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

2012AP1456-CRNM State of Wisconsin v. Cory L. Alexander (L.C. #2010CF191)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Cory Alexander appeals related judgments convicting him, following a jury trial, of four drug-related felonies. Attorney Timothy O'Connell has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967) and ***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 a

[1] All further references in this order to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

suppression ruling, the sufficiency of the evidence, and sentencing. Alexander was sent a copy of the report and has filed a series of responses challenging the suppression ruling and also questioning his status as a repeat offender and trial counsel's failure to object to sending physical evidence into the jury room. Counsel has in turn filed a supplement addressing Alexander's additional claims. Upon reviewing the entire record, as well as the no-merit report, responses and supplement, we conclude that there are no arguably meritorious appellate issues.

Suppression Ruling

Prior to trial, Alexander moved to quash a search warrant for his house in order to suppress the evidence that had been seized during the execution of the warrant. He claimed that facts alleged in the affidavit supporting the application for the search warrant were insufficient to provide probable cause to believe that contraband or evidence of a crime would be found in his house. *See generally* WIS. STAT. § 968.12; ***State v. Ward***, 2000 WI 3, ¶23, 231 Wis. 2d 723, 604 N.W.2d 517.

According to the affidavit, upon receiving information that there was drug activity occurring in an apartment where Alexander resided with his girlfriend, police pulled the garbage from the curb outside the residence on three separate occasions. In the first pull, officers found lots of torn sandwich baggies that appeared to be waste product from drug packaging, along with mail linking the garbage bags to the girlfriend. In the second pull, officers found more sandwich baggies with the corners cut off, several empty GNC packets of white vitamin powder that is sometimes used to cut drugs, and a money gram linking the garbage to Alexander. One of the baggies from the second pull also contained a white powdery substance, which a K-9 officer's

dog sniffed and indicated a hit. In the third pull, the officers again found a lot of sandwich baggies with the corners torn off, and mail linking the garbage to the girlfriend.

Alexander complains that there was no information provided from which to determine the reliability of either the informant who provided police with the original tip, or the dog who indicated a hit on the powdered substance. The circuit court agreed that there was an insufficient basis to conclude that the powdered substance tested positive for drugs. However, it concluded that the baggies and GNC packets alone were sufficiently indicative of drug activity to justify the warrant. We agree. Moreover, even if the warrant had been defective, we are satisfied that the good faith exception would have applied.

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "'the evidence, viewed most favorably to the state 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.'" ***State v. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)); *see also* WIS. STAT. § 805.15(1).

To prove the defendant guilty of aiding and abetting the crime of possession of a controlled substance (in this case, more than forty grams of cocaine) with intent to deliver, the State needed to provide evidence either that Alexander had physical control of the cocaine knowing it was a controlled substance and intending to transfer it to another person, or that he knew that another person possessed the cocaine with intent to deliver it and he was ready and willing to assist in that crime. WIS. STAT. §§ 961.41(1m)(cm)4. and 939.05; WIS JI—CRIMINAL

6035 and 400. To prove the defendant guilty of possession of THC, the State needed to provide evidence that Alexander had physical control of a substance that he knew or believed to be THC, and that was in fact THC. WIS. STAT. § 961.41(3g)(e) and WIS JI—CRIMINAL 6030. To prove the defendant guilty of maintaining a drug trafficking place, the State needed to provide evidence that Alexander knowingly exercised management or control over a structure or place that was used for manufacturing, keeping, or delivering controlled substances. WIS. STAT. § 961.42(1) and WIS JI—CRIMINAL 6037B. To prove the defendant guilty of possession of drug paraphernalia, the State needed to provide evidence that Alexander had physical control over an object used to prepare, package, store, or contain a controlled substance and that he primarily intended to use the object to pack or store, or to ingest, inject, inhale, or otherwise introduce into the body a controlled substance. WIS. STAT. § 961.573(1) and WIS JI—CRIMINAL 6050.

The State first produced testimony from the police officer who examined the trash pulls described above and participated in the execution of the search warrant. The officer stated that they discovered about twenty grams of marijuana, a marijuana grinder, rolling papers, and a money gram for $2,600 on a coffee table in the living room; over ten grams of marijuana and nearly four grams of marijuana blunts, part of a marijuana grinder, a wallet containing $6,360, and over four grams of crack cocaine on an end table in the southeast bedroom; a digital scale covered in white residue, Alexander's ID card, three baggies with cut corners, and a knife with what appeared to be crack cocaine on a dresser in the southeast bedroom; over ninety-three grams of packaged crack cocaine in the closet of the southeast bedroom; more baggies with cut corners and another money gram for $950 in the kitchen; and a money gram for $1,000 in the girlfriend's purse. Several other officers corroborated various portions of the first officer's testimony, and Alexander's girlfriend testified that the marijuana and grinder were Alexander's.

The State also produced testimony from one State crime lab employee who had verified that the substances recovered were in fact THC and crack cocaine, and another who had identified Alexander's fingerprints on one of the baggies. This evidence was more than sufficient to satisfy the State's burden of proof on each of the crimes of conviction.

Alexander points out that the State failed to produce any evidence that he had prior drug convictions, as alleged in the complaint. However, as counsel notes, the circuit court has already entered an amended judgment of conviction removing any references to the current crimes being second or subsequent offenses.

Jury Access to Exhibits

Alexander contends that trial counsel should have objected when the jury asked to see several exhibits consisting of seized cocaine and a baggie. As appellate counsel points out, however, the defense did not challenge the amount of cocaine seized but rather claimed that the cocaine did not belong to Alexander. Therefore, Alexander has failed to show how he was prejudiced by the court allowing the jury to see the exhibits.

Sentences

A challenge to the defendant's sentences would also 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 present his own pre-sentence investigation (PSI), to comment on the department's PSI, and to address the court, both

personally and by counsel. 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 noted that there was a "tremendous amount" of cocaine involved in the count of possession with intent to deliver and that maintaining a drug trafficking place was of serious concern to the community, while the THC and paraphernalia offenses were less serious. The court viewed Alexander's character as a "mixed bag." The court gave Alexander credit for obtaining education and employment and avoiding any criminal record while growing up in a rough area of Chicago, but expressed disappointment that he had not fulfilled his capacity to be "not just a law abiding citizen but a productive citizen" given his abilities and family support. The court also acknowledged that Alexander provided support for his girlfriend and her children, but noted that he did so in an illegal way. The court concluded that a prison term was necessary to protect the public and reinforce that society would not tolerate selling cocaine as a business.

The court then sentenced Alexander to four years of initial confinement and four years of extended supervision on the count of possessing more than forty grams of cocaine with intent to deliver, but withheld sentence and imposed concurrent two-year terms of probation on the remaining three counts. The court also awarded 443 days of sentence credit as calculated by the defense, imposed standard costs and conditions of supervision, and determined that the defendant was eligible for the challenge incarceration program and the earned release program.

The components of the bifurcated sentence imposed were well within the applicable penalty range. *See* WIS. STAT. §§ 961.41(1m)(cm)4. (classifying possession of more than forty grams of cocaine as a Class C felony) and 973.01(2)(b)3. and (d)2. (providing maximum terms of twenty-five years of initial confinement and fifteen years of extended supervision for a Class

C felony). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and we are satisfied that the sentence imposed here was not "'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.'" ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments 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*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgments of conviction are 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