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January 15, 2014

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

2013AP49-CRNM State of Wisconsin v. Randy McCaa
(L.C. #2007CF1764)

Before Fine, Kessler and Brennan, JJ.

Randy McCaa appeals from an amended judgment of conviction for two counts of armed robbery as a party to the crimes, contrary to WIS. STAT. § 943.32(2) and § 939.05. McCaa's appellate lawyer, Marcella DePeters, Esq., has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32, to which McCaa responded.[1] We

[1] McCaa submitted a two-page handwritten "message to the judge" and a fifty-five page handwritten response. This court has reviewed both documents.

have independently reviewed the Record, the no-merit report, and McCaa's response as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

Initially, McCaa was charged with one count of armed robbery as a party to a crime. McCaa's brother Kevin was charged as a co-defendant.[2] According to the complaint, on March 25, 2007, the McCaas entered the residence of Lorraine Yegger. Upon entry, McCaa pulled out a silver semi-automatic handgun and ordered Yegger—who ran a snack shop out of her home—to get on the floor. Meanwhile the second individual, believed to be Kevin, went through the kitchen cabinets and demanded to know where the safe was located. Two children and a man named Tommie Jeff were present during the incident. Yegger told police that at one point the second individual took a butcher knife from the kitchen sink and pointed it at Jeff stating that he would slash Jeff's throat. The complaint alleged that the McCaas then took a cash box belonging to Yegger along with her cell phone and the cash that was in her pockets. The complaint further stated that the McCaas robbed Jeff of his wallet and cell phone. When Yegger's back doorbell rang, the McCaas left out the front door. The charge set forth in the complaint related only to the robbery of Yegger.

Prior to trial, McCaa moved to suppress the out-of-court identification of him from a photo array. The trial court denied McCaa's motion.

[2] Throughout this opinion, Randy McCaa will be referred to as McCaa and Kevin McCaa will be referenced by his first name.

The State subsequently filed an amended information adding an additional count of armed robbery as party to a crime relating to the robbery of Jeff. The case proceeded to trial and a jury found McCaa guilty of both counts. Kevin was acquitted.

The trial court sentenced McCaa to concurrent twenty-year sentences, comprised of fourteen years of initial confinement and six years of extended supervision.

A prior no-merit report was filed by McCaa's first appointed appellate lawyer, Glen B. Kulkoski. Following our review, this court directed Kulkoski to confer with McCaa regarding whether McCaa wanted to pursue a postconviction challenge to the trial court's imposition of a $250 DNA surcharge. We subsequently granted Kulkoski's motion to dismiss the no-merit appeal, and he filed a postconviction motion. The postconviction court vacated the DNA surcharge, and the judgment of conviction was amended accordingly.

Attorney DePeters was appointed as successor counsel. Her no-merit report addresses whether there would be any arguable merit to an appeal on three issues: (1) the trial court's denial of McCaa's motion to suppress the out-of-court identification of him; (2) the sufficiency of the evidence introduced at trial; and (3) the trial court's exercise of sentencing discretion. For reasons explained below, we agree with the conclusion that there would be no arguable merit to pursuing these issues on appeal. We will tie in some of the various issues raised by McCaa in his response as appropriate.

A. *Motion to Suppress*

First, the no-merit report summarized the testimony at the suppression hearing, including that of Police Officer Patrick Elm and Detective Dennis Devalkenaere.[3]

Elm testified that one day after the robberies, he inadvertently showed photographs of the McCaas and two other individuals to Jeff while trying to locate and arrest them for criminal activity unrelated to the underlying robberies. According to Elm, Jeff identified Kevin and McCaa as the individuals who had robbed him the night before. At the time, Elm was unaware that the robberies had occurred or that Jeff had been a victim. After Jeff identified the McCaas, Elm relayed this information to detectives who had arrived at the scene.

Devalkenaere testified that he was tasked with investigating the underlying armed robberies. The day after the robberies occurred, Devalkenaere interviewed Yegger in his squad car. During the interview, Devalkenaere showed Yegger two separate photo arrays for Kevin and McCaa. In the array involving Kevin, Devalkenaere testified that Yegger spent a notable amount of time looking at Kevin's picture. Although Yegger believed he was the second actor in the robberies, she did not positively identify him because she was not one hundred percent certain. Yegger did, however, identify McCaa and told Devalkenaere that she was positive McCaa was the person holding the gun during the robbery.

[3] Jeff also testified during the suppression hearing; however, as noted in the no-merit report, Jeff was not called as a witness during trial. This mooted the issue of whether Officer Elms's behavior was improper or would have tainted Jeff's potential in-court identification.

During his testimony, Devalkenaere detailed the process he used to show the photo arrays. The photo arrays were admitted into evidence during the hearing, and the trial court reviewed them. The trial court concluded:

> [W]ith regard to Exhibits 3 and 4 [i.e., the photo arrays for Kevin and McCaa, respectively], those are the photograph[] lineups, there has been nothing whatever in the procedure that was used to point to anything that was suggestive at all in how the officers operated with regard to the display of those lineups going through various folders.
>
> Additionally, as I look at the six photographs in each of those [arrays,] there is nothing in any of those photographs that would make one person stand out as opposed to all the other people. All are very similar. And so I see nothing that's suggestive with the use of Exhibits 3 and 4 whatsoever.

We agree with the no-merit report that there would be no basis to challenge the trial court's factual findings or its conclusion that the circumstances surrounding the photo array were not impermissibly suggestive. *See* ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 421, 724 N.W.2d 347, 350 ("When we review a trial court's ruling on a motion to suppress, we uphold the trial court's factual findings unless those findings are clearly erroneous."); *see also* ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 647, 740 N.W.2d 404, 407 (setting forth the standard for the admissibility of identification based on photo arrays: "First, the defendant has the burden to demonstrate the out-of-court photo identification was impermissibly suggestive; if the defendant meets this burden, the State has the burden to show that the identification is nonetheless reliable under the totality of the circumstances").[4]

[4] McCaa asserts in his response that his right to due process was violated when the trial court conducted the suppression hearing outside the presence of a jury. There is, however, no right to a jury at suppression hearings.

B. ***Sufficiency of the Evidence***

Next, the no-merit report discussed the sufficiency of the evidence in great detail before concluding:

> In the present case, the jury heard evidence that Yegg[e]r was positive that Mr. McCaa was the person [who] robbed her at gun[]point. Yegger identified Mr. McCaa shortly after the robbery. The jury heard corroboration that the armed robbery occurred from D.J.[, Yegger's twelve-year-old nephew who was present when the robberies occurred]. Both D.J. and Yegger provided testimony that property was taken from Jeff by use of a weapon. No reasonable motive was provided by the defense as to why Yegger would have fabricated the armed robbery. The jury was free to decide that the alibi defense provided by Mr. McCaa and his mother was not credible.[5]

We agree with the report's summation of the evidence and that it was sufficient for the jury to find McCaa guilty. *See* ***State v. Alles***, 106 Wis. 2d 368, 376–77, 316 N.W.2d 378, 382 (1982) (The jury's verdict will be reversed "'only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" (citation and emphasis omitted)). There would be no merit to challenging the sufficiency of the evidence.

In his response, McCaa highlights what he perceives to be critical inconsistencies in the testimony offered by various witnesses at his trial and in various statements the witnesses made to police. He faults his trial lawyer for not emphasizing these inconsistencies at trial in order to establish that this is a case of mistaken identity. For example, McCaa asserts:

[5] Additionally, when McCaa took the stand, the jury heard that he had eleven prior convictions consisting of four adult convictions and seven juvenile adjudications.

- height and weight details provided by witnesses in statements to police are at odds with McCaa's actual height and weight; and

- in various statements to police and testimony, Yegger, Jeff, and D.J. said that the man with the gun held it in his right hand.[6] McCaa submits that he is left handed and as such, statements reflecting that the gunman was right handed should have been highlighted for the jury.

Insofar as McCaa cites distinctions in the testimony offered during trial, this does not present an issue of arguable merit: "It is the jury's task, … not this court's, to sift and winnow the credibility of the witnesses." *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386, 389 (Ct. App. 1985). Further, "[i]t is certainly allowable for the jury to believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent." ***Ibid.***

As to McCaa's assertion that his trial lawyer failed to establish that this is a case of mistaken identity, he seems to overlook Yegger's definitive identification of him. She testified that McCaa had been in her house a couple of times purchasing things from her snack shop *the day before* the robbery, and therefore, was familiar with him.[7] In the face of this compelling testimony, we cannot conclude that McCaa's trial lawyer performed deficiently when he decided

[6] At the preliminary hearing, however, Yegger said she could not remember which hand the man held the gun in.

[7] It appears there was nothing covering McCaa's face or head during the robberies.

not to highlight the various inconsistencies McCaa references. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (to prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's action or inaction constituted deficient performance and that the deficiency caused him prejudice). But, even if McCaa's trial lawyer can be said to have performed deficiently in this regard, there is not a reasonable probability that the result of McCaa's trial would have been different. *See* ***id.***, 466 U.S. at 694 (To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

C. *Sentencing*

The final issue the no-merit report discusses is the trial court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606, 712 N.W.2d 76, 82, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 851, 720 N.W.2d

695, 699. The weight to be given to each factor is committed to the trial court's discretion. ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court began by noting the gravity of the offenses and commented on the fact that a handgun was used in the home of one of the victims. Additionally, the trial court pointed out that children were present and considered the emotional effects the robberies had on the victims.

In terms of character and rehabilitative needs, the trial court acknowledged McCaa's employment history as showing "some stability"; however, it went on to conclude that McCaa's extensive criminal history and issues with alcohol and drugs were aggravating factors. The trial court's comments demonstrate a proper exercise of discretion.

With respect to the severity of the sentence, we note that McCaa faced eighty years in prison on the two counts of armed robbery. The trial court sentenced him to concurrent twenty-year sentences, comprised of fourteen years of initial confinement and six years of extended supervision. The sentence of twenty-five percent of the maximum possible in this case does not shock the public's sentiment. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108, 622 N.W.2d 449, 456 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). There would be no arguable merit to a challenge to the trial court's sentencing discretion and the severity of the sentence.

Our independent review of the Record reveals no other potential issues of arguable merit. We have reviewed and considered the plethora of issues raised by McCaa in his response. To the

extent they are not specifically addressed, we have concluded that they lack sufficient merit or importance to warrant individual attention.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Marcella DePeters, Esq., is relieved of further representation of McCaa in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals