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July 25, 2017

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

2015AP2060-CRNM State of Wisconsin v. Lance D. Smith (L.C. #2014CF272)

Before Kloppenburg, P.J., Lundsten and Sherman, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Lance Smith appeals a criminal judgment convicting him, following a jury trial, of possession of a firearm by a felon as a repeat offender, and sentencing him to a bifurcated prison

term.¹ Assistant State Public Defender William Schmaal filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16);² *Anders v. California*, 386 U.S. 738, 744 (1967); and *State ex rel. McCoy v. Wisconsin Court of Appeals*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence to support the convictions and the circuit court's exercise of discretion at sentencing. Smith was sent a copy of the report, but has not filed a response. Assistant State Public Defender Ellen Krahn has since been substituted as counsel for Schmaal, and has not withdrawn the no-merit report. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Pretrial Matters

The record does not show any irregularities at the initial appearance or preliminary hearing. In any event, a valid conviction cures any defects relating to bindover unless they were preserved by an interlocutory appeal. *See State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991); *State v. Wolverton*, 193 Wis. 2d 234, 254, 533 N.W.2d 167 (1995).

Smith filed a speedy trial demand on April 15, 2014, but withdrew it at a status conference on May 23, 2014. Moreover, the record shows that Smith himself was responsible for the multiple delays in the case, obtaining continuances of the preliminary hearing and trial to

¹ There was a separate judgment entered following the same trial that ordered probation for a conviction on another count of possession of a firearm by a felon. Although the notice of appeal only mentions a single judgment, the no-merit report addresses both the bifurcated prison sentence and the term of probation, as if both judgments had been appealed.

² All further references in this order to the Wisconsin Statutes are to the 2015-16 version, unless otherwise noted.

seek new counsel, to obtain additional discovery, and to allow counsel to further prepare for trial after Smith changed his mind at the last minute about accepting a plea deal.

Both the State and Smith filed motions in limine, most of which were standard and were granted without objection. The only contested motions related to whether Smith had turned over his witness list and any written or recorded statements in a timely manner, and whether or under what circumstances the State could proceed on two of the charges if one of the victims did not show up to testify. The circuit court denied the State's motion to exclude any of the defense witnesses, after ascertaining from defense counsel that there were no written or recorded statements from the defense witnesses that needed to be turned over, aside from those already in the State's possession.

As to proceeding without one of the victims, the State conceded that it would need to dismiss the disorderly conduct charge relating to that victim if she did not show up at trial (and ultimately did so), but maintained that it did not need that victim's testimony in order to prove the firearm count related to her, because it could rely on a theory of constructive possession based upon Smith's DNA on the gun and Smith's presence in the apartment when and where the gun was found. The circuit court agreed that the State could proceed, but noted that it would strictly apply the rules of evidence and constitutional principles relating to the confrontation clause to statements from the missing victim that the State might seek to introduce.

Voir Dire

The State used one of its preemptory strikes to remove the sole African American on the jury panel, but the prosecutor made a record that the basis for the strike was that the panel member was a first cousin of the defendant and had spoken about the case with another cousin.

The defense did not object to any of the panel members who were ultimately chosen for the jury, and we see no basis for challenging the impartiality of the jury based upon any responses given during voir dire.

Sufficiency of the Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is 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 (quoted source omitted); *see also* WIS. STAT. § 805.15(1).

To prove Smith guilty of possession of a firearm by a felon, the State needed to provide evidence that Smith: (1) knowingly possessed a firearm; and (2) had previously been convicted of a felony. WIS. STAT. § 941.29 and WIS JI—CRIMINAL 1343.

Smith stipulated that he had a prior felony conviction, and the State introduced a copy of the judgment from that conviction.

As to the possession element on the count for which probation was imposed, Kimberlee Thomas testified that she observed Smith draw a handgun with a silver barrel from his waistband while he was in her apartment on January 31, 2014.

