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July 31, 2013

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

2012AP2079-CRNM State of Wisconsin v. Rasheed A. Whiters (L.C. # 2010CF1150)

Before Brown, C.J., Reilly and Gundrum, JJ.

Rasheed A. Whiters appeals from a judgment of conviction following a jury trial, and an order denying his postconviction motion in part. Whiters was convicted upon a jury's guilty verdicts of the following: (1) delivering less than 200 grams of THC on May 17, 2010; (2) delivering less than 200 grams of THC on July 14, 2010; (3) delivering a noncontrolled substance while falsely representing that it is a controlled substance on July 14, 2010; (4) possessing with the intent to deliver between five and fifteen grams of cocaine on September 29, 2010; (5) possessing THC on September 29, 2010; (6) possessing drug

paraphernalia on September 29, 2010; and (7) maintaining a drug trafficking place on or between May and September of 2010. After a postconviction hearing, the trial court entered an order vacating Whiters's convictions on counts four and five. Whiters's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Whiters received a copy of the report and has filed two responses. Upon consideration of the report, Whiters's responses, and our independent review of the record, we conclude that the judgment and order 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 criminal complaint alleged that Whiters sold drugs to a confidential informant on two separate occasions (May 17 and July 14 of 2010) and that on September 29, 2010, police executed a search warrant at Whiters's home and found cocaine, THC, and drug paraphernalia. Counts one, two and three directly relate to the two controlled drug buys, and counts four, five, six and seven rely at least in part on evidence seized during execution of the September 2010 search warrant. In the information, six of the counts (all but count six) were charged with a sentence enhancer applicable to second and subsequent drug offenses as authorized by WIS. STAT. §§961.41(3g)(e), and 961.48. Following a jury trial on May 25, 2011, Whiters was convicted and sentenced on each count as follows: (1) two years of initial confinement (IC) and one year of extended supervision (ES); (2) two years IC, one year ES, to run consecutive to count one; (3) one year IC, one year ES, consecutive to counts one and two; (4) eight years IC, four years ES, to run concurrent with all other sentences; (5) one year IC, six months ES, consecutive to counts one, two and three; (6) a $500 fine; (7) two years IC, one year ES,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

consecutive to counts one, two, three, and five. In essence, Whiters's received an aggregate global sentence of twelve and one-half years, with eight years IC and four and one-half years ES.

Postconviction counsel was appointed to represent Whiters. On Whiters's behalf, appointed counsel filed a postconviction motion and addendum challenging counts four through seven of the judgment. Following an evidentiary hearing, the trial court entered an order vacating the convictions on counts four and five, but denying the postconviction motion as to the remaining counts. An amended judgment was subsequently entered.

The no-merit report addresses whether there was sufficient evidence to convict Whiters of counts one through three, six, and seven, whether the trial court erroneously exercised its sentencing discretion as to those counts,[2] and whether the trial court erred in denying Whiters's postconviction motion as to the remaining counts. Based on our independent review of the record, we agree with counsel's conclusion that these issues lack arguable merit.

Jury Trial

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdicts. On review, "an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the [S]tate and the conviction, is so [insufficient] in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Hayes***, 2004 WI 80, ¶56, 273 Wis. 2d 1, 681 N.W.2d 203 (citation omitted). The report sets forth the applicable standard of review and the

[2] Because the convictions entered in connection with counts four and five were vacated, we need not consider whether either was supported by sufficient evidence, or whether the sentences originally imposed in connection with counts four and five constituted an appropriate exercise of discretion.

evidence satisfying the elements of each crime. We agree with counsel's analysis and conclusion that there was sufficient evidence to support each conviction.

The no-merit report also concludes that no procedural errors occurred with respect to the jury selection, the admission of evidence, the colloquy concerning Whiters's decision to testify at trial, the closing arguments of counsel, and the jury instructions.[3] Based on our independent review of the record, this court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit.

