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DISTRICT I

June 10, 2016

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

2015AP132-CRNM State of Wisconsin v. Matthew D. Conner (L.C. #2013CF243)

Before Curley, P.J., Kessler and Brennan, JJ.

Matthew D. Conner appeals a judgment convicting him of one count of delivering heroin. Attorney Dustin C. Haskell filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14),¹ and *Anders v. California*, 386 U.S. 738 (1967). Conner filed a response and two supplements to his response. After considering the no-merit report and responses, and after conducting an independent review of the record, we agree with counsel's

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

assessment that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there was sufficient evidence to convict Conner of the crime. When reviewing the sufficiency of the evidence, we look at whether ““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.”” *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)).

For the jury to convict Conner of delivering heroin, the State was required to prove beyond a reasonable doubt that: (1) Conner delivered a substance to another person; (2) the substance was heroin; and (3) Conner knew or believed that the substance was heroin. WIS. STAT. § 961.41(1)(d)1.; WIS. JI-CRIMINAL 6020.

At trial, Detective Scott Simons testified that he was working undercover with a confidential informant named Carrie, who told him that Conner sold heroin. Simons listened as Carrie had several phone conversations with Conner arranging to buy heroin. Simons testified that he went with Carrie in her car to meet Conner to purchase the drug. When they arrived, Conner got in the backseat of Carrie’s car. Simons testified that he saw Conner give Carrie a tinfoil package and saw Carrie give Conner \$20. Simons also testified that he searched Carrie and her car before they went to meet Conner to make sure that she did not have drugs before she met him.

Police Officer Dane Berghammer testified that he provided assistance and surveillance during the drug transaction. He drove an unmarked green minivan to the location where Carrie

planned to meet Conner. Berghammer testified that he observed Conner standing on the street corner for fifteen or twenty minutes before Carrie and Simons arrived. Berghammer said that Conner got into the back seat, closing the door. Berghammer testified that he saw Conner get out of the car a short while later, but he could not see what occurred in the car because the car had tinted windows.

Birjees Kauser testified that she works in the controlled substances unit at the State Crime Laboratory. She testified that she tested the substance, and it tested positive for the presence of heroin.

Based on this testimony, we agree with the report that there was sufficient evidence for the jury to conclude that Conner was guilty of delivering heroin. There would be no arguable merit to a claim that the evidence was insufficient to support the verdict.

The no-merit report next addresses whether the circuit court misused its sentencing discretion. The circuit court imposed eight years of imprisonment on Conner, with four years of initial confinement and four years of extended supervision, to be served consecutively to any other sentences Conner was serving. In framing its sentence, the circuit court explained that the primary objectives of sentencing were to protect the community, to punish the defendant, to rehabilitate the defendant, and to deter others from committing crimes. The court placed emphasis on Conner's prior criminal record and the fact that he had been revoked from supervision in the past. The circuit court noted that the police began investigating Conner in connection with a heroin overdose death and, while Conner may not have supplied the heroin that killed that particular victim, heroin overdoses occur because heroin is available for purchase on the street. The court considered appropriate factors in deciding the length of sentence to

impose and explained its application of the various sentencing guidelines in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. There would be no arguable merit to an appellate challenge to the sentence.

The no-merit report next addresses whether Conner's statements to police should have been suppressed. Trial counsel moved to suppress the statements, but the circuit court did not rule on the motion because the State agreed not to introduce the statements at trial. Because Conner's statements were not used against him, there would be no arguable merit to an appellate claim that Conner's conviction should be overturned based on the statements.

The no-merit report next addresses whether there are any issues of arguable merit based on the jury selection. The no-merit report points out that all five jurors who indicated that they might be biased were struck for cause. The report further notes that Conner used a preemptory strike to eliminate the sole juror the circuit court did not strike for cause as Conner requested. There would be no arguable merit to an appellate challenge based on potential errors during the jury selection.

Conner argues in his response that his constitutional right to confront the witnesses against him was violated because Carrie did not testify at trial. The confrontation clause guarantees criminal defendants the right to confront the witnesses against them. *State v. Hale*, 2005 WI 7, ¶43, 277 Wis. 2d 593, 691 N.W.2d 637. However, "the right of confrontation does not require the state to produce any particular witness or give the accused the right to insist that the state call any particular witness." *State v. LaTender*, 86 Wis. 2d 410, 434, 273 N.W.2d 260 (1979) (citation and quotation marks omitted). There would be no arguable merit to a claim that

the prosecutor violated Conner's right to confront the witnesses against him by not calling Carrie as a witness at trial.

Conner also argues in his response that he received ineffective assistance of trial counsel. He contends that his attorney should have provided him with photographs of the physical evidence. Conner's attorney had no obligation to provide Conner with copies of the photographs.

Conner argues that his attorney should have requested fingerprint and DNA testing of the tinfoil heroin packet. Because two witnesses, Simons and Berghammer, tied Conner directly to the crime, fingerprint and/or DNA testing would not have exonerated Conner, even if his fingerprints or DNA had not been found on the packet.

Conner argues that his attorney should have further questioned Jurors 4, 7, and 28 because their responses during *voir dire* indicated that they were biased. After reviewing the transcript of the jury selection, we see no basis for Conner's claims that the jurors were biased. We have also considered Conner's other complaints about his attorney's conduct, but find no basis for a claim of ineffective assistance of counsel.

Conner next argues in his response that the prosecutor engaged in misconduct because she did not conduct DNA and fingerprint testing of the physical evidence. As explained above, the testing would not have undercut the eyewitness testimony of the detective who saw Conner give Carrie the drugs and the police officer who saw Conner get into Carrie's car. Conner also contends that the prosecutor should have further questioned Jurors 4, 7, and 28 concerning their bias. As explained above, our review of the jury selection transcript shows no grounds for

Conner's assertion. There would be no arguable merit to a claim that there was prosecutorial misconduct.

Conner argues in a supplemental response that he was not awarded the proper amount of sentence credit in this case. As explained by the circuit court in its order amending the judgment of conviction dated January 17, 2014, it initially granted 176 days of credit to Conner, but later learned from the Department of Corrections that Conner was entitled to less credit because he spent part of the 176 days incarcerated in connection with case no. 10CF716. It is well-established that a defendant is not entitled to dual credit on a consecutive sentence. *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). There would be no arguable merit to this claim.

Finally, Conner argues in a supplemental response that a photograph of the heroin packet he received from his attorney establishes that there was a miscarriage of justice at trial. The photograph bears a date stamp of June 10, 2012, but the drug sale occurred on June 13, 2012. We first note that this photo was not introduced as evidence at trial. Because the photo was not part of the evidence used to convict Conner, the date at the bottom of the photograph has no bearing on Conner's conviction. Beyond its lack of evidentiary value as it pertains to Conner's conviction, there could be any number of explanations for an incorrect date stamp on a photo. There would be no arguable merit to this claim.

Our independent review of the record reveals no potential issues for appellate review. Therefore, we conclude that 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 summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved of any further representation of Conner in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals