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DISTRICT III

November 1, 2016

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

2015AP1395-CRNM State of Wisconsin v. Michael D. Terrell
(L. C. No. 2013CF432)

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

Counsel for Michael Terrell has filed a no-merit report concluding there is no basis to challenge Terrell's convictions for possession with intent to deliver cocaine; delivery of cocaine; delivery of heroin; and possession with intent to deliver heroin. Terrell was advised of his right to respond and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue

that could be raised on appeal. We summarily affirm the judgment of conviction and an order denying postconviction relief. *See* WIS. STAT. RULE 809.21.[1]

The criminal charges stemmed from controlled buys of methamphetamine, crack cocaine, and heroin. After a jury trial, Terrell was convicted of the heroin and cocaine charges, and found not guilty of two counts of delivery of methamphemine. The circuit court imposed concurrent sentences consisting of five years' initial confinement and five years' extended supervision on all counts.

There is no issue of arguable merit concerning the sufficiency of the evidence. Numerous witnesses testified concerning the nature of the controlled buys of crack cocaine and heroin from Terrell. Law enforcement officers also testified regarding the search of Terrell's vehicle pursuant to a warrant which also revealed controlled substances, including crack cocaine, powder cocaine, and heroin.[2] More than ample evidence supported the convictions.

The no-merit report addresses whether trial counsel was ineffective for failing to call alibi witness Susan Enderle to testify at trial. Enderle would purportedly have testified that Michelle Twilley had access to Terrell's vehicle, thus providing an explanation for how Twilley could possibly have placed the drugs in Terrell's vehicle.[3] However, trial counsel did not interview Enderle and she was not called to testify at trial.

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

[2] Police also found 9mm hollow point ammunition in the vehicle.

[3] Enderle was subpoenaed, but did not appear to testify at the postconviction motion hearing. An offer of proof was made through the testimony of an investigator hired by postconviction counsel.

To prevail on a claim of ineffective assistance of counsel, Terrell must affirmatively show that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Judicial scrutiny of counsel's performance is highly deferential. Terrell must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. ***Id.*** at 689.

Here, the circuit court found trial counsel made a reasonable effort to locate Enderle. The court also found that Enderle was "elusive" and difficult to locate, "especially if she didn't want to be located." In addition, the court noted that although Enderle's testimony may have established that someone else had access to Terrell's vehicle, there was nothing to indicate Twilley put drugs in Terrell's vehicle. In fact, Enderle's purported testimony would have been inconsistent with Varajalon Hodges' testimony at trial that he received a letter from Terrell asking Hodges to take the fall and claim responsibility for the drugs in the vehicle. Enderle could also have confirmed Terrell's identity as "Red." This was contrary to the defense position throughout trial that Terrell was not the drug dealer known as "Red," because no witness could state the person they met as "Red" was named Terrell. Accordingly, the circuit court correctly determined there were "very good reasons" for not calling Enderle as a trial witness. Any argument claiming trial counsel was ineffective for failing to call Enderle as a witness would lack arguable merit on appeal.

The no-merit report also addresses whether the circuit court erred by failing to grant a motion for a mistrial after comments made by Twilley and Jade Perrin. Perrin testified the nature of her relationship with Terrell was "[b]uying drugs." She was asked when she purchased drugs from Terrell, and answered "in January." Defense counsel objected and moved for a mistrial as none of the charges alleged a January buy date. The court denied the motion and

instructed the jury to disregard the answer. The court also instructed the jury that the allegations in the case involved the months of February, March and June of 2013.

During Perrin's subsequent testimony, the State asked if she knew anyone else to whom Terrell sold methamphetamine, and Perrin testified she saw Terrell give methamphetamine to another person, and Perrin was there when the transaction took place. After an objection was sustained, Perrin stated, "I did not see him give it to her. Before he came she didn't have anything. After he left, she had two ounces." The court explained to the jury that the objection had been sustained and that the jury was to disregard the series of questions and answers.

Twilley also testified Terrell gave her a ride, and asked her to jump out to make a drug delivery for him. The court sustained an objection and instructed the jury to disregard the question and answer. The State asked Twilley if Terrell told her why or what he was doing when he went to the black Cadillac. Twilley stated, "Well, part of it is common sense. I was riding with a drug dealer and …." An objection was sustained, but Twilley continued, "I was riding with a young man who chose to sell drugs to more people than just me, so …." The jury was instructed to disregard the answer. During cross-examination, Twilley was asked about cooking cocaine and if she "ever made the drugs?" She answered, "No. He made them in my kitchen before."

As the circuit court indicated in its decision on postverdict motions, "the record is replete with cautionary instructions that were provided by the Court ... and the jury paid attention to what the Court was indicating." The court's perception that Terrell was not prejudiced by the improper statements was well founded since the jury acquitted Terrell of two charges against him. Significantly, a retrial before a different jury may have resulted in conviction on those

counts. Viewing the record in its entirety, we agree with the no-merit report that any issue regarding the failure to grant a mistrial would lack arguable merit.

There is also no issue of arguable merit concerning the admissibility of the letter Hodges received from Terrell asking Hodges to claim responsibility for the drugs found in the black Cadillac. The letter was signed by Michael Terrell and stamped as sent from the Eau Claire County jail. The evidence supported a finding that the letter was what it was purported to be. WIS. STAT. § 909.01. A perfect chain of custody was not required. *See* ***State v. McCoy***, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54.

In postconviction motions, Terrell also claimed he inaccurately believed, based on his attorney's advice, that all of the details of his prior convictions would come into evidence at trial if he testified, not just the number of convictions. Had he known the truth, Terrell insisted, he would have chosen to testify at trial to maintain his claim of innocence. At the ***Machner*** hearing,[4] both Terrell and trial counsel testified. The circuit court found credible counsel's statement that he told Terrell only the number of crimes would come into evidence. Credibility determinations are within the sole province of the fact-finder. ***Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). There is no issue of arguable merit regarding this issue.

There is also no arguable merit to any issue regarding a new trial in the interest of justice. As the circuit court properly concluded, the action was fully tried, a vigorous defense was provided, and there was no miscarriage of justice.

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[4] Referring to ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

The record also discloses no basis for challenging the sentence imposed. The circuit court considered the proper factors, including Terrell's character and his extensive criminal record, the seriousness of the offenses, and the need to protect the public. *See* ***State v. Harris***, 119 Wis. 2d 612 23, 350 N.W.2d 633 (1984). The sentence was far below the maximum allowable by law and therefore presumptively neither harsh nor excessive. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶29-33, 255 Wis. 2d 632, 648 N.W.2d 507.[5]

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Melissa Petersen is relieved of further representing Terrell in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[5] Although the circuit court mentioned in passing the COMPAS risk assessment at sentencing, it was not "determinative" of the sentence imposed. *See* ***State v. Loomis***, 2016 WI 68, ¶¶98-99, 371 Wis. 2d 235, 881 N.W.2d 749.