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DISTRICT III

August 15, 2017

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

2016AP949-CRNM State v. Darwin A.E. Clemons
(L. C. No. 2015CM590)

Before Seidl, J.[1]

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).

Counsel for Darwin Clemons has filed a no-merit report concluding there is no basis to challenge Clemons' conviction for possession of THC, as party to a crime. Clemons was advised of his right to respond and has not responded. Upon our independent review of the

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

record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude no arguable issue of merit exists that could be raised on appeal and summarily affirm the judgment.

The criminal charge stemmed from a search of Clemons' residence. Police officers had observed Clemons in a surveillance video in an unrelated investigation. Garbage "pulls" were subsequently performed at Clemons' residence, which revealed multiple clear-plastic baggie corners used in controlled substance sales such as marijuana, as well as a green leafy substance that tested positive for THC. A search warrant was obtained and officers discovered a marijuana blunt in the master bedroom and a marijuana plant. A controlled substance analyst from the Wisconsin Crime Lab testified the substances tested positive for THC. A jury convicted Clemons. The circuit court imposed a $50 fine plus costs.

There is no arguable issue concerning the sufficiency of the evidence. Numerous witnesses testified as to the evidence from which the jury could infer Clemons knowingly possessed THC, as a party to a crime. More than ample evidence supported the conviction.

The no-merit report addresses whether Clemons' trial counsel was ineffective for failing to object to testimony regarding the contents of the garbage "pulls." Previously, the circuit court had denied as untimely the State's motion to introduce the findings of the garbage "pulls" as other acts evidence. A motion to reconsider was also denied on the morning of trial. During cross-examination of one of the police officers at trial, defense counsel asked a series of questions pertaining to the search warrant. Following a side-bar conference concerning whether defense counsel had "opened the door" to suppressed evidence, the State without objection asked a later witness to divulge the contents of the garbage "pull." At the outset, we note the State's

motions were not decided on the merits,[2] and therefore we question the characterization of the garbage "pulls" evidence as "suppressed." In any event, the garbage "pulls" testimony was not prejudicial to Clemons as the crime lab analyst testified the blunt and plant found in the residence tested positive for THC. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Any argument asserting trial counsel was ineffective for failing to object to testimony concerning the garbage "pulls" would therefore lack arguable merit on appeal.

The record also discloses no basis for challenging the sentence imposed. The State recommended a $50 fine plus costs. The defense conceded, "A $50 fine is the minimal amount. That's appropriate …." A defendant who affirmatively approves his sentence cannot attack it on appeal. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989). In any event, the sentence essentially amounted to a minimum sentence and was neither overly harsh nor excessive. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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

Therefore,

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

[2] The circuit court concluded, "[M]otions under the pretrial order, including other acts motions, were to be filed within 15 days of the pretrial order, and that would have been July 16th. Had this been even received in July or early August, I probably would look at it differently; however, the state filed this motion October 6th. That's well beyond the deadline."

IT IS FURTHER ORDERED that attorney Jeffrey Mann is relieved of further representing Clemons in this matter.

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

Diane M. Fremgen
Clerk of Court of Appeals