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**DISTRICT I**

January 30, 2017

To:

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Marvin Kevin Smith 2016003011  
Racine County Jail  
717 Wisconsin Ave.  
Racine, WI 53403-1237

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

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2016AP561-CRNM      State of Wisconsin v. Marvin Kevin Smith (L.C. # 2012CM4395)

Before Brennan, P.J.<sup>1</sup>

Marvin Kevin Smith appeals a judgment convicting him of two counts of misdemeanor retail theft, both as a party to a crime. Smith's appointed appellate counsel, Attorney Leon W. Todd, III, filed a no-merit report on Smith's behalf. *See Anders v. California*, 386 U.S. 738, 744 (1967), and WIS. STAT. RULE 809.32. Smith was sent a copy of the report and informed of his right to respond, but he did not do so. After reviewing the no-merit report and conducting an

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

independent review of the record, we conclude that there are no arguably meritorious appellate issues.

The no-merit report first addresses whether there would be arguable merit to a claim that the circuit court misused its discretion in making procedural or evidentiary rulings. We agree with the report that the circuit court's decision to deny Smith's request to adjourn the trial was a proper exercise of discretion. See *State v. Leighton*, 2000 WI App 156, ¶¶27-28, 237 Wis. 2d 709, 616 N.W.2d 126. Although it is not addressed by the no-merit report, we also conclude that there would be no merit to a claim that the circuit court erred in continuing the trial without Smith when he did not return from the lunch break. Under WIS. STAT. § 971.04(3), trial may continue without a defendant "[i]f the defendant is present at the beginning of the trial and thereafter ... voluntarily absents himself ... without leave of the court." Moreover, the circuit court explicitly admonished Smith about his obligation to return after lunch. Because the circuit court had authority to continue the trial without Smith under § 971.04(3), there would be no arguable merit to a claim that Smith's rights were violated when the trial continued without him.

The no-merit report next addresses whether there is sufficient evidence to support the conviction. When reviewing the sufficiency of the evidence, we look at whether "the evidence, viewed most favorably to the state of 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 (quoted source omitted). "If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn [the] verdict." *Id.*

To establish that Smith was guilty of misdemeanor retail theft, the State was required to prove beyond a reasonable doubt that: (1) Smith or a person he aided and abetted intentionally took and carried away items from a store; (2) the items were merchandise held for resale by a merchant; (3) Smith or a person he aided and abetted knew that the items were merchandise held for resale by a merchant; (4) the merchant did not consent to Smith taking and carrying away the items; (5) Smith or a person he aided and abetted knew that the merchant did not consent; and (6) Smith or a person he aided and abetted intended to deprive the merchant permanently of possession of the merchandise. WIS JI—CRIMINAL 400, 1498.<sup>2</sup>

Jason Hertig testified at trial that he was a loss prevention investigator for Roundy's Supermarkets. He testified that he saw Smith enter the store where he was working on August 8, 2012. Hertig explained that he recognized Smith because Smith had previously been caught taking energy drinks out of other Roundy's stores without paying for them, so Roundy's had circulated bulletins with Smith's picture to security staff. Hertig testified that he watched as Smith filled a shopping cart with energy drinks with the assistance of a woman, later identified as Keyana Taylor. Smith then covered the drinks with paper towels taken from a shelf. Hertig testified that Smith then exited the store through one door, while Taylor went through another door with the shopping cart, not stopping to pay for the items before she left the store. Smith and Taylor were both apprehended outside the store. The value of the items in the cart was \$294.74.

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<sup>2</sup> In addition to retail theft charges, Smith was charged with two counts of bail jumping. The circuit court dismissed the two counts of bail jumping at the close of the State's evidence because the State had not met its burden of proof. The prosecutor explained to the court that she did not have certified copies of a criminal complaint showing that Smith had been charged with a misdemeanor prior to these crimes and released from custody on a bond with conditions that he had violated.

Police Officer Allison Cerqua testified that she was dispatched to the store at 11111 West Greenfield Avenue in the City of West Allis for a complaint of retail theft in progress. When she arrived, she was informed by a loss prevention employee that Smith and another woman, who were both detained in the parking lot, had just taken the items in the cart from the store. Officer Cerqua testified that she then arrested Smith based on the statement of the loss prevention employee.

Christopher Kmoch, a senior corporate security investigator for Roundy's, testified that on August 13, 2012, he was at a store located on South 76th Street in the City of Greenfield when he saw Smith enter the store with another man. Kmoch testified that he had never seen Smith in person but recognized him from Roundy's security bulletins. Kmoch further testified that he had previously seen Smith numerous times on recorded video stealing from other stores belonging to Roundy's. Kmoch testified that he called the police as he watched Smith and the other man work together to place energy drinks and other items in their shopping cart. Kmoch said that the two men then proceeded to the front of the store, with Smith walking in front while the other man pushed the cart. When they reached an area where there were several employees, Smith attempted to distract the employees while the other man left the store with the cart. Kmoch testified that the total value of the merchandise was \$316.97, and that no one at Roundy's consented to Smith's actions.

Police Officer Stephen Turnacliff testified that he was dispatched to the store on South 76th Street on August 13, 2012, in response to a complaint of retail theft. He testified that Smith was waiting inside the store with a loss prevention employee. Officer Turnacliff testified that he arrested Smith based on the statement provided by the loss prevention employee.

In addition to testimony, the State showed the jury two videos, one from each store, that depicted the events described by Hertig and Kmoch. The testimony of the witnesses, as briefly summarized above, coupled with the videotape of Smith's actions in the store, was sufficient to support the jury's verdict of guilty on the two counts of misdemeanor retail theft.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion. Smith was initially sentenced by the Honorable Daniel L. Konkol on May 31, 2013. That sentence was vacated based on Smith's motion for resentencing, in which he argued that his trial lawyer had not made an adequate argument on his behalf. The second sentencing hearing was held before the Honorable T. Christopher Dee on August 6, 2015. Smith was sentenced to two consecutive terms of two years of imprisonment, with eighteen months of initial confinement and six months of extended supervision.

In deciding what length of sentence to impose, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court explained at the sentencing hearing that prison was necessary to protect the public because Smith refused to stop committing retail thefts even though he had between thirty and thirty-two prior convictions. The circuit court considered as aggravating the fact that Smith had recruited others to help him with the thefts, including young people, and was teaching them criminal conduct. The court stated that although one theft of this nature "may not be devastating, the accumulation of many acts raises prices for other customers, can force the store to hire more security, force the store to lay people off, could force the store ultimately to move, shut down." The circuit court considered appropriate factors and

applied them to the facts of this case in a reasoned and reasonable manner. *See State v. Gallion*, 2004 WI 42, ¶¶39–46, 270 Wis. 2d 535, 678 N.W.2d 197. Therefore, we conclude that there is no arguable merit to a challenge to the sentence on appeal.

We have independently reviewed the record but have found no arguable basis for reversing the judgment of conviction. 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 Leon W. Todd, III, is relieved from any further representation of Smith in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*