesitations" even though there was no traffic.

Raddatz explained that he was trained to look for signs of impairment such as "slow reaction, confusion … [h]esitations, inconsistent control of the vehicle," and Raddatz believed that the driving he observed was "consistent with people who are impaired." Raddatz testified

that the vehicle pulled over and Raddatz then activated his emergency lights before stopping behind the vehicle. The squad car's dash cam was played for the circuit court, and the court noted that Raddatz's observations were "depicted on the video." Defense counsel argued that construction, including closed roads, put the driving behavior Raddatz observed into context. Although the court acknowledged that there may have been reasonable explanations for what the officer observed, it properly noted that police officers are not required to rule out the possibility of innocent behavior before initiating a brief investigatory stop. *See* ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996). Given the articulable facts recited by Raddatz, there is no arguable merit to any claim that the court erred by concluding the officer had reasonable suspicion to stop Zernia's vehicle.

The no-merit report also addresses whether there are any grounds to challenge the effectiveness of Zernia's trial counsel. Upon reviewing the record, we agree with counsel's conclusion that there is no arguable merit to this possible issue, and we do not discuss it any further.

Although Zernia was convicted upon a jury's verdict, the no-merit report does not address whether the evidence at trial was sufficient to support Zernia's conviction. The no-merit report also fails to reflect that appointed appellate counsel considered other potential issues that arise in cases tried to a jury—i.e., jury selection, evidentiary objections during trial, confirmation that the defendant's decision to testify was knowingly made or waiver of the right to testify was valid, use of proper jury instructions, and the propriety of opening and closing arguments. Nor does the no-merit report address whether there is any arguable merit to challenge the sentence imposed.

It is important that a no-merit report provides a basis for determining that the no-merit procedure has been complied with. *See* ***State v Allen***, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124 (stating that when an issue is not raised in the no-merit report, it is presumed to have been reviewed and resolved against the defendant as long as the court of appeals follows the no-merit procedure). We will address the potential issues not mentioned in the no-merit report to demonstrate that the no-merit procedure has been followed. *See* ***id.***, ¶82 (noting it is difficult to know the nature and extent of the court of appeals' examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion). However, appellate counsel should be aware that any future no-merit report that is similarly incomplete may be rejected by this court.

Upon our independent review of the record, we conclude that any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). At trial, Raddatz described Zernia's driving behavior and further testified that during his interaction with Zernia, she exhibited "slow movements; slow, slurred speech" and "she seemed confused." Based on his observations, Raddatz asked Zernia to perform standardized field sobriety tests, and she was arrested after failing two of the three tests. A chemist for the Wisconsin State Laboratory of Hygiene testified that Zernia's blood tested positive for tetrahydrocannabinol (THC), with 10 nanograms per milliliter of delta-9-THC—a restricted controlled substance in Wisconsin—as the primary active component.

At trial, Zernia recounted that after being awake for approximately twenty hours, including a long shift at McDonald's, she offered to drive a co-worker home. Zernia explained

that any hesitation or confusion while driving was attributable to road closures and fatigue. At trial, as in her response to the no-merit report, Zernia argues there were innocent explanations for her driving behavior and her interactions with the arresting officer. However, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. A jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). As stated, we must view the evidence in the light most favorable to sustaining the jury's verdict. The evidence submitted at trial was sufficient to support Zernia's conviction.

Our review of the trial record likewise discloses no issues of arguable merit. There is no basis to challenge jury selection. Evidentiary objections throughout the trial were properly ruled on, and no potentially objectionable testimony was elicited. The circuit court conducted a proper colloquy with Zernia to establish a knowing exercise of her right to testify. The jury instructions accurately conveyed the applicable law and burden of proof, and no improper arguments were made to the jury.

Finally, we conclude that there would be no arguable merit to a challenge to the sentence imposed by the circuit court. Although the court did not expressly acknowledge the primary sentencing factors, *see* ***State v. Gallion***, 2004 WI 42, ¶¶23, 59-61, 270 Wis. 2d 535, 678 N.W.2d 197, our review of the record satisfies us that the court properly exercised its discretion. For instance, it took note of Zernia's prior convictions, but it also noted they were several years old and that there were no additional aggravating factors. Ultimately, the court determined that it

was appropriate to impose the minimum sentence required by law. *See* WIS. STAT. § 346.65(2)(am)3.

An independent review of the record discloses no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Peter Anderson is relieved of his obligation to further represent Erica Zernia in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals