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October 16, 2013

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

2012AP575-CRNM State of Wisconsin v. Randall S. Wickersham (L.C. # 2010CF270)

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

Randall Wickersham appeals a judgment convicting him, following a jury trial, of three counts of delivery of schedule I or II narcotics, contrary to WIS. STAT. § 961.41(1)(a) (2011-12),[1] and one count of maintaining a drug trafficking place, contrary to WIS. STAT. § 961.42(1). Attorney Timothy O'Connell 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); and

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

State ex 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 sufficiency of the evidence and whether the circuit court erroneously exercised its sentencing discretion. Wickersham was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether the evidence, when viewed most favorably to the State and the conviction, is so lacking in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found the defendant guilty beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). To prove Wickersham guilty of delivery of a schedule I or II narcotic, the State needed to provide evidence, on each count, that he delivered a schedule I or II controlled substance—in this case, morphine, which is a schedule II controlled substance. *See* WIS. STAT. §§ 961.41(1)(a), 961.16(2)(a)(10). To prove Wickersham guilty of maintaining a drug trafficking place, the State needed to provide evidence that he knowingly kept or maintained a place and that the place was used for keeping or delivering morphine. *See* WIS. STAT. § 961.42(1).

At trial, the State presented the testimony of confidential informant Dustin VanRensselaer. VanRensselaer testified that he contacted police to help "take down" Wickersham with the hopes that police would help VanRensselaer get his suspended drivers' license back sooner. VanRensselaer met with Detective Ryan Klavekoske on March 12, 2010.

Klavekoske searched him and outfitted him with a recording device. VanRensselaer went to Wickersham's residence to attempt a controlled buy of morphine, but Wickersham was not home, so VanRensselaer gave the device back. Later that same day, VanRensselaer learned that Wickersham was at home, so he again contacted Klavekoske. Klavekoske again searched and outfitted VanRensselaer with the device. VanRensselaer went back to Wickersham's residence and this time purchased seven fifteen-milligram morphine pills from Wickersham's brother. VanRensselaer then gave Klavekoske the morphine pills and device.

VanRensselaer contacted the police again on March 24, 2010, for another controlled buy. This time, Officer Jake Vosters searched VanRensselaer and gave him a recording device and money to purchase morphine pills. VanRensselaer testified that he went to Wickersham's residence and bought three thirty-milligram morphine pills from Wickersham, which he turned over to Vosters.

On April 9, 2010, VanRensselaer contacted Klavekoske for another controlled buy. Klavekoske searched and outfitted VanRensselaer with the device. VanRensselaer this time purchased five fifteen-milligram morphine pills from Wickersham at his residence. VanRensselaer again gave the pills and device to Klavekoske after the drug purchase. Later on that same day, VanRensselaer contacted Klavekoske again and did another controlled buy. VanRensselaer testified that, during that buy, he went to Wickersham's residence and purchased four fifteen-milligram pills of morphine, which he then gave to Klavekoske along with the device.

VanRensselaer testified that he had been convicted of a crime once before, that he had used morphine without a prescription, that he had contacts to obtain morphine without a prescription, and that he was not within the view of police the whole time of the transactions.

The State then presented testimony from Vosters, who testified that, on March 24, 2010, he met with VanRensselaer. Vosters searched VanRensselaer, outfitted him with an audio transmitting device, concealed a hand-held recorder on his person, and provided him with money to buy drugs. Vosters watched from a surveillance vehicle as VanRensselaer went into and out of Wickersham's residence. Vosters testified that he could hear the transmission over the audio transmitting device at the time VanRensselaer left the surveillance vehicle, but that the recording obtained from the handheld recorder was of poor quality and muffled. After the transaction, Vosters retrieved three morphine pills and the audio transmitting device from VanRensselaer. Vosters testified that he recognized the pills and packaging that were identified as exhibit six at trial as the pills he'd received from VanRensselaer, in the packaging he'd used to "package them into evidence." The recording from the handheld recorder also was admitted into evidence and played for the jury.

The jury then heard testimony from the State's third witness, Martin Koch from the State Crime Laboratory. Koch testified that he had tested the pills that were marked as exhibits five through eight and concluded that all four exhibits were composed of morphine.

Klavekoske also testified on behalf of the State. He testified that he met with VanRensselaer two separate times on March 12, 2010 to orchestrate controlled drug buys. Each time, Klavekoske searched VanRensselaer, gave him a digital recording device and outfitted him with an audio transmitting device, and gave him marked bills to make the purchase. During the

first attempted controlled buy, Klavekoske observed VanRensselaer walk into Wickersham's residence and then come out about ten minutes later. VanRensselaer advised Klavekoske that he had been unable to purchase drugs because Wickersham was not home. VanRensselaer gave back the audio transmitting device and the recorder. A recording obtained from that attempted transaction was received into evidence and played for the jury.

Klavekoske testified that, during the second controlled purchase on March 12, 2010, Wickersham was home. Klavekoske monitored the audio transmission coming from the audio transmitting device while VanRensselaer was inside Wickersham's residence. Klavekoske testified that the transaction resulted in the purchase of seven blue pills, which he placed into an evidence bag that he identified as exhibit five. The recording obtained from the digital recording device was received into evidence and played for the jury.

Klavekoske then testified that, on March 24, 2010, he was not in Dodge County, but that he contacted Vosters to arrange a controlled buy with VanRensselaer. On April 9, 2010, Klavekoske again met with VanRensselaer and searched him, outfitted him with an audio transmitting device, and provided him money to conduct a drug purchase. Klavekoske monitored VanRensselaer on the transmitting device as VanRensselaer purchased five pills from Wickersham, which Klavekoske testified were the pills marked as exhibit seven and had been given to Klavekoske by VanRensselaer after the buy. Later that same day, Klavekoske met with VanRensselaer again, searched him, outfitted him with the transmitting device, provided him with money, and then monitored him as VanRensselaer made another purchase from Wickersham of four pills, which Klavekoske testified were marked as exhibit eight. The jury listened to recordings obtained from the April 9 transactions.

The jury then heard testimony from the State's final witness, Lieutenant Terrance Gebhardt. Gebhardt testified that he conducted surveillance with Klavekoske for the two drug buys on April 9, 2010. At the conclusion of the buys, Gebhardt and Klavekoske went to Wickersham's residence and arrested him.

The defense called Wickersham's wife, Renee Wickersham, as a witness. Renee stated that she lives with her husband and their two sons. On March 12, 2010, VanRensselaer came over and went into the bedroom with her two sons for a brief moment, and then VanRensselaer left. She testified that Wickersham never sold any drugs, and he never got out of his recliner where he keeps the pills. She stated that the other three times that VanRensselaer came over, the same thing happened—that VanRensselaer would go into the bedroom with her two sons and then leave. She stated that Wickersham never got up or sold any drugs. Renee also testified that Wickersham did not possess the type of pills consisting of exhibits five through eight, nor has she ever seen them at their residence. She later admitted that the thirty-milligram morphine pills may have belonged to her.

Wickersham also testified at trial. He stated that he has serious pain for various medical reasons, and that he has a morphine prescription. Wickersham stated that the pills consisting of exhibit five are not the color of pills he takes. He stated that he and/or his wife have taken pills similar to those in exhibits six, seven, and eight, but he denied giving VanRensselaer any pills, and he said he would never do such a thing. Wickersham further testified that he has heard that VanRensselaer is a liar.

The judge read the jury instructions and instructed the jury on the elements the State was required to prove. The jury found Wickersham guilty on counts two through five. The court

then entered judgment on those counts. Considering all of the evidence, we agree with counsel's assessment that there would be no merit to arguing on appeal that no juror, acting reasonably, could have found the defendant guilty beyond a reasonable doubt on all four counts. We also have reviewed the pre-trial proceedings, voir dire, evidentiary rulings during trial, and the jury instructions, and conclude that they present no issues of arguable merit on appeal.

Sentence

A challenge to the defendant's sentence also would 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 and did so. The court proceeded to consider 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. Regarding the severity of the offenses, the court stated that morphine is a dangerous and addictive drug. The court also considered that the amount of the drug delivered was small, but that there were multiple deliveries. With respect to the defendant's character, the court stated that Wickersham had not taken responsibility for his actions and that he could not be found credible. The court also noted a need to protect the public.

The court then sentenced Wickersham as follows: on count two, five years of probation, sentence withheld, and one year of conditional jail; on count three, five years of probation, sentence withheld; on count four, five years of probation, sentence withheld; and on count five,

one and one-half years of probation, sentence withheld. The court awarded one day of sentence credit and directed the defendant to provide a DNA sample but waived the fee.

On counts two through four, delivery of narcotics, a class E felony, Wickersham had faced maximum terms of ten years of initial confinement and five years of extended supervision. WIS. STAT. § 973.01(2)(b)5 and (d)4. On count five, maintaining a drug trafficking place, a class I felony, Wickersham had faced a maximum term of one and one-half years of initial confinement and two years of extended supervision. WIS. STAT. § 973.01(2)(b)9 and (d)6. The sentences imposed were well within the statutory limits. There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh. ***State v. Grindemann***, 2002 WI App 106, ¶ 31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *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***, 386 U.S. at 744, 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