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**DISTRICT II**

September 30, 2015

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

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2014AP2668-CRNM      State of Wisconsin v. Sylvester A. Whitelow (L.C. # 2013CF412)

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

Sylvester Whitelow appeals from a judgment convicting him of two counts of delivery of cocaine, two counts of delivery of heroin, and one count of conspiracy to deliver heroin, all as second or subsequent offenses. Whitelow's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Whitelow filed a response. After reviewing the record, counsel's report, and Whitelow's response, we

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version.

conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

On April 4, 2013, the State filed a criminal complaint charging Whitelow with two counts of delivery of cocaine, two counts of delivery of heroin, and one count of conspiracy to deliver heroin, all as second or subsequent offenses. The charges stemmed from three separate incidents occurring in the city of Waukesha. In the first two incidents, Whitelow sold cocaine and heroin to an undercover police informant while a police detective witnessed the transactions. In the third incident, Whitelow arranged for the sale of heroin to the informant but was arrested by police prior to the sale.

Eventually, after some initial delay,<sup>2</sup> the matter proceeded to trial, and a jury found Whitelow guilty of the charged offenses. The circuit court subsequently imposed an aggregate sentence of twenty years of imprisonment, consisting of ten years of initial confinement and ten years of extended supervision. This no-merit appeal follows.

The no-merit report addresses the following appellate issues: (1) whether the evidence at Whitelow's jury trial was sufficient to support his convictions; (2) whether the circuit court properly exercised its discretion at sentencing; and (3) whether trial counsel was effective.

With respect to the sufficiency of the evidence, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the state and the convictions, "is so lacking in probative value and force that no trier of fact, acting reasonably, could have found

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<sup>2</sup> The delay in trying the case was due primarily to (1) the unavailability of a state witness; and (2) the fact that Whitelow's motion to learn the identity of the undercover police informant required further litigation.

guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced ample evidence to convict Whitelow of his crimes. We agree with counsel that any challenge to the sufficiency of the evidence would lack arguable merit.

With respect to the sentence imposed, the record reveals that the circuit court’s sentencing decision had a “rational and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In imposing its aggregate sentence, the court considered the seriousness of the offenses, Whitelow’s character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Whitelow’s history of drug dealing, the sentence does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Whitelow’s sentence would lack arguable merit.

Finally, with respect to whether Whitelow was afforded effective assistance of trial counsel, there is nothing in the record to suggest that trial counsel was ineffective. As noted by the no-merit report, trial counsel aggressively defended Whitelow by successfully pursuing a motion to learn the identity of the undercover police informant in the case, cross-examining witnesses at trial, calling witnesses for Whitelow, and arguing the case to the jury. Consequently, we are satisfied that the no-merit report properly analyzes this issue as lacking arguable merit.

As noted, Whitelow filed a response to counsel’s no-merit report. The response is difficult to decipher, as it is rambling, repetitive, and often nonsensical. It appears to focus on

the same three issues raised in the no-merit report.<sup>3</sup> In any event, we are not persuaded that the response presents an issue of arguable merit.

In addition to the foregoing issues, we considered other potential issues that arise in cases tried to a jury, e.g., jury selection, objections during trial, confirmation that the defendant's waiver of the right to testify is knowingly made, use of proper jury instructions, and propriety of opening statements and closing arguments. Here, the jury was selected in a lawful manner. Objections during trial were few in number and properly ruled on. When Whitelow elected not to testify at trial, the circuit court conducted a proper colloquy to ensure that his waiver was valid. The jury instructions accurately conveyed the applicable law and burden of proof. No improper arguments were made to the jury during opening statements or closing arguments. Accordingly, we conclude that such issues would lack arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Patrick Flanagan of further representation in this matter.

Upon the foregoing reasons,

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<sup>3</sup> We briefly address two complaints that Whitelow makes regarding trial counsel. First, he complains that counsel withdrew his speedy trial request without his knowledge. Second, he complains that counsel failed to call a witness named Zhane Bell to testify at trial. We fail to see how either action prejudiced Whitelow. To begin, counsel withdrew the speedy trial request after obtaining for Whitelow the relief he was entitled under the applicable statute: discharge from custody on a signature bond. *See* WIS. STAT. § 971.10(4). Moreover, Whitelow's description of Bell's alleged testimony is cumulative to the testimony that counsel elicited from another defense witness at trial.

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 Patrick Flanagan is relieved of further representation of Whitelow in this matter.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*