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August 16, 2016

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

2014AP758-CRNM State v. Christopher Robert Loesch (L. C. No. 2012CF131)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Christopher Loesch has filed a no-merit report concluding no grounds exist to challenge Loesch's conviction for delivering three grams or less of methamphetamine, contrary to WIS. STAT. § 961.41(1)(e)1.[1] Loesch has filed a response challenging the sufficiency of the evidence to support his conviction and the effectiveness of his trial counsel. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we

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

conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State charged Loesch with one count of delivering three grams or less of methamphetamine. A jury found Loesch guilty of the crime charged. Out of a maximum possible sentence of twelve and one-half years, the court imposed a term of six and one-half years, consisting of two and one-half years' initial confinement and four years' extended supervision, the sentence to run consecutive to any sentence Loesch was then serving.

Any challenge to the jury's verdict would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). At trial, Jim Mikla, an investigator with the St. Croix County Sheriff's Department, testified that an informant, Heather Benson, agreed to assist in a "controlled buy" from Loesch in exchange for $20 gas money and consideration on a burglary charge that she had pending in Eau Claire County. Mikla testified that Benson arranged to purchase 3.5 grams of methamphetamine for $350. Mikla explained that before a controlled buy, the informant is searched to ensure the individual does not already have drugs on them. Law enforcement searched Benson and her car, and provided her with a body wire and pre-recorded United States currency for the buy. Benson, who was driving her own vehicle, was then surveilled by four officers in three vehicles from Hudson to River Falls, where Benson had arranged to buy the drugs. Law enforcement followed Benson from the original meeting place in a grocery store parking lot to a Dairy Queen, where a man and a woman in a car made contact with Benson. Law enforcement then followed both cars to a River Falls residence owned by Connie Driscoll, who lived with her daughter, Michelle

Driscoll. The car that made contact with Benson was owned by Connie, but its driver was identified by law enforcement as Loesch.

Mikla testified that during the entire period of surveillance, the officers lost sight of Benson's car approximately three to four times, but only for between fifteen and twenty seconds—when Benson would turn a corner or when she was obstructed by another vehicle. Mikla also testified that the body wire inexplicably "shut down during the course of the controlled buy." Mikla added that after Benson left the residence, law enforcement followed her to a predetermined location where she was searched and turned over what was later determined to be 2.8 grams of methamphetamine, as well as $130 of the original $350.

Benson testified that when she initially called Loesch's phone number, a woman answered and told her Loesch was busy. Benson later called and talked to Loesch about purchasing methamphetamine. Benson testified that before the scheduled buy, both she and her car were searched by law enforcement and she was given the cash and the body wire, which she placed in her pocket. According to Benson, Loesch called and told her to meet him at the Dairy Queen and to then follow him. Benson recalled that there was a woman and a child in the car with Loesch. Benson further testified that she followed Loesch to a residence in River Falls, exited her car and then followed Loesch, the woman—later identified as Michelle—and the child into the house. Benson stated that the child went upstairs and she went with Loesch to a downstairs bathroom where he weighed out 2.8 grams of methamphetamine on a digital scale and gave Benson the drugs in exchange for $220. Benson added that after weighing the drugs, Loesch asked if Benson wanted "to do some." Benson testified that when she indicated she had to leave, Loesch asked if she was wearing a wire. Benson lifted her shirt to show there was no

wire, then put the drugs in her pocket, walked back to her car and drove to meet law enforcement.

In his response, Loesch challenges the sufficiency of the evidence, claiming that Benson was not a credible witness and her testimony was the only evidence directly implicating Loesch in the alleged crime. Loesch emphasizes that law enforcement failed to recover any corroborating evidence, such as the digital scale or the pre-recorded money. It is the jury's function, however, to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. A jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Loesch's conviction.

The no-merit report addresses whether there is any arguable merit to a claim that the trial court erroneously admitted into evidence the bag of methamphetamine. Whether to admit evidence is addressed to the trial court's discretion. ***State v. Pharr***, 115 Wis. 2d 334, 342, 340 N.W.2d 498 (1983). An appellate court will sustain an evidentiary ruling if it finds that the trial court examined the relevant facts, applied a proper standard of law and, using a demonstrative rational process, reached a conclusion that a reasonable judge would reach. ***Loy v. Bunderson***, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). Here, Loesch challenged admission of the bag of methamphetamine based on foundation and chain of custody. Specifically, Loesch claimed the "identifying case agency number is off by one number between the report drafted by the chemist and the piece of evidence that was received." Loesch also challenged the fact that

the exhibit passed through the United States Mail and was handled by any number of different people who had not been identified or testified.

The law with respect to chain of custody requires proof sufficient "to render it improbable that the original item has been exchanged, contaminated or tampered with." ***B.A.C. v. T.L.G.***, 135 Wis. 2d 280, 290, 400 N.W.2d 48 (Ct. App. 1986). A perfect chain of custody, however, is not required. ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54. The proponent of the evidence need not negate the possibility that there was an opportunity for tampering with an exhibit, nor is the proponent required to trace the exhibit's custody by calling each custodian as a witness. ***State v. McCarty***, 47 Wis. 2d 781, 788, 177 N.W.2d 819 (1970). Any alleged gaps in a chain of custody ultimately go to the weight of the evidence rather than its admissibility. McCoy, 298 Wis. 2d 523, ¶9. Moreover, items deposited in the mail are presumed to have been received by the addressee. ***Luedtke v. Shedivy***, 51 Wis. 2d 110, 118, 186 N.W.2d 220 (1971).

Here, the record shows the chain of custody was clearly established. The police sealed the package before it was mailed and it arrived at the crime lab in the same condition with no evidence of tampering. Further, the discrepancy of one zero between the number of the crime lab report and the number on the evidence bag had no effect on identifying the evidence. The report referenced the submitting agency's case number as "1200024 rather than "120024." The numbers of significance, however, are the first two (representing the year) and the last two (representing the sequential number of cases handled by the department). Thus, this would have been the 24th case of 2012. In addition to the "significant" numbers being the same on both the evidence and the report, the crime lab number and Loesch's name were also present on both. When the analysis was completed, the evidence was placed in a sealed bag, initialed and dated

by the analyst and ultimately returned by mail to the submitting agency, where it was placed in the police evidence room until trial. Any challenge to the admission of this exhibit into evidence based on chain of custody would, therefore, lack arguable merit.

The record discloses no arguable basis for challenging the effectiveness of Loesch's trial counsel. To establish ineffective assistance of counsel, Loesch must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the case. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Any claim of ineffective assistance must first be raised in the trial court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

In his response to the no-merit report, Loesch argues that his trial counsel was ineffective by failing to introduce into evidence a recording police made of a phone conversation between Benson and Michelle setting up the drug buy. Loesch recounts:

> If you listen to the recording that lasted 1 hour and 47 minutes, during the time [Benson] was traveling to River Falls, her phone rings and she has a conversation with a person who tells her to meet at Sam's house. Then [Benson] asks "How long will he be in his P.O. meeting – Oh about 30 minutes, okay Bye."

Loesch contends he never heard this recording and would have asked for it to be played at trial because it establishes that someone other than Loesch, who was meeting with his probation officer that day, was setting up a meeting place with Benson. We agree with counsel's analysis in the supplemental no-merit report that this recording would not have materially altered the facts already known to the jury. At trial, Benson testified that her initial call to Loesch's telephone was answered by a female, later identified as Michelle, and that Benson spoke with Michelle about buying methamphetamine. Moreover, that Loesch was having a meeting with his

probation officer during this initial call does not establish that he was unavailable for the subsequent buy.

Loesch also asserts trial counsel was ineffective by failing to call Michelle as a witness at trial, claiming Michelle "would have testified that [Loesch] did not sell meth to [Benson]." According to the supplemental no-merit report, however, Loesch agreed with appellate counsel that Michelle was not likely to incriminate herself in order to exculpate Loesch. Ultimately, Loesch needs "to do more than point to witnesses that trial counsel did not call at trial." ***State v. Balliette***, 2011 WI 79, ¶67, 336 Wis. 2d 358, 805 N.W.2d 334. Loesch must prove that failing to call the witnesses "fell below an objective standard of reasonableness." ***Id.*** Loesch cannot show that counsel's performance fell below an objective standard of reasonableness when he failed to call Michelle based on the unjustified hope that she would exculpate Loesch by incriminating herself. To the extent Loesch claimed a recorded phone conversation between himself and Michelle included her admission that she was responsible for the drug sale, appellate counsel recounts that the subject recording did not include any admission by Michelle.

Next, Loesch contends trial counsel was ineffective by failing to subpoena Loesch's work records to show Loesch "could not have been involved with drug dealing when surveillance officers previously witnessed meth sales taking place at" the residence Michelle shared with her mother. Loesch, however, bases his argument on a false premise, as nobody testified they witnessed Loesch involved in previous meth sales at the residence. Officers acknowledged that Loesch was "associated" with the residence and that the home had previously been under investigation due to complaints of Michelle dealing drugs. There was, however, no testimony describing any specific previous drug sales by Loesch at the home. Loesch, therefore, cannot establish how he was prejudiced by the absence of the work records.

Loesch also claims his trial counsel was ineffective by failing to pursue voice analysis or testing of DNA and fingerprints from the bag of methamphetamine. Loesch does not explain how any voice analysis would support a claim of ineffective assistance of counsel. With respect to testing of the bag of methamphetamine, Loesch has not stated that such testing would have exonerated him. Further, trial counsel used the absence of testing by the State as part of the defense at trial, intimating that the State did not pursue corroborating evidence because, perhaps, it did not corroborate Benson's story. The fact that a strategy fails does not make the attorney's representation deficient. *See* ***State v. Koller***, 87 Wis. 2d 253, 264, 274 N.W.2d 651 (1979). Based on the record and the defense presented at trial, any claim that counsel was ineffective by failing to pursue testing would lack arguable merit. Our review of the record discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner*** hearing.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offense; Loesch's character, including his criminal history; the need to protect the public; and the mitigating circumstances Loesch raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that Loesch's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Because the circuit court relied on a COMPAS risk assessment at sentencing, we previously put this appeal on hold pending our supreme court's decision in ***State v. Loomis***, appeal No. 2015AP157-CR. The supreme court accepted certification in ***Loomis*** to address whether due process prohibits circuit courts from relying on COMPAS at sentencing, either

because it is proprietary in nature, preventing the defense from challenging its scientific validity, or because it takes gender into account. The supreme court has now issued a decision in ***Loomis***, holding:

> [A] sentencing court may consider a COMPAS risk assessment at sentencing subject to the following limitations. As recognized by the Department of Corrections, the PSI instructs that risk scores may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.
>
> Importantly, a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing.

State v. Loomis, 2016 WI 68, ¶¶98-99, __ Wis. 2d __, __ N.W.2d __.

In a supplemental no-merit report, counsel recounts that the circuit court identified several factors contributing to the sentence imposed, including Loesch's long criminal history; his multiple probation revocations; his commission of the present crime while on extended supervision; the seriousness of the offense; and his significant rehabilitative needs, which required a term of "structured discipline" in order to "adjust to a lifestyle without chemicals." With respect to COMPAS specifically, the circuit court noted that COMPAS "indicates high risk and high need on almost every category, and is a factor that the Court has to look at." The court further stated: "[C]learly, when one is looking at 12 and-a-half years as the maximum, [six and one-half years] is a medium range of sentence, and I'm satisfied, again, that based on all my findings and comments, that a medium sentence[] is appropriate. Also given the high scores in the COMPAS assessment." We agree with counsel's conclusion that while the circuit court referenced COMPAS at sentencing, it was not "determinative" of the sentence imposed. It

merely reinforced the circuit court's assessment of other, independent factors. Accordingly, we conclude that further proceedings on this possible issue would lack arguable merit.

Any claim that the trial court erred by amending the judgment of conviction to remove 173 days of sentence credit would lack arguable merit. At the time of the underlying offense, Loesch was serving a term of extended supervision from a prior conviction. His extended supervision was revoked on February 6, 2013, and he was reconfined for two years and six months, minus 212 days of jail credit. Loesch's subsequent sentence in this case was imposed consecutive to any sentence Loesch was already serving. After his conviction, the Department of Corrections notified the court that the 173 days of sentence credit awarded here had been included in the sentence credit earlier awarded in the other case. Because dual credit is not permitted when sentences are consecutive, *see* ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988), there is no arguable merit to a claim that the circuit court erred by amending the judgment to remove what would have been impermissible dual credit.

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Steven L. Miller is relieved of further representing Loesch in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals