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January 5, 2018

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

2017AP273-CRNM State of Wisconsin v. Scott Fitzgerald Ferguson
(L.C. #2014CF3917)

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).

Scott Fitzgerald Ferguson appeals from a judgment of conviction for one count of being a felon in possession of a firearm and one count of possessing THC with intent to deliver (between 1000 and 2500 grams), as a party to a crime, as a second and subsequent offense. *See* WIS. STAT. §§ 941.29(2), 961.41(1m)(h)3., 939.05, and 961.48(1)(b) (2013-14).¹ Ferguson's appellate

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

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

According to the criminal complaint, police officers secured a warrant to search the home of Ferguson, a suspected drug dealer, in August 2014. While they were waiting to enter the residence, they saw Ferguson drive away from his home in a truck. The officers conducted a traffic stop based on the truck's lack of a front license plate. A drug-detecting police dog at the scene of the stop "alerted on the exterior of the truck, indicating the presence of a controlled substance." A search of the truck revealed seventy-five bags of suspected marijuana.

Ferguson was arrested. At the time of his arrest, he had two cellular telephones and nearly eight hundred dollars in cash. The officers then executed the search warrant at Ferguson's house and found over two hundred and fifty packages of marijuana, a gun, bullets, and a digital scale. The officers also found Ferguson's state identification card and paperwork containing Ferguson's name.

The case proceeded to a jury trial, which was held over five days in June 2016. The State presented testimony from numerous officers involved in the traffic stop and the search of Ferguson's home, as well as testimony from technicians concerning the drugs, fingerprints, and DNA collected from the truck and Ferguson's home. The defense did not present any witnesses.

² According to the no-merit report, Ferguson raised several issues with appellate counsel. Appellate counsel explains Ferguson's concerns and addresses them in the no-merit report.

In closing argument, trial counsel argued that the State failed to prove that the drugs and gun belonged to Ferguson and that the drugs were not simply for personal use.

The jury found Ferguson guilty of being a felon in possession of a firearm and possessing THC with intent to deliver (between 1000 and 2500 grams). The trial court sentenced Ferguson to four years of initial confinement and four years of extended supervision for the firearm count, and it imposed a concurrent sentence of seven years of initial confinement and four years of extended supervision for the drug count. It ordered that the sentences be served consecutive to Ferguson's revocation sentence. The trial court also ordered Ferguson to provide a DNA sample and pay two \$250 mandatory DNA surcharges.

Appellate counsel filed a thirty-seven-page no-merit report that addresses twenty-four potential appellate issues. For instance, the no-merit report discusses pretrial litigation concerning Ferguson's challenge to the search warrant and a competency evaluation that was conducted at the request of trial counsel. The no-merit report also discusses the selection of the jury, objections made during the trial, and potential motions that could have been brought. Finally, the no-merit report discusses the sentences imposed. Appellate counsel concludes there would be no arguable merit to assert that Ferguson is entitled to a new trial or other relief. This court agrees with appellate counsel's thorough description and analysis of the potential issues identified in the no-merit report, and we independently conclude that pursuing those issues

would lack arguable merit. In addition to agreeing with appellate counsel's description and analysis, we will briefly discuss several of the identified issues.³

We begin with Ferguson's pretrial motion challenging the search warrant. Ferguson requested a *Franks/Mann* hearing at which he would have had the opportunity to show, by a preponderance of the evidence, that the officer who signed the affidavit in support of the search warrant deliberately or recklessly included false information in, or omitted material information from, the warrant affidavit. See *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *State v. Mann*, 123 Wis. 2d 375, 388-89, 367 N.W.2d 209 (1985). A defendant is entitled to a hearing on a motion to suppress evidence obtained through a search warrant if he or she "makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause." *Franks*, 438 U.S. at 155-56; see also *State v. Anderson*, 138 Wis. 2d 451, 462, 406 N.W.2d 398 (1987).

Ferguson's two-page motion alleged that the affidavit was deficient because it "contained a substantial amount of 'boilerplate' language." The motion also complained that while the officer's affidavit indicated that he received information from a confidential informant within the previous seventy-two hours, he did not specify the date or time that information was received. The motion further asserted that police reports provided to the defense did not indicate that the police conducted surveillance of Ferguson or his home after talking with the confidential

³ This court will not attempt to address every issue that arose in this case. The thirty-seven-page no-merit report provides an exhaustive summary of the numerous motions and rulings that occurred before and during trial. As noted, we agree with appellate counsel's analysis and conclusion that none of the issues identified presents an issue of arguable merit.

informant and that the State did not provide any police reports concerning the interview of the confidential informant. In addition, the motion pointed out that although the confidential informant said there were two guns in the residence, only one was recovered during the search. The motion concluded: “[T]he combination of missing information combined with the affidavit’s inaccuracies and missing police reports can only lead [to] one conclusion. The affidavit supporting the search warrant contained deliberately misleading representations.”

In response, the State filed a brief arguing that Ferguson’s motion “failed to establish that the Affiant made a knowing, intentional or reckless false statement.” The trial court concluded that Ferguson had not “met [his] burden to have a preliminary showing that the affidavit contains false statements that were either knowingly, intentionally made or [made] with reckless disregard for the truth.” The trial court said that “case law requires more than a conclusory statement” and Ferguson’s motion lacked support such as “affidavits or sworn statements from reliable witnesses to ... corroborate the conclusion or assertion that information in the affidavit is either false or misleading or [made] with a reckless disregard for the truth.”

We agree with appellate counsel that there would be no arguable merit to challenge the trial court’s ruling. The assertions Ferguson made in his motion were conclusory and unsupported, and the record does not reveal any support for those allegations.

The next issue we address is the pretrial competency evaluation, which trial counsel requested based on several statements Ferguson made to him. The record indicates that a psychologist met with Ferguson, who told her that “he did not believe he needed to be evaluated” and “was competent.” Ferguson refused to participate in the examination. The psychologist reviewed Ferguson’s medical records from his current and prior incarcerations and spoke to several individuals about Ferguson. She concluded that there was “little to no indication that Mr.

Ferguson suffers from a mental illness or cognitive deficiencies that would impede his ability to communicate reliably and effectively so that he might assist defense counsel.”

At the hearing on the competency report, the State and trial counsel both indicated that they were not challenging the psychologist’s findings. At first Ferguson said that he would not waive his right to an evidentiary hearing on his competency. However, when the trial court called the psychologist to offer testimony about her report, Ferguson told the trial court that he was competent, obviating the need for an evidentiary hearing. *See* WIS. STAT. § 971.14(4)(b). The trial court found that Ferguson was competent and the case proceeded. We agree with appellate counsel that there is no appealable issue related to the trial court’s finding that Ferguson was competent to proceed.

We turn to an issue Ferguson raised with appellate counsel. The no-merit report explains: “[Ferguson] complains that the [S]tate should have been forced to disclose the identity of the confidential informant” who provided information that led to the issuance of the search warrant. This would have required the filing of a motion pursuant to *State v. Outlaw*, 108 Wis.2d 112, 121-27, 321 N.W.2d 145 (1982), the supreme court case that set forth the requirements a defendant must meet before the State is required to identify a confidential informant. *See also* WIS. STAT. § 905.10 (discussing the State’s privilege to refuse to disclose an informant’s identity and the exception that applies when the informant’s testimony is “necessary to a fair determination of the issue of guilt or innocence in a criminal case”).

In this case, trial counsel explicitly noted during the trial that he determined before trial that there was no basis to bring an *Outlaw* motion. However, trial counsel said, testimony from one officer about search warrants had led trial counsel to become concerned that jurors might have the impression that there were neighborhood complaints about Ferguson dealing drugs.

Trial counsel said that testimony from the confidential informant might be needed to rebut that impression. In response, the trial court said that so far, it had heard only general information from the officers. It said that testimony from the informant would be needed only if the State were to try “to introduce evidence about what a confidential informant saw or did.” Trial counsel did not voice disagreement with the trial court’s observations and did not formally move for the State to disclose the confidential informant’s identity. Further, no officer subsequently testified about what the confidential informant saw or did in this case.

We agree with appellate counsel that the record does not suggest testimony from the confidential informant was necessary for Ferguson to have a fair trial. There would be no arguable merit to seek relief based on trial counsel’s decision not to move that the State be required to reveal the confidential informant’s identity or based on the trial court’s statements about the officer’s testimony.

Next, we consider the sufficiency of the evidence. We have carefully reviewed the record. The officers’ testimony and the evidence seized from the truck and the home—including individually wrapped packages of marijuana, large amounts of cash, a digital scale, a gun, bullets, and other evidence—provided ample evidence to support the jury’s findings that Ferguson, a convicted felon, possessed a gun and possessed more than 1000 grams of marijuana with intent to deliver.

We turn to the sentencing. We conclude that 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, ¶¶41-43.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *Gallion* and its progeny. The trial court addressed Ferguson's criminal history, including the fact that he was on extended supervision at the time of his arrest. It also discussed the two crimes of which he was convicted and the "very high need to protect the community from" Ferguson. Our review of 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 merit to assert that the sentences were excessive. *See Ocanas*, 70 Wis. 2d at 185. The trial court could have imposed a total of fourteen years of initial confinement and ten years of extended supervision. The two concurrent sentences totaling seven years of initial confinement and four years of extended supervision do not shock the conscience. *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.").

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 Richard L. Zaffiro is relieved of further representation of Ferguson 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
Acting Clerk of Court of Appeals