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**DISTRICT I**

June 6, 2023

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Robert Ellsworth Corr. Center  
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You are hereby notified that the Court has entered the following opinion and order:

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2020AP502-CRNM      State of Wisconsin v. Bonnie Elizabeth Buth  
(L.C. # 2017CF1351)

Before Donald, P.J., Dugan and White, JJ.

**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).**

Bonnie Elizabeth Buth appeals the judgment convicting her of operating a motor vehicle while intoxicated (OWI) as a seventh offense. Her appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967).

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<sup>1</sup> The no-merit report was filed by Attorney Leon W. Todd, who has been replaced by Attorney Lauren J. Breckenfelder as Buth's appellate counsel.

All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Buth received a copy of the report and responded by filing a number of documents.<sup>2</sup> Upon consideration of the report, the response, and an independent review of the record as mandated by *Anders*, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The complaint in this matter alleged that on March 18, 2017, at approximately 2:00 a.m., Police Officer Joseph Benson observed a 2007 Ford travelling without its taillights on. Officer Benson initiated a traffic stop. Instead of pulling over to the side, the vehicle stopped in the middle of the road.

The complaint further alleged that Officer Benson made contact with the driver, Buth. He observed that Buth had red glassy eyes and detected the odor of alcohol coming from her. Buth agreed to participate in field sobriety tests, during which she performed poorly, exhibited poor balance, and displayed multiple clues of impairment. Based on these observations, Officer Benson believed Buth to be intoxicated. Buth was transported to the hospital where a sample of her blood was drawn for chemical analysis. The results of that analysis were still pending at the time the complaint was filed. The complaint additionally alleged that Buth had previously been convicted of OWI-related offenses, as counted under WIS. STAT. § 343.307(1), on six prior occasions.

The information subsequently added a second count of operating a motor vehicle with a prohibited alcohol concentration, as a seventh offense. The information alleged that, at the time

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<sup>2</sup> Buth filed 126 pages with this court, which included medical records and handwritten notes identifying various issues for this court's consideration. We previously construed the submission as Buth's response and accepted it as filed.

of the incident, Buth's blood alcohol concentration (BAC) was 0.068, which was above the .02 limit she was allowed due to her prior convictions.

The case proceeded to a jury trial. Immediately prior to *voir dire*, however, defense counsel informed the court that Buth had asked her to withdraw from her case so she could obtain new counsel. Buth's chief criticisms of trial counsel were that counsel had not shown her any of the evidence and had not subpoenaed Joe Klein, an individual Buth wanted to testify on her behalf. The circuit denied Buth's request, noting that it was "323 days into this case. It's the third time it's been set for trial." The trial court additionally noted that Buth had never mentioned her issues and concerns about trial counsel at any prior court proceeding and that it "look[ed] like a delay tactic."

Both Buth and Klein subsequently testified for the defense. The night before she was arrested, Buth described having a dinner meeting with Klein and going to Klein's home. Buth testified that she had not been feeling well and that she did not drink any alcoholic beverages at the restaurant. While at Klein's home, Buth testified that she was coughing and continued to not feel well, so Klein offered to make her some "tea." After drinking the tea, Buth testified that she fell asleep. When she woke up, she was uncomfortable with the situation, got into her car, and started driving home at some point between 1:30 and 2:00 a.m. The police subsequently pulled her over. Buth testified that at no point from the time she woke up on March 17, 2018, through the time she was pulled over did she knowingly consume any alcoholic beverages.

Klein testified that the tea he made for Buth was a mixture of Nyquil and one shot of vodka. Klein testified that he never told Buth about the ingredients in the tea. He also said he did not see Buth drink any other alcoholic beverages that night.

The jury—after hearing testimony from Officer Benson, Wisconsin State Crime Laboratory Toxicologist Amy Sasman, Buth, and Klein—found Buth guilty of both counts in the information. Pursuant to WIS. STAT. § 346.63(1)(c), judgment was entered only on the OWI citation. The circuit court sentenced Buth to five years of initial confinement and five years of extended supervision on that charge.

The no-merit report addresses four potential issues: whether the jury was properly selected and instructed; whether there were evidentiary issues or procedural errors that entitle Buth to a new trial or other relief; whether the evidence was sufficient to support the verdicts; and whether the circuit court properly exercised its discretion at sentencing. This court is satisfied that the no-merit report properly concludes the issues it raises are without merit and we briefly elaborate on a couple of facts only insofar as they relate to issues that Buth raises in her response.

Buth argues that trial counsel was ineffective in multiple ways. Among other reasons, Buth contends trial counsel was ineffective for not fighting for her involuntary intoxication defense and for not introducing Buth’s “medical proof.”

The requirements for showing ineffective assistance of counsel are well-established; a defendant must show that counsel’s performance was deficient and that the deficiency prejudiced the defense. See *State v. Balliette*, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. “Whether counsel was ineffective is a mixed question of fact and law.” *Id.*, ¶19. The defendant must show both elements of the test, and we need not address both prongs if the defendant fails to make a sufficient showing on one of them. See *State v. Maloney*, 2005 WI 74, ¶14, 281 Wis. 2d 595, 698 N.W.2d 583.

First, the record reflects that Buth’s trial counsel did pursue—albeit unsuccessfully—an involuntary intoxication defense. *See* WIS JI—CRIMINAL 755A. Pursuant to WIS. STAT. § 939.42:

An intoxicated or a drugged condition of the actor is a defense only if such condition is involuntarily produced and does one of the following:

- (1) Renders the actor incapable of distinguishing between right and wrong in regard to the alleged criminal act at the time the act is committed.
- (2) Negatives the existence of a state of mind essential to the crime.

After listening to the arguments, the circuit court properly concluded that the defense did not apply under the facts of the case.

The circuit court noted that the evidence did not support a claim that Buth’s intoxicated condition left her incapable of distinguishing between right and wrong with regard to the offenses. *See State v. Gardner*, 230 Wis. 2d 32, 44, 601 N.W.2d 670 (Ct. App. 1999) (“Because Gardner failed to present evidence that he was so intoxicated as to be unable to distinguish right from wrong, the court properly denied instructing the jury on the involuntary intoxication defense.”). Buth testified that she was not intoxicated when Officer Benson pulled her over. Moreover, as the no-merit report explains, no version of the evidence showed that Buth’s intoxicated condition negated any state of mind essential to her crimes—because neither crime contained an element involving a required state of mind. *See* WIS JI—CRIMINAL 2660C, 2663. Neither counsel’s performance nor the circuit court’s ruling with regard to an involuntary intoxication defense presents an issue of arguable merit.

Second, Buth contends that her medical proof would have helped her defense but her trial counsel “didn’t want to bring it in.” She contends that O.J. Simpson was allowed to present evidence relating to his physical health to the jury, but she was not. Buth advises that she has numerous illnesses and could not taste or smell. Even if this is true, the materials before us, which include some of Buth’s medical records, do not provide a basis on which Buth could pursue an arguably meritorious claim that she was prejudiced by trial counsel’s alleged deficiency. See *Strickland v. Washington*, 466 U.S. 668, 697 (1984) (explaining that to demonstrate prejudice, “[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”).

Buth additionally asserts that she is entitled to sentence modification based on her successful completion of the substance abuse program. Buth highlights that she pushed to participate in the treatment program, even though the trial court did not order her to do so as part of its sentence. A claim for sentence modification on this ground lacks arguable merit given that postsentencing progress or rehabilitation does not, as a matter of law, constitute a new factor warranting sentence modification. See *State v. Kluck*, 210 Wis. 2d 1, 7-8, 563 N.W.2d 468 (1997); *State v. Ambrose*, 181 Wis. 2d 234, 240-41, 510 N.W.2d 758 (Ct. App. 1993).

Our review of the record discloses no other potential issues for appeal. This court has reviewed and considered the various issues raised by Buth. To the extent we did not specifically address all of them, this court has concluded that they lack sufficient merit or importance to warrant individual attention. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Buth further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Lauren J. Breckenfelder is relieved from further representing Bonnie Elizabeth Buth in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*