In response to counsel's no-merit report, Whiters contends that the audio and video surveillance of his transactions with the confidential informant violated his Fourth Amendment right to be free from unreasonable searches and seizures. Though this issue was not addressed in the trial court or in Whiters's postconviction motion and is not preserved for appellate review, we will address it in our discretion under the rubric of ineffective assistance of counsel. We conclude that under WIS. STAT. § 968.31(2)(b), and ***State v. Maloney***, 2005 WI 74, ¶¶31, 34, 37, 281 Wis. 2d 595, 698 N.W.2d 583, there is no arguably meritorious issue concerning trial counsel's failure to challenge the introduction of Whiters's recorded interactions with the confidential informant.[4] Under § 968.31(2)(b), also known as the one-party consent exception to Wisconsin's Electronic Surveillance Control Law (WESCL), the contents of a warrantless oral

[3] Because these issues were neither preserved in the trial court nor raised in a subsequent postconviction motion, they are arguably forfeited for review in this no-merit appeal. *See* WIS. STAT. RULE 809.30(2)(h); WIS. STAT. § 974.02. However, forfeiture and waiver are rules of judicial administration, and we have chosen to independently review the entire trial in the context of this no-merit appeal.

[4] In support of his argument that a warrant was required, Whiters points us to a case that was subsequently overruled by the United States Supreme Court. *See* ***United States v. White***, 405 F.2d 838 (1969), *rev'd*, 401 U.S. 745 (1971).

communications intercept may be disclosed in a felony proceeding. In ***Maloney***, the one-party consent exception was applied to videotaped recordings. ***Maloney***, 281 Wis. 2d 595, ¶¶34, 37. There is no arguable merit to a claim that trial counsel provided ineffective assistance of counsel by failing to challenge the admissibility of the audio and video recordings conducted with the consent of the confidential informant.

Sentencing

Appellate counsel's no-merit report addresses whether Whiters's sentences were either illegal or the result of an erroneous exercise of discretion. Based on our independent review, we agree with counsel's analysis and conclusion that each sentence was within the enhanced maximum penalty range, was authorized by statute, and was therefore legal.

We also agree with appellate counsel's conclusion that the trial court properly exercised its sentencing discretion.[5] In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The trial court also discussed the relevant sentencing factors under ***State v. Gallion***, 2004 WI 42, ¶¶40-44, 270 Wis. 2d 535, 678 N.W.2d 197. Finally, the sentence was not so excessive or unusual as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no meritorious challenge to the trial court's sentencing decision.

[5] Here again, to be preserved for review, most sentencing issues would have needed to be raised in a postconviction motion. *See* WIS. STAT. RULE 809.30(2)(h); ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992) (forfeiture applies to many sentencing issues as well). We choose to review the trial court's exercise of sentencing discretion in this no-merit appeal.

Postconviction Proceedings

Appointed postconviction counsel filed a motion challenging Whiters's convictions on counts four through seven. Whiters's postconviction motion and addendum asserted that the evidence relating to these counts was discovered in the basement of Whiters's two-unit apartment, and that at trial, officers testified that Whiters occupied the downstairs unit and that the upstairs unit was vacant at the time of the search. At an evidentiary postconviction hearing, Whiters introduced evidence demonstrating that the upstairs apartment was actually occupied by another person who vacated the premises shortly after the search, and that both units had access to the building's basement. Postconviction counsel argued that Whiters was entitled to a new trial on these counts based on alternative theories of ineffective assistance of counsel, newly discovered evidence, or in the interest of justice. Postconviction counsel also argued that the search warrant was limited to Whiters's apartment and that any evidence seized from the basement exceed the warrant's scope and should therefore be excluded.

The trial court agreed that the evidentiary value of the items discovered in the basement was compromised by trial testimony that there was no upstairs tenant, and the omission of trial evidence tending to prove the existence of that upstairs tenant. The trial court entered an order vacating the convictions as to counts four and five, both of which relied exclusively on evidence seized from the basement.

We agree with appellate counsel's analysis and conclusion that there is no meritorious challenge to that part of the trial court's order declining to vacate the remaining convictions. Whiters's postconviction motion did not challenge counts one through three, and any such claim is forfeited or waived. Whiters's conviction on count six was for possessing drug paraphernalia.

While paraphernalia was found in the basement pursuant to the search warrant, much of the drug paraphernalia evidence introduced at trial was discovered on Whiters's person and in his apartment. Count seven, a conviction for maintaining a drug trafficking place, was also supported by sufficient trial evidence other than that found in the basement. Evidence of the controlled buys underlying counts one through three, and of the paraphernalia located in Whiters's apartment, constituted sufficient evidence to support the jury's verdict that Whiters's maintained a drug trafficking place between May 1, 2010, and September 30, 2010. Because there was sufficient untainted trial evidence to support Whiters's convictions on counts six and seven, the trial court properly denied Whiters's postconviction motion as to those counts.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to further represent Whiters in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Shelley M. Fite is relieved from further representing Rasheed A. Whiters in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals