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DISTRICT I/III

August 15, 2017

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

2016AP426-CRNM State v. Terrell Montrelle Maclin
(L. C. No. 2014CF5737)

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

Counsel for Terrell Maclin has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),[1] concluding no grounds exist to challenge Maclin's convictions for two

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

counts of possession of a firearm by a felon, both as party to a crime, and one count of possessing tetrahydrocannabinols (THC), as a second or subsequent offense, with all three counts as a repeater. Maclin was informed of his right to file a response to the no-merit report 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. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State initially charged Maclin with one count of party to the crime of possessing a firearm as a felon and one count of THC possession, as a second or subsequent offense, both as a repeater. An Amended Information corrected an address. Over Maclin's objection, the circuit court granted the State's motion to file a Second Amended Information adding an additional count of party to the crime of felon in possession of a firearm, as a repeater. Maclin was convicted upon a jury's verdict of the crimes charged. Out of a maximum possible sentence of thirty-five and one-half years, the court imposed concurrent sentences resulting in a seven-year term consisting of five years' initial confinement followed by two years' extended supervision.

Any claim that the circuit court erred by permitting the Second Amended Information would lack arguable merit. A charging document serves to inform the accused of the acts that he or she allegedly committed in order to enable him or her to understand the charges and prepare a defense. ***State v. Derango***, 2000 WI 89, ¶50, 236 Wis. 2d 721, 613 N.W.2d 833. The circuit court, however, "may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." WIS. STAT. § 971.29(2). Whether to permit an amendment rests within the circuit court's discretion and will not be reversed absent an erroneous exercise of that discretion. ***State v. Malcom***, 2001 WI App 291,

¶23, 249 Wis. 2d 403, 638 N.W.2d 918. Here, Maclin opposed the Second Amended Information, claiming he was surprised by the additional charge and had decided to proceed to trial based on the charging of the single firearm possession count. The State, however, argued that Maclin was not prejudiced as he was aware since the case began that two guns were found in the trunk of the car. The circuit court agreed that "in this circumstance," Maclin was not prejudiced and, consequently, granted the State's motion to file a Second Amended Information. Because the record supports the circuit court's discretionary decision, any claim that the circuit court erred by allowing the amendment would lack arguable merit.

Any challenge to the jury's verdicts would lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). At trial, Milwaukee police officers testified consistently that they stopped a vehicle for a seatbelt violation, a cracked windshield, and illegal window tints. Maclin was the passenger in that vehicle. As the officers approached the vehicle, using a flashlight to illuminate the interior of the vehicle, the officers observed Maclin reach back toward what was later determined to be a fold-down arm rest for the back seat. During their respective interactions with the driver and Maclin, the officers detected a strong odor of burnt marijuana coming from inside the vehicle. The officers also observed "a suspected marijuana blunt" in plain view in a cup holder between the driver and Maclin.

A canine unit was called, and the dog "hit on the vehicle and ultimately hit on the back seat" where the officer had observed Maclin reaching earlier. The back arm rest opened into the vehicle's trunk where officers found two firearms and a backpack containing nine "corner cut" baggies of marijuana, handgun ammunition, and an orange pill bottle that contained marijuana

residue and Maclin's fingerprint on the outside. Two clear plastic baggies containing a green leafy substance later identified as marijuana were found in Maclin's pants pocket during a custodial search following his arrest. Maclin stipulated that he was a felon and that his felony conviction remain unreversed as of the date of the traffic stop.

It is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. A jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Maclin's convictions.

Any challenge to Maclin's waiver of his right to testify would lack arguable merit. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. The circuit court must therefore conduct an on-the-record colloquy with a criminal defendant to ensure that: (1) the defendant is aware of his or her right to testify; and (2) the defendant has discussed this right with his or her counsel. ***Id.***, ¶43. Here, the court engaged Maclin in an on-the-record colloquy, discussing with him both his right to testify and his right to not testify. After indicating that he had sufficient time to discuss his rights with counsel, Maclin confirmed he was waiving his right to testify and the circuit court found Maclin's decision to be free and knowing. There is no arguable merit to challenge this waiver.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Maclin's character, including his criminal history; the need to protect the public; and the mitigating circumstances Maclin raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The sentences imposed are well within the maximum available, and it cannot reasonably be argued that Maclin's sentences are so excessive as to shock public sentiment. *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 issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Eileen T. Evans is relieved of further representing Maclin 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