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DISTRICT III

October 17, 2023

To:

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Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1498-CRNM State of Wisconsin v. Anthony Dewayne Oliver
(L. C. No. 2017CF1810)

Before Stark, P.J., Hruz and Gill, 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).

Anthony Dewayne Oliver appeals a judgment convicting him of armed robbery and aggravated battery with the use of a dangerous weapon. Appellate counsel, Angela Dawn Chodak, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Oliver filed multiple responses. After reviewing the record, counsel's report, and Oliver's responses, we conclude that there are no issues of arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

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

Oliver was convicted, following a jury trial, of armed robbery and aggravated battery with the use of a dangerous weapon. According to the complaint and the facts adduced at trial, Oliver attacked the victim with a crowbar when she exited the bar where she worked. At sentencing, the circuit court sentenced Oliver to twenty years of initial confinement, followed by ten years of extended supervision on the armed robbery count. The court sentenced Oliver to a concurrent term of four years of initial confinement followed by three years of extended supervision on the battery count.

Appellate counsel's no-merit report first addresses the pretrial proceedings and whether Oliver properly waived his right to testify. Upon our independent review of the record, we agree with appellate counsel's assessment of these issues.

Appellate counsel's no-merit report also addresses whether there was sufficient evidence for the jury to find Oliver guilty of both counts at trial. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the record persuades us that the State produced ample evidence, in the form of witness testimony and multiple exhibits, to convict Oliver of his crimes. We agree with counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing. The record reveals that the court's sentencing decision had a "rational and explainable basis." *See* ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d

197 (citation omitted). In fashioning Oliver's sentences, the court addressed the relevant sentencing factors, focusing primarily on the gravity of the offenses. *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The resulting sentences were within the potential maximum authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, there would be no arguable merit to a challenge to the court's sentencing discretion.

Oliver filed numerous responses to appellate counsel's no-merit report in which he argues that his trial counsel was ineffective for multiple reasons: the DNA surcharges imposed were punitive; the State committed a ***Brady***[2] violation by failing to turn over a relevant transcript; and his arrest was the result of the police using his probation agent as a "stalking horse."

Upon our independent review of the record, we conclude that there is no arguable merit to a claim of ineffective assistance of counsel. A defendant receives constitutionally ineffective assistance of trial counsel if counsel performs deficiently and counsel's deficient performance prejudices the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In light of the evidence presented at trial, none of the allegations Oliver raised demonstrate that he was prejudiced by his trial counsel's performance.

Oliver also contends that the circuit court wrongly imposed two DNA surcharges and that one of the surcharges should be dismissed. Specifically, Oliver contends that the surcharges were punitive and thus a violation of the Ex Post Facto Clause of the United States Constitution.

[2] *See* ***Brady v. Maryland***, 373 U.S. 83 (1963).

WISCONSIN STAT. § 973.046 (1r)(a) requires one surcharge per conviction. Oliver was convicted of two crimes. Furthermore, any challenge to the multiple DNA surcharges would lack arguable merit for appeal because they do not constitute an Ex Post Facto Clause violation. *See* ***State v. Williams***, 2018 WI 59, ¶43, 381 Wis. 2d 661, 912 N.W.2d 373 ("[T]he mandatory DNA surcharge statute does not have a punitive effect. Accordingly, the statute does not violate the Ex Post Facto Clauses [of the state and federal constitutions].").

Oliver also contends that the State violated ***Brady v. Maryland***, 373 U.S. 83 (1963), when it failed to turn over a transcript of a recorded jail call between Oliver and his brother. "A ***Brady*** violation has three components: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material." ***State v. Wayerski***, 2019 WI 11, ¶35, 385 Wis. 2d 344, 922 N.W.2d 468. It should be noted that Oliver only challenges the State's failure to turn over the transcript of the phone call; he does not challenge the recording of the call itself. Oliver's challenge fails because there is no transcript of the phone call and, therefore, there was nothing for the State to turn over. The contents of the recording were introduced at trial in the form of testimony from Detective David Steffens and his narrative report discussing the phone call's contents. Moreover, a transcript of the conversation would not have been exculpatory or impeaching because according to Steffens' testimony and report, Oliver told his brother to discard certain articles of clothing. Surveillance videos of the attack showed the perpetrator wearing the same clothing Oliver told his brother to discard in the recorded conversation. Lastly, the transcript would not have been material in light of the sufficiency of the other evidence presented at trial.

Oliver also contends that his arrest was the result of the police using his probation agent as a "stalking horse."[3] Oliver raised this issue in a motion to dismiss prior to trial, and his motion was denied. Upon our review of the record, we conclude that nothing in the record suggests that police "used" Oliver's probation agent as a means of circumventing warrant requirements. Police identified Oliver as a result of extensive investigation and did obtain warrants prior to his arrest. There would be no arguable merit to further pursuit of this issue.

Lastly, our review of the record prompts us to address one issue not addressed by appellate counsel's no-merit report. At trial, Steffens testified that during his investigation, he listened to a recorded jail call between Oliver and his brother in which Oliver told his brother to go to his home and retrieve certain articles of clothing—clothing that tied Oliver to the attack. Steffens detailed the conversation in a narrative report, which was admitted at trial, but the audio recording of the phone call was not played for the jury. Oliver's trial counsel did not object to Steffens' testimony or the admission of the narrative report on hearsay grounds.

We conclude that there would be no arguable merit to a challenge to counsel's lack of an objection. Steffens' testimony was one of many items of evidence that tied Oliver to the crime. Multiple witnesses testified, the jury viewed surveillance video of the attack, and the victim's DNA was found in Oliver's car. Accordingly, Oliver was not prejudiced by the lack of a hearsay objection, and there would be no arguable merit to challenging the admission of Steffens' testimony regarding the recorded phone call.

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[3] A "stalking horse" is "[s]omething used to cover one's true purpose; a decoy." ***State v. Hajicek***, 2001 WI 3, ¶22, 240 Wis. 2d 349, 620 N.W.2d 781 (alteration in original; citation omitted). In the context of determining whether a search is a police or probation search, a "stalking horse" is a probation officer who uses his or her authority "to help the police evade the [F]ourth [A]mendment's warrant requirement." ***Id.*** (alterations in original; citations omitted).

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Angela Dawn Chodak is relieved of further representation of Anthony Dewayne Oliver in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals

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