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DISTRICT II

December 13, 2017

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

2016AP1454-CRNM State of Wisconsin v. Gkarr L. Piggee (L.C. #2014CF712)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Gkarr L. Piggee appeals from judgments convicting him of four counts of first-degree recklessly endangering safety as party to the crime contrary to WIS. STAT. § 941.30(1) (2013-14)[1] and one count of attempted first-degree intentional homicide contrary to WIS. STAT.

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

§§ 940.01(1)(a) and 939.32. Piggee's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16) and ***Anders v. California***, 386 U.S. 738 (1967). Piggee received a copy of the report and was advised of his right to file a response. He has not done so. Upon consideration of the report and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgments because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21 (2015-16).

The no-merit report addresses the following possible appellate issues: (1) whether the evidence was sufficient to convict Piggee, (2) whether any evidentiary errors at trial require a new trial, and (3) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

The no-merit report considers sufficiency of the evidence for each count. Our standard of review is whether the evidence, viewed in the light most favorable to the State, is so insufficient in probative value and force that as a matter of law no reasonable jury "could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The standard is the same whether the evidence is direct or circumstantial. ***Id.*** The record reveals that for each count, at least one witness gave testimony to support each requisite element. Upon that evidence, we cannot say that the jury erred in finding guilt beyond a reasonable doubt. We conclude that no arguable merit could arise from a challenge to the sufficiency of the evidence.

The no-merit report discusses whether any evidentiary rulings warrant a new trial. The no-merit report addresses what counsel describes as hearsay evidence that Piggee fired the weapon, evidence to which trial counsel did not object. Piggee's theory of the case was that he was present when another actor (Jimmie Carter) fired the weapon. Any hearsay testimony that placed Piggee at

the scene of the shootings would not have undermined that theory. Additionally, the victim, M.C., testified that he knew Piggee, and Piggee was the one who fired the weapon at him. Under these circumstances, any hearsay evidence that Piggee fired the weapon at M.C. was not prejudicial and could not form the basis for an ineffective assistance of trial counsel claim. *See* ***State v. Jeannie M.P.***, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694 (ineffective assistance of counsel claim requires prejudice arising from deficient performance).

The no-merit report also discusses testimony from law enforcement officers as to M.C.'s truthfulness. Officer Cecchini testified that M.C.'s recitation of the events was consistent each time he told it, i.e., that Piggee fired at him. This is not a ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984), violation because the testimony was the officer's view of the circumstances at the time he was investigating the case. ***State v. Snider***, 2003 WI App 172, ¶27, 266 Wis. 2d 830, 668 N.W.2d 784. Investigator Rybarik, who interviewed M.C., testified that M.C.'s statements during the interview were consistent with M.C.'s trial testimony. Testifying that M.C.'s interview statements and trial testimony were consistent was not a ***Haseltine*** violation because the investigator did not opine that M.C. was being truthful at trial, an issue properly left to the jury. ***Snider***, 266 Wis. 2d 830, ¶27. We agree with appellate counsel that these evidentiary matters do not have arguable merit for appeal.

With regard to the sentences, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Piggee to a fifteen-year term (ten years of initial confinement and five years of extended supervision) for attempted first-degree intentional homicide and consecutive terms (but concurrent to each other) of ten years (five years of initial confinement and five years

of extended supervision) for each count of first-degree recklessly endangering safety, the latter terms stayed in favor of five concurrent terms of five years of probation consecutive to the attempted first-degree intentional homicide sentence. In fashioning the sentences, the court considered the need to protect the public and deter others; the seriousness of the offenses; the impact on the victims; Piggee's culpability, character, age, neurological development and juvenile record; that Piggee's unlawful conduct was escalating in seriousness; and that he demonstrated a lack of insight and maturity. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight of the sentencing factors was within the circuit court's discretion. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The sentences complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The circuit court properly imposed a $250 DNA surcharge for each of the five convictions. WIS. STAT. § 973.046(1r)(a). Because he was convicted of a crime under WIS. STAT. ch. 940, Piggee was not eligible for either the Challenge Incarceration Program or the Substance Abuse Program. Sec. 973.01(3g), (3m). We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

There would be no arguable merit to a challenge to the circuit court's consideration of the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment materials included within the presentence investigation report.[2] The court properly utilized COMPAS consistent with our supreme court's decision in ***State v. Loomis***, 2016 WI 68, ¶¶98-99, 109, 371 Wis. 2d 235, 881 N.W.2d 749. The record shows COMPAS was not

[2] The presentence investigation report was dated March 30, 2015, before the supreme court's July 2016 decision in ***State v. Loomis***, 2016 WI 68, 371 Wis. 2d 235, 881 N.W.2d 749, *cert. denied*, 137 S. Ct. 2290 (2017).

"determinative" of the sentence imposed. It merely informed the circuit court's assessment of other, independent factors which were properly considered by the circuit court, as discussed above.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgments of conviction and relieve Attorney Hans Koesser of further representation of Piggee in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21 (2015-16).

IT IS FURTHER ORDERED that Attorney Hans Koesser is relieved of further representation of Gkarr Piggee in this matter.

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

Diane M. Fremgen
Clerk of Court of Appeals