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April 17, 2018

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

2016AP1947-CRNM State of Wisconsin v. Keith Bryant Anderson
(L. C. No. 2015CF2223)

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 Keith Anderson has filed a no-merit report concluding no grounds exist to challenge Anderson's convictions for possession of a firearm by a felon and disorderly conduct while armed. Anderson filed a response challenging the effectiveness of his trial counsel, and appellate counsel filed a supplemental no-merit report addressing his claims. 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 (2015-16).¹

The charges against Anderson stemmed from a police investigation following a report of shots fired on a residential street in Milwaukee. Before trial, Anderson stipulated that he had a prior felony conviction. At trial, James Exum testified that while sitting on his front porch during daylight hours, he saw an individual he identified as Anderson drive up in a gray convertible with the top down, park, get out of the car with a black handgun in his right hand, and walk between two houses across the street from his house.² Exum then saw Anderson walk back to his car and drive off. According to Exum, Anderson later returned in the same vehicle with two passengers, stopped in front of the house across the street, and fired one shot in the air. As Anderson drove away, Exum saw a group of young males emerge from a lot next to his house and shoot multiple times at Anderson's car, which then crashed into a parked car before Anderson, along with the other occupants, jumped out with his gun and ran down the street. When police arrived at the scene, a bullet and spent casings were found under the seat and on the floorboard inside the abandoned car.

Anderson's mother, Taisha Chatman, testified that she lived a block away from the shooting scene and Anderson, along with a male friend of his, had been at her house all day for a party. Chatman recounted that when Anderson left the party, he was going to take her stepdaughter home.

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

² The complaint states that on the day of the incident, Exum identified Anderson from a photo array as the shooter and driver of the vehicle.

After a colloquy in which Anderson confirmed he was voluntarily choosing to testify, Anderson testified he had been at his mother's house all day and did not leave until 7:30 p.m., when he and a friend left in Anderson's car to take Chatman's stepdaughter home. Anderson stated that when they drove onto North 23rd Street, they heard guns and a bullet hit the car, they ducked, and Anderson hit a parked car while attempting to drive away. Anderson denied that he had a gun in the car and denied knowledge of any of the shell casings inside the car.

Anderson was convicted upon the jury's verdicts of the crimes charged. Out of a maximum possible sentence of ten years and nine months,³ the circuit court imposed concurrent sentences resulting in a six-year term consisting of two and one-half years' initial confinement followed by three and one-half years' extended supervision. The circuit court granted Anderson's postconviction motion for four days of presentence credit on both counts and a reduction in the amount of DNA surcharges.

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdicts; whether the circuit court properly exercised its sentencing discretion; and whether trial counsel was ineffective by failing to object to potential hearsay statements and by eliciting testimony regarding Anderson's probation status. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit.

In his response to the no-merit report, Anderson raises additional challenges to the effectiveness of his trial counsel. To establish ineffective assistance of counsel, Anderson must

³ The maximum sentence for the disorderly conduct charge was ninety days in jail plus six months for the dangerous weapon enhancer.

show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance affected the outcome of the trial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Anderson claims his trial counsel was ineffective by failing to "investigate and call witnesses in support of his defense." Specifically, Anderson asserts his trial counsel should have called Vanessa McCullum and Chatman's stepdaughter as witnesses to refute Exum's identification of Anderson as the person who shot the gun from the car. The supplemental no-merit report, along with appellate counsel's affidavit, reflect that trial counsel made strategic decisions not to call either witness.

McCullum, who lived on 23rd Street, reported to police that she observed the driver of the car that crashed on her street shoot a gun in the air. She also reported that earlier, she observed the same person get out of the same car with a gun and walk between her house and the house next door. Trial counsel did not believe McCullum would be a helpful witness based on her reported observations, as Anderson admitted driving the car that crashed at the scene. To the extent Anderson emphasizes that McCullum was unable to identify him from a photo array shown to her by police on the night of the incident, McCullum indicated she did not get a good look at the man's face. Therefore, her inability to identify Anderson from the photo array did not exculpate him. Further, trial counsel anticipated that McCullum's inability to identify Anderson from the photo array would be introduced through police testimony, and a police detective ultimately testified to this fact at trial.

Trial counsel decided not to call Chatman's stepdaughter as a witness in an effort to avoid the admission of her statement to police. The stepdaughter told police that on the day in

question, Anderson showed her a silver and black handgun that he claimed he stole from the father of his sister's baby. She further reported that she left the party with Anderson and his "guy," and as Anderson's car traveled on 23rd Street, Anderson shot at his sister's house before people started shooting at Anderson's car. The stepdaughter stated that when the shooting stopped, she ran from the car and hid in some bushes several blocks away. Although she later claimed that the police tricked her when she gave the statement and that she was willing to recant, trial counsel made a strategic decision not to call the stepdaughter as a witness to avoid the introduction of her damaging police statement. Trial counsel believed that her conflicting statements would be more harmful than helpful to Anderson's defense.

"Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. 668 at 690. We agree with counsel's conclusion in the supplemental no-merit report that trial counsel's strategic decisions were not objectively unreasonable. Anderson's claims that trial counsel was ineffective by failing to call these witnesses therefore lacks arguable merit. Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a *Machner*⁴ hearing.

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

Therefore,

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

⁴ See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

IT IS FURTHER ORDERED that attorney Andrea Taylor Cornwall is relieved of her obligation to further represent Anderson in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals