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DISTRICT I

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

2016AP980-CRNM State of Wisconsin v. Robert Nathaniel Forney, Jr. (L.C. # 2013CF1736)

Before Brennan, P.J., Kessler and Brash, 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).

Robert Nathaniel Forney, Jr., appeals from a judgment of conviction for two felonies: (1) first-degree recklessly endangering safety by use of a dangerous weapon, as a repeater; and (2) possession of a firearm by a felon, as a repeater. *See* WIS. STAT. §§ 941.30(1), 939.63(1)(b), 939.62(1)(c), 941.29(2)(a), and 939.62(1)(b) (2011-12).[1] Forney's postconviction/appellate

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

counsel, Michael J. Backes, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Forney has not filed a response.[2] We have independently reviewed the record and the no-merit report as mandated by ***Anders*** and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Forney was charged with attempted first-degree intentional homicide and being a felon in possession of a firearm after an incident at the home of his relative, Tyrone Nixon. According to the criminal complaint, Forney argued with a man named Marion Washington and "discharged a firearm directly at his head." The complaint stated: "Washington says he was able to put his hands up at the last second[,] avoiding being struck in the head."

Forney did not give a statement to the police. The case proceeded to trial, where three citizen witnesses testified that Forney attended a gathering of six people at Nixon's home. Nixon said that while he was in the bathroom, he heard shots and when he came out, he found Washington on the floor, bleeding. Nixon said that at that point, Forney and a woman named Shelita Garrett were no longer in the residence.

Garrett testified that she was at the gathering with her friend, who Garrett believed was related to the other attendees. Garrett said she met Forney for the first time that night and that

[2] This is the second time Backes has filed a no-merit report in this case. We rejected the first no-merit report because we identified an issue of arguable merit concerning the imposition of two mandatory DNA surcharges. *See* ***State v. Forney***, No. 2015AP95-CRNM, unpublished slip op. and order at 2-3 (WI App Feb. 25, 2016). Our order rejecting the first no-merit report noted that Forney had filed a response to the no-merit report "which prompted Backes to file a supplemental no-merit report" addressing Forney's concerns. *See* ***id.*** at 1. After Backes successfully challenged one of the DNA surcharges in the trial court, he filed the no-merit report that is before us now. This time, Forney has not filed a response.

she was in the next room when Forney shot Washington. She testified that she saw Forney "hold the gun towards" Washington. Garrett identified Forney in the courtroom, and she also identified a photograph of him shortly after the shooting.

Washington testified that he was friends with Nixon and others at the gathering but did not know Forney, although he "knew of him." Washington said there came a time when Forney put his hand on Washington's throat and fired a gun at him multiple times, which caused an abrasion on Washington's face and injuries to his left wrist and right hand. Washington admitted that he initially gave police a description of the shooter that did not resemble Forney because he was angry with Forney and "wanted to kill him." However, Washington later told police that Forney had shot him, and he identified Forney after viewing a photo array.

Forney did not testify at trial. His defense was that there was insufficient evidence that he was the shooter and that whoever the shooter was attempted to kill Washington. The jury found Forney guilty of the lesser-included offense of first-degree recklessly endangering safety by use of a dangerous weapon. It also found Forney guilty of being a felon in possession of a firearm.

The trial court sentenced Forney to nine years of initial confinement and five years of extended supervision for the first-degree recklessly endangering safety count, and it imposed a consecutive sentence of five years of initial confinement and five years of extended supervision for the firearm count. Both sentences were imposed consecutive to any other sentence, including a revocation sentence Forney was serving. The trial court also imposed the mandatory $250 DNA surcharge on both counts.

Postconviction/appellate counsel filed a no-merit report. We rejected the no-merit report after concluding that the imposition of "the new mandatory, per-conviction, DNA surcharge was an unconstitutional ex post facto law as applied to a defendant convicted of multiple felonies after January 1, 2014, when the underlying crimes were committed before January 1, 2014." *See* ***State v. Forney***, No. 2015AP95-CRNM, unpublished slip op. and order at 3 (WI App Feb. 25, 2016); *see also* ***State v. Radaj***, 2015 WI App 50, ¶35, 363 Wis. 2d 633, 866 N.W.2d 758.

Postconviction/appellate counsel subsequently filed a postconviction motion pursuant to ***Radaj***, asking the trial court "to vacate the previously established DNA surcharge and apply the DNA surcharge which existed at the time he committed the crimes." The trial court vacated the second DNA surcharge, leaving only a single $250 DNA surcharge.[3]

Postconviction/appellate counsel again filed a no-merit notice of appeal. The no-merit report now before this court addresses whether trial counsel provided ineffective assistance by failing to: find an alibi witness; insist that Forney testify at trial; insist that Forney agree to the presentation of a self-defense theory and support trial counsel's request for a self-defense jury instruction; and, adequately prepare for trial. The no-merit report also discusses whether the sentences were unduly harsh or unreasonable and whether there would be arguable merit to seek sentence modification. Postconviction/appellate counsel concludes that there would be no merit to assert ineffective assistance or to challenge Forney's sentences. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in

[3] The Honorable Jonathan D. Watts presided over the trial and sentenced Forney. The Honorable Frederick C. Rosa decided the postconviction motion after being assigned the case due to judicial rotation.

the no-merit report, and we independently conclude that pursuing those issues would lack arguable merit. We will briefly discuss those issues, as well as three additional issues: the jury selection process, the sufficiency of the evidence, and the imposition of a single DNA surcharge.

We begin with the ineffective-assistance-of-counsel issues. To establish ineffective assistance of counsel, a defendant must show: (1) deficient performance; and (2) prejudice. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The no-merit report indicates that Forney told postconviction/appellate counsel that an alibi witness should have been "brought to [c]ourt to testify on his behalf." Counsel explains that Forney has not provided the names of any potential alibi witnesses and that the information available to both trial counsel and postconviction/appellate counsel—including the fact that the halfway house where Forney was living was "very near the scene of the shooting"—did not support an alibi defense. Nothing in the record leads us to doubt counsel's assessment. We conclude that there would be no arguable merit to challenging trial counsel's decision not to present an alibi defense.

We likewise conclude there would be no arguable merit to assert that trial counsel should have insisted that Forney testify or allow trial counsel to argue self-defense. Whether Forney wanted to testify and wanted counsel to argue self-defense were both issues raised and discussed on the record. The trial court conducted a colloquy with Forney concerning his right to testify, during which trial counsel said that he had advised Forney not to testify and Forney was following his advice. The trial court discussed with Forney the fact that the decision was his, and that he "could testify even against [his] attorney's advice." Forney said he understood that and was choosing not to testify. Similarly, when trial counsel told the trial court that he wanted the trial court to consider giving a self-defense jury instruction—a request the State opposed—Forney spoke privately with trial counsel and then indicated that he did not want the instruction

given. The trial court discussed Forney's decision with him and agreed to follow Forney's request and not continue to analyze whether a self-defense instruction should be given. The record demonstrates that after talking with trial counsel and the trial court, Forney affirmatively chose not to testify and not to seek the self-defense jury instruction. There would be no merit to assert ineffective assistance of counsel with respect to the decisions Forney made.

Finally, the no-merit report indicates that Forney told postconviction/appellate counsel that trial counsel "did not adequately prepare for trial by contesting the State's case or by providing meaningful evidence in his defense." The record does not support these general assertions. Instead, the record demonstrates that trial counsel actively cross-examined witnesses and successfully persuaded the jury that the shooter did not act with the intent required for attempted first-degree intentional homicide. We do not discern any basis to challenge trial counsel's preparation for or performance at trial.

Next, we consider the sentences imposed. There would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentences were excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender,

and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

Here, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. Our review of the no-merit report and the sentencing transcript leads us to conclude there would be no merit to challenging the trial court's compliance with ***Gallion***. Further, there would be no arguable merit to assert that the sentences were excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Given the dangerous weapon enhancer on count one and the repeater enhancers on both counts, the trial court could have imposed a total of twenty-seven-and-one-half years of initial confinement and ten years of extended supervision. There would be no merit to argue that the trial court's sentences totaling fourteen years of initial confinement and ten years of extended supervision were excessive. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

We briefly discuss the jury selection process. During the course of jury selection, the judge disclosed that he knew one of the potential jurors socially, as the juror's spouse was best friends with the judge's significant other. The judge said he did not "believe this would be a reason to disqualify the juror for cause" but indicated that the issue could be addressed if needed. The trial court also told the potential juror that he had disclosed their relationship to the parties. Subsequently, neither attorney raised any concerns about allowing that individual to serve on the jury. Other jurors were struck for cause. After the jury was impaneled, the trial court confirmed

that trial counsel did not intend to bring a ***Batson*** motion.[4] We have not identified any issues of arguable merit concerning the jury selection process.

We also conclude that there would be no merit to challenging the sufficiency of the evidence. The testimony of the three witnesses, detailed above, provided a factual basis for both of the jury's guilty verdicts.

Finally, we conclude that there would be no merit to challenging the remaining DNA surcharge. The postconviction motion asked the trial court "to vacate the previously established DNA surcharge and to apply the DNA surcharge which existed at the time he committed the crimes for which he stands convicted." The trial court interpreted the motion to be a request "to vacate one of the two DNA surcharges pursuant to ***Radaj***." (Full case citation omitted.) The trial court gave Forney what it believed he asked for and in doing so, implicitly exercised discretion by allowing the remaining DNA surcharge to stand. That implicit exercise of discretion is supported by the record in this case, which indicates that DNA on a buccal swab taken from Forney was compared to DNA collected from a shirt found at the crime scene. *See* **State v. Cherry**, 2008 WI App 80, ¶10, 312 Wis. 2d 203, 752 N.W.2d 393 (factors for courts to consider when ordering a defendant to pay a DNA surcharge include "whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost" and "whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost"); *see also* **State v. Ziller**, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241 (rejecting the notion that the "circuit court must explicitly describe its reasons for imposing a

[4] *See* **Batson v. Kentucky**, 476 U.S. 79 (1986) (State may not use race as a basis for its peremptory challenges.).

DNA surcharge" or otherwise "use magic words"). We do not discern there would be any arguable merit to challenging the remaining DNA surcharge in this case.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Michael J. Backes is relieved of further representation of Forney in this matter. *See* 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