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DISTRICT II

March 30, 2016

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

2015AP1703-CRNM State of Wisconsin v. Markese K. Tibbs (L.C. # 2014CF426)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Markese K. Tibbs appeals from a judgment convicting him of robbery with use of force as a party to a crime. Tibbs' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Tibbs received a copy of the report, was advised of his right to file a response, and has elected not to do so. After

[1] All references to the Wisconsin Statutes are to the 2013-14 version.

reviewing the record and counsel's report, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

Tibbs was convicted following a jury trial of robbery with use of force as a party to a crime. The charge stemmed from an April 1, 2014 robbery of a liquor store in Kenosha. Tibbs and a co-defendant, Montriel Solomon, entered the store, and Solomon took liquor without paying for it. A store clerk followed the men outside to retrieve the liquor and was punched and kicked by Solomon. The store manager, who witnessed the attack outside and tried to stop it, was punched by Tibbs. Tibbs and Solomon fled the scene but were later arrested by police. They were tried together[2] and, upon conviction, sentenced to identical terms of three years of initial confinement and two years of extended supervision.

The no-merit report addresses the following appellate issues: (1) whether the evidence at trial was sufficient to support Tibbs' conviction, and (2) whether the circuit court erroneously exercised its discretion at sentencing.[3]

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 conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found

[2] Tibbs moved to sever his case from Solomon's based upon a statement Solomon made to police. Following a hearing on the matter, the circuit court denied the motion because the statement could be redacted so that it did not implicate Tibbs and violate his right to confrontation. *See* ***Richardson v. Marsh***, 481 U.S. 200, 211 (1987). Ultimately, neither the State nor the defense introduced Solomon's statement at trial.

[3] In the no-merit report, counsel uses the phrase "abuse of discretion." We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced the phrase with "erroneous exercise of discretion." *See, e.g.*, ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

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 Tibbs of his crime. Although Tibbs did not take the liquor from the store, he watched Solomon do it[4] and assisted him in carrying away the liquor by punching the store manager. Accordingly, 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 (citation omitted). In fashioning its sentence, the court considered the seriousness of the offense, Tibbs' 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. As the sentence was well within the statutory maximum, it cannot be considered excessive. *See* ***State v. Daniels***, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983). Accordingly, we agree with counsel that a challenge to Tibbs' sentence would lack 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 valid, 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 properly ruled on. When Tibbs elected not to testify, the circuit court conducted a proper colloquy to ensure that his waiver was valid. The jury instructions accurately

[4] The actions of Tibbs and Solomon inside the store were captured by a video surveillance camera. The video was introduced as evidence at trial.

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.[5] 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 Thomas J. Erickson of further representation in this matter.

Upon the foregoing reasons,

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 Thomas J. Erickson is relieved of further representation of Markese K. Tibbs in this matter.

Diane M. Fremgen
Clerk of Court of Appeals

[5] After Tibbs' sentencing, a former Kenosha police officer acknowledged under oath that he planted a bullet and an ID belonging to Tibbs at a home that was being searched as part of a separate homicide investigation. There is no indication that the officer's misconduct in that matter affects the validity of the judgment in this case. Although the officer was on the prosecution's list of potential witnesses at trial, he was not called to testify.