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DISTRICT IV

February 17, 2016

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

2013AP2509-CRNM State of Wisconsin v. Mark J. Walkowiak (L.C. # 2010CF218)

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

Attorney Farheen Ansari filed a no-merit report seeking to withdraw as appellate counsel for appellant Mark Walkowiak. *See* WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738, 744 (1967). By order dated March 17, 2015, we allowed Attorney Ansari to withdraw, and Attorney Christopher August was appointed to represent Walkowiak in this no-merit appeal. On

January 13, 2016, Walkowiak filed a no-merit response.[1] On January 16, 2016, Attorney August filed a supplemental no-merit report. Upon our independent review of the record and the no-merit reports and response, we conclude that further proceedings would be wholly frivolous. Accordingly, we affirm.

In September 2010, Walkowiak was charged with assault by prisoner. The complaint alleged that Walkowiak intentionally expelled saliva onto a correctional officer while the officer was attempting to place Walkowiak in temporary lock-up. Walkowiak pled not guilty and was represented by counsel at a jury trial. The jury returned a guilty verdict. Walkowiak waived his right to counsel at sentencing and represented himself at the sentencing hearing. The circuit

[1] By order dated March 17, 2014, we rejected Walkowiak's 104-page no-merit response, explaining that we had determined that it was of a burdensome and unreasonable length. We accepted the exhibits attached to the text as an appendix, and extended the time for Walkowiak to file a no-merit response with up to fifty pages of text. By order dated August 17, 2014, we noted that the time for Walkowiak to file a response had passed, but that if Walkowiak submitted a response prior to our issuing a decision, we would accept the response for filing.

On January 13, 2016, Walkowiak filed a document titled "Motion for Reconsideration and Compulsion for Attorney to Act on Defendant's Behalf." It appears that Walkowiak intends the document as his no-merit response, and we consider the arguments raised in the document in this opinion. Additionally, the document contains a request for us to consider all of Walkowiak's submissions or order Attorney August to consider all of those submissions and discuss each point with Walkowiak. To the extent that Walkowiak is seeking reconsideration of our prior order rejecting Walkowiak's 104-page submission, we decline reconsideration. It remains that the submission was unreasonably lengthy. Finally, Walkowiak requests that we provide him with a copy of all of his prior submissions, direct Attorney August to provide him with a copy, or allow Walkowiak additional time to rewrite those submissions. If Walkowiak wishes to obtain copies from this court, the cost for those copies is forty cents per page. It is unclear whether Attorney August has copies of Walkowiak's submissions to this court, but if he has copies, it would appear reasonable for him to provide those copies to Walkowiak, and we expect he will do so. We deny Walkowiak's request for additional time to submit a further no-merit response in light of our prior rejection of Walkowiak's lengthy submissions, the amount of time this case has been pending and the extensions already granted, and the lack of a showing of good cause for further extension.

court imposed the maximum sentence of three and one-half years, with eighteen months of initial confinement and two years of extended supervision, and a $10,000 fine.[2]

The no-merit report addresses whether the circuit court erred by failing to address a pro se motion filed by Walkowiak in the early stages of this case. Our review of the motion indicates that the motion lacked merit, and we agree with counsel that further proceedings on this issue would be wholly frivolous.

The no-merit report also addresses whether there would be arguable merit to further proceedings based on the circuit court's decision to bind Walkowiak over for trial following the preliminary hearing. We agree with counsel's assessment that further proceedings on this issue would be wholly frivolous. *See* ***State v. Webb***, 160 Wis. 2d 622, 632 n.7, 467 N.W.2d 108 (1991) (bind over will be upheld "if there is any substantial evidence to support the preliminary hearing judge's finding of 'probable cause'" (quoted source omitted)).

The no-merit report also addresses whether there would be arguable merit to a challenge to the circuit court's decision denying the defense motion to dismiss the information based on

[2] At the sentencing hearing on March 28, 2012, the circuit court explained that it was imposing the maximum sentence of three and one-half years and a $10,000 fine. The court stated that the prison term would consist of one and one-half years of initial confinement and one and one-half years of extended supervision. The judgment of conviction reflected a sentence of eighteen months of initial confinement and eighteen months of extended supervision, for a total of three years. The court held a hearing a week later, on April 4, 2012, to clarify the sentence it imposed. The court explained that, as it stated, it intended to impose a sentence of three and one-half years, with one and one-half years of initial confinement, and that the court erred by stating the term of extended supervision would be one and one-half years. Rather, the court stated, the term of extended supervision should have been stated as two years. The court entered an amended judgment of conviction reflecting the sentence of three and one-half years of imprisonment. Neither the original nor the amended judgments of conviction reflect the $10,000 fine imposed by the circuit court. Because it appears that the failure to list the fine was a clerical error, upon remittitur, the clerk of the circuit court shall enter a second amended judgment of conviction reflecting the $10,000 fine.

double jeopardy after Walkowiak was disciplined at the prison based on the same conduct. We agree with counsel that further proceedings as to this issue would lack arguable merit. *See* ***State v. Fonder***, 162 Wis. 2d 591, 593-97, 469 N.W.2d 922 (Ct. App. 1991) (holding that double jeopardy does not bar criminal prosecutions following prison disciplinary proceedings for the same acts because, although prison discipline may carry punitive aspects, the principal purposes of prison discipline are "maintenance of institutional order and safety and assistance of individual rehabilitation").