As to the possession element on the count for which Smith was sentenced to prison, Madison Police Officer William Quast testified that he recovered a Smith and Wesson semiautomatic handgun from a boot in the closet of an apartment rented by Shani Brown. Smith had been dating Brown and was alone inside Brown’s apartment immediately before his arrest

arising from a reported domestic disturbance involving a gun on February 9, 2014. A DNA analyst from the Wisconsin State Crime laboratory matched biological material recovered from the gun's hand grip and safety lever to a comparison standard of Smith's DNA profile taken from a buccal swab. Contrary to Smith's apparent belief, it was not necessary for either Thomas or Brown, who failed to appear at trial, to testify that the gun Thomas observed on January 31, 2014, was the same gun that was recovered from the closet of Brown's apartment (although we note that Thomas did testify that the gun recovered from Brown's apartment appeared "similar" to the one Smith had drawn in Thomas's apartment). The jury could make the inference that Smith had constructive possession of the handgun recovered from Brown's apartment on February 9 based upon Smith's presence in the apartment on that date and his DNA on the weapon.

Sentence

A challenge to Smith's prison sentence would also lack arguable merit. Our review of a sentence determination begins "with the presumption that the [circuit] court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The record shows that Smith was provided an opportunity to address the circuit court prior to sentencing, both personally and by counsel, and to present a character witness on his behalf. The court considered the standard sentencing factors and explained their application to this case 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.

The circuit court then sentenced Smith to eighteen months of initial confinement and eighteen months of extended supervision on one of the firearm counts, and imposed a consecutive four-year term of probation on the other firearm count. The court also imposed standard costs and conditions of probation, awarded the stipulated amount of thirty days of sentence credit, and determined that Smith was not eligible for the Challenge Incarceration Program or Substance Abuse Program. The court directed Smith to provide a DNA sample for the State's databank, but waived the DNA surcharge.

The three-year bifurcated sentence constituted about one-fifth of Smith's maximum exposure on that count, and just over ten percent of the total twenty-eight years of imprisonment that Smith faced on both counts together. *See* WIS. STAT. §§ 941.29(2) (2013-14) (classifying possession of a firearm by a felon as a Class G felony); 973.01(2)(b)7 and (d)4 (2013-14) (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony); 939.62(1)(b) (2013-14) (increasing maximum term of imprisonment for offense otherwise punishable by one to ten years by four additional years for habitual criminality); and 973.01 (2013-14) (explaining bifurcated sentence structure). There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentence imposed here was not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." *State v. Grindemann*, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. In fact, the sentence was even shorter than the alternative four-year sentence that Smith himself recommended, if the circuit court did not want to follow his primary recommendation of an imposed and stayed sentence of eighteen months of initial confinement and eighteen months extended supervision. *See State v.*

Scherreiks, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved).

Assistance of Counsel

Prior to the preliminary hearing, the circuit court permitted Smith to discharge his first publicly appointed attorney in order to retain private counsel. However, when Smith was unable to pay the private attorney he had hired, the court permitted that attorney to withdraw and the State Public Defender appointed another attorney for Smith. Less than a month prior to trial, Smith moved to discharge his third attorney and obtain successor counsel based upon a difference of opinion regarding trial strategy and the fact that counsel was unable to spend as much time as Smith would like on Smith's case, because counsel had several other cases with trials that were scheduled ahead of Smith's. The circuit court denied the motion on the grounds that a disagreement over trial strategy did not warrant a substitution of counsel on the eve of trial, when the matter had already been set over twice. However, as we noted above, the circuit court did subsequently grant another continuance of the trial date to allow counsel to further prepare. Smith again attempted to discharge counsel during trial, telling the court that he wanted a new attorney, after the first witness had testified. The circuit court again denied the motion, noting that there had been no showing that counsel provided ineffective assistance.

We note that Smith did not ask to proceed pro se. We agree with the circuit court's analysis that, absent a showing of ineffective assistance of counsel, Smith had no basis to obtain a fourth attorney either shortly before or during trial. We further note that counsel was able to obtain an acquittal on one count of disorderly conduct and the dismissal of another count of

disorderly conduct, and argued vigorously on Smith's behalf that there was insufficient evidence to prove that Smith had possessed the gun found in the boot on the date it was found.

Conclusion

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. See *State v. Allen*, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 184. We conclude that any 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 pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Assistant State Public Defender Ellen Krahn is relieved of any further representation of Lance Smith in this matter pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals