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DISTRICT I/II

December 11, 2013

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

2013AP1423-CRNM State of Wisconsin v. Ervin Lee Reeves (L.C. #2010CF5468)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

A jury found Ervin Lee Reeves guilty of one count each of possession of heroin with intent to deliver (<= 3 grams), second or subsequent offense, and fleeing an officer. He appeals from the resulting judgment of conviction. Reeves'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). Reeves received a copy of the report and, although he was notified of his right to file a response,

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

he did not exercise it. Upon consideration of the no-merit report and our 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. We affirm the judgment and relieve Attorney Mark A. Schoenfeldt of further representing Reeves in this matter.

The no-merit report considers whether the following issues have arguable appellate merit: whether the evidence was sufficient to support the verdict, whether the trial court erroneously exercised its discretion in sentencing Reeves by imposing an excessive sentence, whether Reeves was denied the effective assistance of trial counsel, and whether the trial court erroneously exercised its discretion in denying Reeves's motion to suppress. Our review of the record satisfies us that appellate counsel has properly analyzed the identified issues.

Upon a challenge to the sufficiency of the evidence, a reviewing court examines the evidence before the jury and reasonable inferences drawn therefrom in the light most favorable to the verdict. ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990). The test is whether the evidence is so deficient in probative value and force that, as a matter of law, no reasonable jury could have found guilt beyond a reasonable doubt. ***Id.*** This court will substitute its judgment for that of the trier of fact only when the evidence relied upon was inherently or patently incredible. ***Id.*** The credibility of the witnesses and the weight of the evidence are for the jury. ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990).

The jury heard the following testimony: Patricia Niemi was in her house in the 8100 block of Marion Street one morning looking out the window as she talked on the phone. She saw a green SUV "fishtail[]" around the corner, followed by a police car with its lights activated.

Niemi saw the driver, a large bald black male, throw something out of the SUV window. She retrieved the item, a baggie filled with "a ball of something wrapped in foil and then a bag," and called police. Based on his training and experience, responding Officer David Martinez believed the package contained heroin.

Police officers Gary Inman and John Graber were on duty at about 10:30 a.m. Inman activated his squad car's siren and lights after observing a green Chevy Tahoe roll through a stop sign. The officers attempted to conduct a traffic stop but the Tahoe accelerated, traveling up to fifty miles an hour on residential streets, including the 8100 block of Marion Street, "blew through" a four-way stop, rounded a corner on two wheels, bounced as it righted itself, again went up on two wheels, and finally stopped. The posted speed limits were twenty-five and thirty miles per hour. The driver, a large bald black male identified as Reeves, was the only occupant. A search of Reeves and the vehicle yielded no contraband. Although the officers never lost sight of Reeves's vehicle, neither one saw him throw anything out the window.

Department of Justice Special Agent Mark Banks works with a drug task force. Banks learned that Reeves signed a letter of proffer stating that he wished to cooperate with the State, that the State made him no guarantees, that Reeves would take full responsibility for the charges against him, that the statement in the letter would be used against him if the case proceeded to trial, and that Reeves wanted to meet with him to discuss possible consideration in regard to his criminal case. Reeves told Banks that a squad car was trying to effect a traffic stop, that he did not stop because he had heroin in the vehicle, and that he stopped only after he had tossed it out the window. Reeves also named his suppliers. The package Niemi turned over contained seventeen folds of heroin weighing 2.2 grams. In Banks's opinion, heroin packaged in multiple

folds is for distribution, not personal use. A crime lab analyst testified that she performed four tests on the substance, confirming that it was heroin.

Niemi did not identify the make or model of the green SUV and could not give more than a general description of the driver. No fingerprints or DNA tied Reeves to the bindles of heroin Niemi found in her front yard. The jury was entitled to infer, however, as it was instructed per WIS JI—CRIMINAL 172, that Reeves's flight showed consciousness of guilt. Furthermore, convictions may be supported solely by circumstantial evidence. ***Poellinger***, 153 Wis. 2d at 501. The same highly deferential standard of review applies whether the conviction relies on direct or circumstantial evidence. ***Id.*** at 503. No issue of arguable merit could arise regarding the sufficiency of the evidence.

Our independent review satisfies us that there also are no issues of arguable merit related to other aspects of the trial. The court conducted a thorough and proper voir dire. Reeves appeared in street clothes and his restraints were not visible to the jury. Reeves moved to dismiss at the close of the State's case and proceeded to present a defense, which waived his motion to dismiss, as the entire evidence is sufficient to sustain his conviction. *See* ***State v. Kelley***, 107 Wis. 2d 540, 544, 319 N.W.2d 869 (1982).

The no-merit report also considers whether the trial court properly exercised its discretion in sentencing Reeves to a global sentence of six and one-half years' initial confinement followed by seven years' extended supervision. A trial court's sentence is reviewed for an erroneous exercise of discretion. ***State v. Paske***, 163 Wis. 2d 52, 70, 471 N.W.2d 55 (1991). The court must consider three primary factors: the gravity of the offense, the character of the defendant, and the need to protect the public. ***Id.*** at 62. The weight to be given to each of the factors,

however, is a determination particularly within the court's discretion. ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). After considering all relevant factors, the sentence may be based on any one of the three primary factors. ***State v. Krueger***, 119 Wis. 2d 327, 338, 351 N.W.2d 738 (Ct. App. 1984). A sentence is unduly harsh only if its length is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. ***Ocanas***, 70 Wis. 2d at 185.

Here, the court thoroughly explained its sentencing rationale. It considered the seriousness of Reeves's possession of "a lot" of heroin and his high-speed flight in a residential neighborhood, his "horrible" drug addiction, his lengthy juvenile and criminal record, and his numerous failures in community programs and alternatives to revocation. Reeves's thirteen and one-half year sentence is presumptively not unduly harsh, as it is well within the limits of the twenty-two-year sentence and $35,000 fine maximum that he faced. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. The court also ordered Reeves to submit a DNA test and pay the surcharge unless he already has paid one. Automated court records indicate that he was ordered to pay the surcharge in Milwaukee county case No. 2004CF4577. No basis exists to disturb the sentence imposed.

The no-merit report next considers whether trial counsel performed ineffectively. One claiming ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense, ***State v. Franklin***, 2001 WI 104, ¶11, 245 Wis. 2d 582, 629 N.W.2d 289 (citing ***Strickland v. Washington***, 466 U.S. 668, 687 (1984)), and must overcome the strong presumption that counsel acted reasonably within professional norms, *see* ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). A claim of

ineffective assistance of trial counsel first must be raised in the trial court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). On this record, however, we see no issue of arguable merit relating to the effectiveness of the performance of Reeves's trial counsel.

Lastly, the report addresses whether the trial court erroneously exercised its discretion in denying Reeves's motion to suppress the drug evidence. Reeves filed a pretrial motion to suppress the evidence of the heroin bindles Niemi retrieved in her yard. This court reviews motions to suppress by examining the constitutional challenge to the search. "Whether police conduct has violated the constitutional guarantees against unreasonable searches and seizures is a question of constitutional fact." ***State v. St. Martin***, 2011 WI 44, ¶16, 334 Wis. 2d 290, 800 N.W.2d 858 (citation omitted). We defer to the trial court's findings of facts while "independently apply[ing] those historical facts to the constitutional standard." ***Id.***

The trial court found as facts the testimony recited above. It found credible Inman's testimony that he initiated the pursuit when he observed Reeves run a stop sign and did not see Reeves toss anything out the window. The court concluded there was no issue with suppressing the drugs because Reeves was stopped for observed traffic violations. Thus, there would be no arguable merit to asserting that the circuit court erred by suppressing the evidence. Therefore,

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

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved of further representing Reeves in this matter.

Diane M. Fremgen
Clerk of Court of Appeals