The no-merit report also addresses whether the circuit court erred by denying Walkowiak's motion for a directed verdict and whether the evidence was sufficient to support the jury verdict. We agree with counsel that further proceedings on these issues would lack arguable merit. *See* ***Millonig v. Bakken***, 112 Wis. 2d 445, 451, 334 N.W.2d 80 (1983) ("[A] verdict should be directed only where there is no conflicting evidence as to any material issue and the evidence permits only one reasonable inference or conclusion."); ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990) (a challenge to the sufficiency of the evidence must show that "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"). The evidence at trial, including testimony by the victim and other officers present during the incident, as well as video footage of the incident, was sufficient to support a finding of guilt in this case.

The no-merit report also addresses whether the circuit court erroneously exercised its discretion by denying the defense motion to modify the jury instructions to require the jurors to agree that Walkowiak acted with intent to "offend," rather than with intent to "abuse, harass, ...

or offend." We agree with counsel's assessment that this issue lacks arguable merit. *See* ***State v. Derango***, 2000 WI 89, ¶14, 236 Wis. 2d 721, 613 N.W.2d 833.

The no-merit report also addresses whether there would be arguable merit to a challenge to Walkowiak's sentence. A challenge to a circuit court's exercise of its sentencing discretion must overcome our presumption that the sentence was reasonable. ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483. Here, the court explained that it considered facts relevant to the standard sentencing factors and objectives, including the seriousness of the offense, Walkowiak's character, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. The court imposed eighteen months of initial confinement and two years of extended supervision and a $10,000 fine, the maximum authorized by statute. Given the facts of this case, the sentence was not so excessive or unduly harsh as to shock the conscience. *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507. We discern no erroneous exercise of the court's sentencing discretion.

The no-merit report states that Walkowiak raised the issue of his history of seizures with no-merit counsel, and that counsel concluded that this issue lacks arguable merit because no evidence of Walkowiak's history of seizures was introduced at trial. We directed successor no-merit counsel to review whether there would be arguable merit to a claim of ineffective assistance of counsel for failing to obtain and present evidence of Walkowiak's history of seizures at trial. Counsel filed a supplemental no-merit report asserting that he has investigated the issue and has found no evidence to support Walkowiak's claim that he suffers from seizures.

Walkowiak argues in his no-merit response that he was having a seizure at the time of the charged incident and therefore lacked intent to spit on the victim. He asserts that his trial counsel

was aware that Walkowiak was having a seizure or a seizure-like episode at the time of the incident and that Walkowiak has a medical history to support that claim, but that counsel refused to obtain Walkowiak's medical records. However, Walkowiak also admits that he has never been medically diagnosed with seizures or a disorder causing seizures, and does not explain what documents he believes his counsel should have obtained to support his seizure defense.

We conclude that a claim of ineffective assistance of counsel for failing to present evidence that Walkowiak may have been suffering a seizure at the time of the incident would lack arguable merit. In opening arguments, the defense argued that the prison video security camera would show that, upon being handcuffed to be taken to lock-up, Walkowiak immediately fell to the ground. The defense argued that the video could not explain why Walkowiak fell, such as whether Walkowiak was having a panic attack or a seizure. The defense argued that, after Walkowiak was placed in a restraint chair, the officer placed pressure on Walkowiak's neck, choking him and causing him to salivate. Thus, defense counsel raised the seizure defense at trial, and Walkowiak does not explain what additional evidence his counsel should have submitted to support it.

Walkowiak also asserts in his no-merit response that he had difficulty hearing during the trial, and had to rely on his defense counsel to assist him. However, Walkowiak does not explain how he was prejudiced by his difficulty hearing and his need to rely on defense counsel.

Walkowiak argues that he was not allowed to wear "street clothes" during trial. However, he does not explain how he was prejudiced in this regard, in light of the fact that one element of the crime of assault by prisoner was that Walkowiak was an inmate at an institution.

Walkowiak argues that five or six jurors should have been struck for conflicts of interest. Walkowiak does not explain who those jurors were or what the alleged conflicts entailed. Our review of the jury selection does not support Walkowiak's assertion.

Walkowiak asserts that the video of the incident shows a wind gust that would have blown the spit onto the victim, and that Walkowiak screamed "I'm drowning! I'm going to throw up!" immediately prior to the spitting incident. However, the video was shown to the jury, and Walkowiak raised the defense at trial that he was "being choked" prior to the spitting incident. We discern no arguable merit to further arguments on these points.

Walkowiak asserts that testimony by the victim and witnesses was inconsistent. However, defense counsel argued to the jury that the victim and witnesses gave inconsistent testimony, and it was the function of the jury to resolve issues of credibility.

Walkowiak argues that his counsel coerced him not to testify by telling Walkowiak that he would be "on his own" if he did. We discern no arguable merit to a claim that counsel coerced Walkowiak into giving up his right to testify based on this assertion.

Finally, Walkowiak contends that his counsel was ineffective by referring to Walkowiak as a "jerk" during closing arguments and by failing to contact other witnesses. Walkowiak does not explain in what way he believes he was prejudiced by his counsel's actions or inactions. Our review of the record does not support Walkowiak's assertion that his counsel was ineffective, and Walkowiak does not offer any facts outside the record that would alter our analysis.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is modified to reflect the $10,000 fine imposed by the circuit court and, as modified, summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Christopher August is relieved of any further representation of Mark Walkowiak in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals