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DISTRICT IV

January 27, 2016

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

2013AP2883-CRNM State of Wisconsin v. Terrance D. Jackson (L.C. #2011CF388)

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

Terrance Jackson appeals a judgment convicting him, following a jury trial, of a second or subsequent offense of possessing heroin with intent to deliver, in an amount over three grams, and as a repeat offender. Attorney Gina Frances Bosben has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90,

[1] All further references to the Wisconsin Statutes are to the 2013-14 version, unless otherwise noted.

403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence, trial counsel's performance, and the sentence imposed. Jackson 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 conclude that there are no arguably meritorious appellate issues.

Sufficiency Of The Evidence

We begin by addressing whether there is any non-frivolous basis to challenge the sufficiency of the evidence, both because discussing the evidence produced at trial places other potential issues in context, and because a successful claim on that issue would result in a vacation of the conviction and directed verdict for acquittal rather than a retrial.

The general test for sufficiency of the evidence is whether the evidence 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 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)). With respect to the charge in this case, the State needed to prove that: (1) Jackson possessed, that is, had actual physical control of a substance; (2) the substance was heroin, whose possession is prohibited by law; (3) the weight of the substance, including any material mixed in with it, was more than three grams; (4) it could be inferred from Jackson's statements, conduct, or other circumstances that Jackson knew or believed the substance was heroin; and (5) Jackson intended to deliver the heroin, meaning to transfer or attempt to transfer it from one person to another, either with the purpose or with awareness that his conduct was practically certain to cause delivery. *See* WIS. STAT. § 961.41(1m)(d)2. (2009-10); WIS JI—CRIMINAL 6035 and 6001.

Stevens Point police officer Allan Raasoch testified that he detained Jackson on a probation hold and then witnessed Jackson being strip searched during the booking procedure at the jail. After Jackson had disrobed, Raasoch saw something fall from under Jackson's genitals, and then observed an aluminum foil packet on top of Jackson's underwear that had not been on the floor prior to the search. The packet contained eighteen individual bindles. When Jackson then bent over and spread his buttocks for a visual cavity search, Raasoch further observed about half a square inch of reflective material in Jackson's anus that the officer suspected to be more aluminum. Correctional officers Johnny Ciulla and Andrew Thurs also participated in the strip search and both observed a foil packet falling from Jackson's genital area onto his underwear, and saw something shiny or plastic-looking protruding from Jackson's anus.

Officer Raasoch then transported Jackson in handcuffs to a hospital emergency room to have the material removed. While a nurse was going over Jackson's health history, Officer Raasoch stepped out of the examination room to speak on the phone with his supervisor and, when Raasoch returned, he noticed a packet on the floor directly beneath where Jackson was sitting that appeared to have fecal matter on it and to match what Raasoch had previously observed during the jail strip search. The plastic baggie was filled with a brown powder substance. Probation officer Matthew Grover, who was also present in the examination room, did not observe anything on the floor until after he went to the door with his back to Jackson to call Raasoch back into the room.

A controlled substance analyst from the State Crime Laboratory testified that the foil packet and each of the eighteen foil bindles recovered during the jail search, as well as the plastic baggie recovered from the hospital examination room, all tested positive for heroin. The

collective weight of the powdered material collected from the items, which included both heroin and the antihistamine diphenhydramine which is commonly used as a cutter, was 7.546 grams.

Misty Koralewski, who lived in the house at which Jackson was detained, testified that Jackson would periodically supply her with heroin. She said a coffee grinder that officers found in her bedroom belonged to Jackson, and that Jackson used it to grind heroin and cut it with something else. A latent print analyst from the State Crime Laboratory testified that she had identified Jackson's fingerprint on the coffee grinder.

This evidence was more than sufficient to satisfy all of the elements of the charged offense.

Assistance Of Counsel

We agree with appellate counsel that the record shows that trial counsel conducted vigorous cross-examination of the State's witnesses in support of the theory that the drugs in the hospital room may have been dropped by someone else, and we see no significant errors that would support a claim of ineffective assistance.

Sentence

A challenge to Jackson's sentence 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 Jackson was afforded an opportunity to comment on the PSI and to address the court. The court then went over the facts adduced at trial regarding the severity of

the offense and the information set forth in the PSI relevant to Jackson's character, and sentenced Jackson to three years of initial confinement and three years of extended supervision, to be served concurrently with a sentence Jackson was already serving following a revocation that had been triggered by this case. The court also imposed standard costs and conditions of supervision; directed Jackson to provide a DNA sample if he had not already done so, but waived the fee; and determined that Jackson was eligible for the challenge incarceration program and the substance abuse program.

The components of the bifurcated sentence were well within the applicable penalty ranges, and the total confinement period constituted 24% of the maximum exposure Jackson faced, taking into account the penalty enhancers. *See* WIS. STAT. §§ 961.41(1m)(d)(2). (classifying possession of more than three grams of heroin with intent to deliver as a Class E felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E felony); 961.48 (increasing maximum imprisonment for a second or subsequent drug offense by four years); 939.62(1)(c) (increasing maximum term of imprisonment for offense otherwise punishable by more than ten years by six additional years for habitual criminality); 973.01(2)(c) (enlarging maximum initial incarceration period by the same amount as the total term of imprisonment based upon a penalty enhancer) (all 2009-10 statutes).

There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and 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.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632,

648 N.W.2d 507 (quoted source omitted). Additionally, the sentence imposed was in line with Jackson's own recommendation of two to three years each of initial confinement and extended supervision and the PSI's recommendation of three to four years of initial confinement and two to three years of extended supervision, and was substantially less than the "close to a maximum" sentence requested by the State. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved).

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*** 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 Attorney Gina Frances Bosben is relieved of any further representation of Terrance Jackson in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals