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January 26, 2018

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

2016AP2237-CRNM State of Wisconsin v. Shaker W. Davis, IV (L.C. # 2012CF6060)

Before Kessler, Brash and Dugan, 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).

A jury found Shaker W. Davis, IV, guilty of one count of possessing a firearm while a felon and two counts of bail jumping, all felony offenses, and one misdemeanor count of possessing tetrahydrocannabinols (marijuana). The circuit court found that Davis committed his crimes as a repeat offender. The circuit court imposed an evenly bifurcated five-year term of

imprisonment for the unlawful possession of a firearm. For each bail jumping conviction, the circuit court imposed an evenly bifurcated two-year term of imprisonment, one term concurrent with and one term consecutive to any other sentence. For the misdemeanor offense, the circuit court imposed a $500 fine. The circuit court also imposed a DNA surcharge for each conviction. Davis subsequently moved for relief from the four DNA surcharges. The circuit court entered a postconviction order concluding that Davis was required to pay a single $250 DNA surcharge for possessing a firearm while a felon. The circuit court vacated the other three DNA surcharges. Davis appeals.

Davis's appointed postconviction and appellate counsel, Benjamin T. Van Severen, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Davis did not respond. This court has considered the no-merit report and independently reviewed the record. We conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State alleged that Davis possessed a firearm while a felon and that he possessed tetrahydrocannabinols, all on December 17, 2012. The State further alleged that on that date, Davis was out of custody after posting bail on a felony charge, so his alleged possession of a firearm and of a controlled substance constituted felonious failures to comply with the conditions of his bond. The State asserted that Davis committed all four crimes as a repeat offender because

[1] The instant no-merit proceeding is the second no-merit appeal arising out of Davis's convictions in this matter. After filing an earlier no-merit report, appellate counsel considered an inquiry from this court and concluded that the case warranted further postconviction proceedings. We granted appellate counsel's requests for voluntary dismissal and an extension of Davis's appellate deadlines. *See* ***State v. Davis***, No. 2016AP243-CRNM, unpublished op. and order (WI App July 22, 2016). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

he previously was convicted of a felony in 2010. Davis demanded a jury trial, which commenced in February 2014.

We first consider whether Davis could raise an arguably meritorious challenge to his conviction based on the jury selection process. After a jury was chosen but before it was sworn, several jurors voiced concerns about the burden of service. Defense counsel then moved to dismiss the chosen panel, asserting it was tainted by the belated statements from jurors who did not want to serve. Davis personally confirmed that he supported the motion. The circuit court granted the requested relief and brought in a new slate of prospective jurors from which the parties selected the panel that ultimately served in this matter. Davis could not raise an arguably meritorious challenge based on the foregoing events. He moved to dismiss the original jury, and principles of judicial estoppel prevent him from complaining on appeal that the circuit court granted him the relief he requested.[2] *See* ***State v. Washington***, 142 Wis. 2d 630, 635, 419 N.W.2d 275 (Ct. App. 1987).

We next consider whether Davis could challenge the sufficiency of the evidence. Before the jury could find Davis guilty of possessing a firearm while a felon, the State was required to prove that he possessed a firearm and that he had been convicted of a felony before the date of the offense. *See* WIS. STAT. § 941.29(2)(a) (2011-12); WIS JI—CRIMINAL 1343 (2011). Before the jury could find Davis guilty of possessing tetrahydrocannabinols, the State was required to prove that he possessed a substance, the substance was tetrahydrocannabinols, and Davis knew or believed that the substance was tetrahydrocannabinols. *See* WIS. STAT. § 961.41(3g)(e)

[2] For the sake of completeness, we observe that, because the jurors chosen from the first venire were not sworn, jeopardy had not attached at the time those jurors were dismissed. *See* WIS. STAT. § 972.07(2) (providing that jeopardy attaches after a selected jury is sworn).

(2011-12); WIS JI—CRIMINAL 6030 (2013). Before the jury could find Davis guilty of bail jumping, the State was required to prove that he was charged with a felony, released on bond, and intentionally failed to comply with the terms of the bond. *See* WIS. STAT. § 946.49(1)(b) (2011-12); WIS JI—CRIMINAL 1795 (2010). The State presented evidence that satisfied the elements of each offense.

Officers Michael Martin and Michael Slomczewski testified that on December 17, 2012, they conducted a traffic stop of a vehicle after observing that the two occupants were not wearing seatbelts. The driver, subsequently identified as Davis, consented to a search of his person. During the search, Martin found a substance in Davis's pocket that Martin suspected was marijuana. The police then searched the car and found a gun under the seat. A forensic investigator described swabbing the gun for DNA, and another officer described executing a post-arrest search warrant and taking a DNA sample from Davis.

Lisa Treffinger, a forensic scientist employed by the Wisconsin State Crime Laboratory, testified that DNA analysis revealed a match between Davis's DNA and DNA found on the gun. She said that only one in seventy-seven trillion people would have the same DNA profile as Davis, and, in light of that statistic, she concluded to a reasonable degree of scientific certainty that Davis was the source of DNA found on the gun.

Birjees Kauser, a chemist from the State Crime Laboratory, described testing the substance found in Davis's pocket. She told the jury the substance contained tetrahydrocannabinol, the active ingredient in marijuana.

Davis stipulated that he was convicted of a felony before December 17, 2012, and was not permitted to possess a firearm. He also stipulated that on December 17, 2012, he was out of

custody on bond, knew the conditions of his bond, and knew that those conditions included a provision that he not commit any crime.

When this court reviews the sufficiency of the evidence on appeal, we apply a highly deferential standard. We may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This court will uphold a jury's verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. *See* ***id.*** In light of our deferential standard of review, an appellate challenge to the sufficiency of the evidence would lack arguable merit.

Davis did not testify at trial, and we have considered whether he could mount an arguably meritorious claim that he was deprived of the right to testify in his own defense. The circuit court conducted a colloquy with Davis and established on the record that he understood his right to testify on his own behalf, that he had discussed that right with his trial lawyer, and that he knowingly and voluntarily chose not to testify. The colloquy satisfied the requirements for a valid waiver of the right to testify. *See* ***State v. Weed***, 2003 WI 85, ¶¶43-44, 263 Wis. 2d 434, 666 N.W.2d 485. Further appellate proceedings to pursue this issue would be frivolous within the meaning of ***Anders***.

We have considered whether Davis could mount an arguably meritorious claim that he suffered a violation of his right to confront a witness against him because he did not have the opportunity to cross-examine the person who analyzed the DNA in this case. Instead, Treffinger testified about the results of an analysis conducted by one of her colleagues at the State Crime

Laboratory. A criminal defendant has the right under the Federal and Wisconsin Constitutions to confront his or her accusers. *See* U.S. CONST. amend. VI; WIS. CONST. art. I, § 7. Because Davis did not raise a confrontation clause claim at trial, however, he would be required to pursue any such claim in postconviction proceedings as an allegation that his trial lawyer was constitutionally ineffective for failing to raise the issue. *See* ***State v. Carprue***, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31.

To prevail in a claim of ineffective representation, a defendant must prove both that the lawyer's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant fails to satisfy one prong of the analysis, a reviewing court need not address the other. ***Id.*** at 697.

We have therefore considered whether Davis could make an arguably meritorious claim that his trial counsel performed deficiently by failing to claim that Treffinger's testimony violated his right of confrontation. He could not. The question is governed by application of the rule "that a defendant's right to confront witnesses against him is not violated when a testifying expert reviews the case file and comes to an independent conclusion, even though the expert's opinion is based in part on tests performed by another analyst." *See* ***State v. Griep***, 2015 WI 40, ¶29, 361 Wis. 2d 657, 863 N.W.2d 567. Here, Treffinger testified that every year she conducts approximately 100 peer reviews of her colleagues' DNA analyses. She confirmed that, following her peer review in this case, she independently concluded to a reasonable degree of scientific certainty that Davis contributed the DNA that was on the gun found in this case. Davis had the opportunity to confront and cross-examine Treffinger. We are satisfied that Davis could not pursue an arguably meritorious challenge to trial counsel's effectiveness based on failure to allege a confrontation clause violation.

In the no-merit report, appellate counsel examines whether Davis could mount arguably meritorious claims that his trial counsel was ineffective for failing to challenge the stop of the car Davis was driving and for failing to pursue suppression of the evidence found during the course of that stop. Upon our independent examination of the record, we agree that it does not support such claims. "An officer may conduct a traffic stop when he or she has probable cause to believe a traffic violation has occurred." ***State v. Popke***, 2009 WI 37, ¶13, 317 Wis. 2d 118, 765 N.W.2d 569. Here, Martin and Slomczewski both testified at trial that they stopped the car that Davis was driving after observing that neither of the two occupants was wearing a seatbelt. Operating a car when its occupants are not wearing seatbelts normally violates WIS. STAT. § 347.48(2m). A copy of the citation that Davis received for the seatbelt violation was entered as an exhibit at trial.[3] Further proceedings based on allegations of an improper vehicular stop would lack arguable merit.

Martin's testimony established that after the vehicular stop, Davis consented to a pat-down search. "A 'search authorized by consent is wholly valid.'" ***State v. Williams***, 2002 WI 94, ¶19, 255 Wis. 2d 1, 646 N.W.2d 834 (citation omitted). During the search, Martin found marijuana in Davis's pocket. That discovery justified the subsequent search of the car that Davis was driving. *See* ***State v. Smiter***, 2011 WI App 15, ¶¶2, 14-16, 331 Wis. 2d 431, 793 N.W.2d 920 (discovery of illegal drugs following a traffic stop constitutes reasonable suspicion that further evidence of drug crimes might be found in the defendant's vehicle, warranting a search of

[3] Electronic docket entries of the City of Milwaukee Municipal Court, of which we may take judicial notice, *see* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522, show that Davis was found guilty of the seatbelt violation.

the vehicle). On this record, further proceedings to pursue a claim premised on allegations of an improper search would lack arguable merit.

We next consider whether Davis could pursue an arguably meritorious challenge to his sentences. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court indicated that punishment was the primary sentencing goal, and the court discussed the factors that it viewed as relevant to that goal. The circuit court considered the gravity of the

offenses and determined that they were of intermediate severity. The circuit court noted that Davis "was not about to commit an armed robbery or shoot someone," but that he was flouting the law in numerous ways at the time he was stopped. In assessing Davis's character, the circuit court took into account that he previously was both adjudicated delinquent for possessing a controlled substance and found guilty of possessing a short-barreled shotgun. In the circuit court's view, Davis's history reflected an "undesirable behavior pattern." *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (criminal history is evidence of character). The circuit court also observed that Davis did not take responsibility for his crimes, and the court concluded it could not find him to be remorseful. In discussing the need to protect the public, the circuit court found that Davis was a potential danger to himself, the police, and the community by going armed with a loaded firearm when he was prohibited from doing so.

The circuit court appropriately considered whether to impose probation as a disposition here. *See* ***Gallion***, 270 Wis. 2d 535, ¶25 (stating that the circuit court should consider probation as the first sentencing alternative). The circuit court concluded, however, that probation would unduly depreciate the gravity of the offenses. Additionally, the circuit court observed that Davis committed his crimes while subject to conditions of bail imposed in another pending case, reflecting his inability to conform his conduct as required while in the community.

Upon review of the totality of the circumstances, the circuit court rejected as too severe the State's recommendation for five and one-half years of initial confinement and five years of extended supervision. The circuit court instead imposed an aggregate, evenly-bifurcated seven-year term of imprisonment for the felony offenses, and a $500 fine for possessing tetrahydrocannabinols.

The circuit court identified the factors that it considered in choosing sentences in this matter. The factors are proper and relevant.[4] Moreover, the sentences are not unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Here, Davis, a repeat offender, faced maximum sentences of fourteen years of imprisonment and a $25,000 fine for possession of a firearm while a felon, two years of imprisonment and a $1,000 fine for possessing tetrahydrocannabinols, and ten years of imprisonment and a $10,000 fine for each bail jumping conviction. *See* WIS. STAT. §§ 941.29(2)(a) (2011-12); 961.41(3g)(e) (2011-12); 946.49(1)(b) (2011-12); 939.50(3)(g)-(h) (2011-12); 939.62(1)(a)-(b) (2011-12). The penalties imposed were far less than the law allowed. "'[A] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Grindemann***, 255 Wis. 2d 632, ¶31 (citation omitted). Accordingly, Davis's sentences are not unduly harsh or excessive. We conclude that a further challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

[4] A COMPAS report was attached to the presentence investigation report filed in this matter. COMPAS is an assessment tool used, in part, to predict recidivism. *See* ***State v. Loomis***, 2016 WI 68, ¶¶13-14, 371 Wis. 2d 235, 881 N.W.2d 749. Long after the completion of circuit court proceedings in this matter, the supreme court released ***Loomis*** to resolve a challenge to the use of a COMPAS risk assessment in sentencing. The ***Loomis*** court concluded that a sentencing court may consider a COMPAS risk assessment, *see* ***id.***, ¶¶8-9, but the assessment may not be "determinative in deciding whether [the defendant] should be incarcerated, the severity of the sentence or whether [the defendant] could be supervised safely and effectively in the community," *see* ***id.***, ¶109. In the present case, the sentencing court did not mention the COMPAS risk assessment. Therefore, we conclude that no arguably meritorious basis exists to contend that the COMPAS risk assessment was "determinative" in sentencing.

We next consider whether Davis could mount an arguably meritorious claim that the circuit court erred by denying him eligibility for the Wisconsin substance abuse program and the challenge incarceration program. Both prison programs offer substance abuse treatment, and an inmate who successfully completes either program may convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2. A circuit court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's conclusions if they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; WIS. STAT. § 973.01(3g)-(3m).[5] In this case, the circuit court explained that eligibility for the treatment programs would potentially reduce Davis's time in initial confinement to less than the circuit court deemed necessary for punishment. Further pursuit of this issue would lack arguable merit.

We last consider whether Davis could pursue an arguably meritorious challenge to the $250 DNA surcharge that the circuit court declined to vacate. We conclude he could not do so.

The law in effect in December 2012, when Davis committed the crimes underlying this appeal, gave the circuit court discretion to impose a $250 DNA surcharge when imposing a sentence for most felonies, including possessing a firearm while a felon. *See* WIS. STAT. § 973.046(1g) (2011-12); *see also* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752

[5] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

N.W.2d 393.[6] Effective January 1, 2014, the legislature amended the law to require the sentencing court to impose a $250 DNA surcharge for each felony conviction and a $200 DNA surcharge for each misdemeanor conviction, irrespective of when the crime was committed. *See* 2013 Wis. Act 20, §§ 2353-55, 9426(1)(am); *see also* WIS. STAT. § 973.046(1r). In a series of subsequent decisions, this court held that a sentencing court could not impose multiple mandatory DNA surcharges for felony offenses committed before January 1, 2014, *see* ***State v. Radaj***, 2015 WI App 50, ¶¶4-5, 35-36, 363 Wis. 2d 633, 866 N.W.2d 758, or any DNA surcharges for misdemeanors committed before that date and resolved as of April 1, 2015, *see* ***State v. Elward***, 2015 WI App 51, ¶¶2, 7, 363 Wis. 2d 628, 866 N.W.2d 756; but the supreme court upheld imposing a single mandatory DNA surcharge at sentencing after January 1, 2014, for a felony committed before that date. *See* ***State v. Scruggs***, 2017 WI 15, ¶¶49-50, 373 Wis. 2d 312, 891 N.W.2d 786.

The circuit court sentenced Davis in April 2014. In postconviction proceedings, the circuit court determined that he was subject to a single mandatory $250 DNA surcharge pursuant to ***Scruggs*** and WIS. STAT. § 973.046(1r). We agree. We acknowledge that while this appeal was pending, we held that a circuit court must normally exercise discretion before imposing a DNA surcharge for a crime committed before January 1, 2014, if the defendant previously provided a DNA sample in connection with another case.[7] *See* ***State v. Williams***, 2017 WI App 46, ¶27, 377 Wis. 2d 247, 900 N.W.2d 310, *review granted* (WI Oct. 10, 2017)

[6] When we decided ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, the governing version of WIS. STAT. § 973.046(1g) was identical to the version in effect when Davis committed the crimes at issue here.

[7] The certified documents attached to the criminal complaint reflect that Davis was ordered to submit a DNA sample in connection with a felony conviction in 2010.

(No. 2016AP883-CR). That rule is inapplicable here. It applies only when "no DNA-analysis-related activity occurs in relation to the particular conviction for which the surcharge is imposed." *See* ***id.***, ¶¶24-26. In this case, the State conducted DNA testing to connect Davis to the firearm found in the car he was driving. Accordingly, ***Williams*** does not apply.

Moreover, were we to believe that ***Williams*** controls here, we would nonetheless conclude that Davis cannot pursue an arguably meritorious challenge to the DNA surcharge imposed. "'[R]egardless of the extent of the [circuit] court's reasoning, we will uphold a discretionary decision if there are facts in the record which would support the [circuit] court's decision had it fully exercised its discretion.'" ***State v. Payano***, 2009 WI 86, ¶41, 320 Wis. 2d 348, 768 N.W.2d 832 (citation omitted). We have rejected the notion that the circuit court must use "magic words" when deciding to impose a DNA surcharge. *See* ***State v. Ziller***, 2011 WI App 164, ¶¶12-13, 338 Wis. 2d 151, 807 N.W.2d 241. The circuit court's entire sentencing rationale may be examined to determine if imposition of the DNA surcharge is a proper exercise of discretion. *See* ***id.***, ¶¶11-13.

In this case, the circuit court's sentencing remarks expressly included reference to the fact that "[Davis's] DNA is on the firearm" found in the car Davis was driving, and the court went on to describe as "overwhelming" the evidence that Davis possessed the firearm. In ***Cherry***, we explained that among the factors that may support a discretionary DNA surcharge is that "the case involved any evidence that needed DNA analysis so as to have caused DNA cost." *See* ***id.***, 312 Wis. 2d 203, ¶10. Given the use of DNA testing to connect Davis to the firearm in this case, the imposition of a DNA surcharge for the firearm conviction can be sustained as a reasonable exercise of discretion. Accordingly, we are satisfied that a challenge to the imposition of the surcharge would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Benjamin T. Van Severen is relieved of any further representation of Shaker W. Davis, IV, on appeal. *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