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June 26, 2018

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

2016AP2227-CRNM State of Wisconsin v. John M. Lewis (L. C. No. 2014CF213)

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 John Lewis has filed a no-merit report concluding no grounds exist to challenge Lewis's conviction for second-degree intentional homicide or the denial of a postconviction motion. Lewis has responded that his plea was not voluntary due to ineffective assistance of his trial counsel. 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 and summarily affirm. *See* WIS. STAT. RULE 809.21 (2015-16).¹

The charges in this case stemmed from a fight and subsequent murder outside a bar in Wausau. Lewis was charged with a count of first-degree intentional homicide and twenty-five other counts including various felony bail jumping counts as a repeater; numerous counts of possession of firearms by a felon, as a repeater; numerous counts of possession with intent to deliver heroin, as a repeater; possession of other drugs, as a repeater; and possession of drug paraphernalia, as a repeater. Lewis agreed to plead no contest to a single amended count of second-degree intentional homicide, and the twenty-five other counts were dismissed outright, together with the dismissal of a separate case and another uncharged offense. The circuit court imposed a sentence consisting of forty years' initial confinement and twenty years' extended supervision.

The no-merit report addresses whether Lewis's plea was knowingly, voluntarily, and intelligently entered; whether the circuit court properly exercised its sentencing discretion;² whether Lewis received the effective assistance of counsel; and whether the court erred by denying Lewis's postconviction motion. We agree with counsel's analysis and conclusion that there is no arguable merit to these issues.

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

² We note the presentence investigation report referenced the COMPAS risk assessment. However, the circuit court specifically referenced at sentencing its awareness of the recently decided *State v. Loomis*, 2016 WI 68, ¶¶98-99, 371 Wis. 2d 235, 881 N.W.2d 749, and stated, "I will disregard the COMPAS assessment when imposing sentence." Accordingly, any challenge to the sentence based on COMPAS would lack arguable merit.

In his response to the no-merit report, Lewis insists his trial attorney performed ineffectively. Lewis specifically asserts an “outright failure to investigate witnesses,” and he also contends his attorney “never even took into consideration to hire a private investigator [or] to make a judgment call to do his own investigation into all the numerous statements ... or even draw the conclusion of self-defense” Lewis’s affidavit in support of his postconviction motion seeking to withdraw his plea based on ineffective assistance of counsel also stated:

[I]t occurred to me that my trial attorney had done absolutely nothing to assist in my defense had I proceeded to trial, such as hiring a private investigator to interview the State’s witnesses disclosed through discovery. Believing that he would make no such effort in the future, I believed that I had no choice but to proceed with the plea agreement that day.

Similarly, Lewis testified at the postconviction hearing:

Q: Okay. So in your affidavit in support of this motion, you state that eventually you decided to go through with the plea because you didn’t feel Mr. Wallace had properly prepared for your trial; is that correct?

A: Yes.

Q: Could you explain why you believe that?

A: Because in 21 months he hadn’t ... did no investigations with none of the witnesses. He didn’t ... did none of that, no investigation as far as my side of the story and what happened. He said that he is putting all of these statements together, but a lot of these statements they was saying that I was jumped and they followed me to my car, so how could you come to the conclusion that all of these statements put together say that I just went to the car, came back, and just shot him.

They followed me to my car, tried to explain that to him – do you know what I mean – and I feel like he did not do none of that information or none of the investigation to questioning the witnesses, because a lot of witnesses that they had numerous statements, even within that timeframe of the date that the incident had happened, and then afterwards they came back and talked to the police when they found them self [sic] in trouble again, and then added it, well, I remember it from this day, months down the line.

The circuit court concluded at the outset that Lewis's motion and affidavit were conclusory. Moreover, the court specifically rejected Lewis's contention that his trial attorney failed to conduct a thorough investigation or review of the case. In this regard, the court specifically found credible trial counsel's testimony at the postconviction hearing. The court stated: "His testimony included that he had reviewed all the reports. He had listened to recordings. He had compared statements for inconsistencies, and in fact, he talked to Mr. Lewis about all that. So he was not deficient in the performance of his duties either."

The circuit court further found that the issue of self-defense "was always present and being discussed." The court also recognized Lewis's extensive criminal history and stated, "I don't find it believable that Mr. Lewis wasn't clear on the charge or that he was forced to enter a plea" The court emphasized the dismissal of twenty-five charges, and the reduction of Lewis's potential punishment by approximately 400 years, in exchange for a plea to a single amended count of second-degree intentional homicide. The court specifically found:

So when I look at this entire record, the Court finds that he did understand the plea offer, he did understand the charge he was pleading to, he clearly understood the maximum penalty he was facing, and the Court finds that he did knowingly and voluntarily enter his plea

Quite simply, the circuit court believed the attorney's version of the facts and found Lewis' testimony not credible. The credibility of witnesses and the weight to be given their testimony are matters for the circuit court to decide. *State v. Baudhuin*, 141 Wis. 2d 642, 647, 416 N.W.2d 60 (1987). The record in this case more than amply supports the court's determinations.

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.

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of his obligation to further represent Lewis in this matter. 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