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DISTRICT IV

June 27, 2018

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

2017AP1839-CRNM State of Wisconsin v. Joseph J. Howard (L.C. # 2015CF97)

Before Lundsten, P.J., Blanchard, and Fitzpatrick, 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).

Joseph Howard appeals a judgment convicting him, following a jury trial, of a second and subsequent offense of possession of narcotic drugs, as a repeat offender. Attorney Steven Zaleski has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT.

RULE 809.32 (2015-16);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses a suppression motion, the sufficiency of the evidence, the chain of custody for the seized drugs, and sentencing issues. Howard was sent a copy of the report, and has filed a response alleging that appellate counsel was ineffective for failing to fully research the law and record, that trial counsel was ineffective for failing to call and cross examine the woman who had informed the police that Howard was selling heroin; that Howard's due process rights were violated by having to wear a "stun-gun belt" at trial; that the drug evidence produced at trial did not match the description in the police reports of the seized drugs; that a police officer testified about additional drug paraphernalia evidence that was not produced at trial; and that the circuit court allowed hearsay evidence to be introduced at trial. Upon reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues.

First, we have reviewed the trial transcript and are satisfied that the evidence was sufficient to prove all the elements of the charged offense. *See* WIS. STAT. § 961.41(3g)(am) and WIS JI—CRIMINAL 6030 (setting forth elements of possession of a controlled substance). Agent Robert Deglow testified that he participated in a search of Howard's apartment. Deglow discovered three individually packaged baggies inside the battery compartment of a remote control on a nightstand in Howard's bedroom, next to Howard's wallet. Former Beaver Dam Police Detective Ryan Klavekoske also participated in the search. Klavekoske took possession of the baggies and sealed them into an evidence bag. Based upon Klavekoske's observations during the search, Howard appeared to be the sole occupant of the apartment. Lieutenant

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

Terrence Gebhardt of the Beaver Dam Police Department testified that he took the sealed evidence bag to the Wisconsin Department of Justice Crime Laboratory, and subsequently received it back in the mail. David Hannon from the crime lab testified that he took possession of the sealed evidence bag, analyzed samples from the three baggies, and determined that the substance in the baggies contained heroin.

As to chain of custody, Howard may intend to argue that the jury could not reasonably have inferred that the heroin produced as an exhibit at trial was the same substance seized from his apartment. We disagree based on our review of the record. The jury could have reasonably inferred that the baggies were simply packaged differently at trial than when Klavekoske had last seen them because they had been opened and tested at the crime lab. Any alleged gaps in the testimony regarding the chain of custody of the baggies went to the weight of the evidence. *See* ***United States v. Lott***, 854 F.2d 244, 250 (7th Cir. 1988). It was for the jury to resolve any discrepancies in the description of the seized heroin and the remaining heroin produced as an exhibit at trial.

Further, Howard's defense at trial was not that the baggies seized from his apartment contained something other than heroin, but that Howard was not the one who had put the baggies into the remote. It was not necessary for the State to produce additional physical evidence, such as Howard's fingerprints on the remote, in order for the jury to make the reasonable inference that Howard possessed the remote that was found on his bedside table.

Next, we agree with counsel's analysis that the tip from Howard's girlfriend that Howard was selling heroin provided reasonable grounds for a probation search. Contrary to Howard's belief, it was not necessary for the State to produce the girlfriend's testimony at the suppression

hearing.[2] This does not raise a hearsay issue because the girlfriend's statements were not admitted at the suppression hearing for the truth of the matter asserted, but rather as an explanation for why the search was conducted.

Howard also complains that the investigative officer testified at the suppression hearing about finding plastic baggies and rubber gloves in a trash can, without producing those items at the suppression hearing. Howard refers to this as "hearsay evidence." However, the term "hearsay" refers only to statements made by someone out of court, and offered for the truth of the assertion, not to physical evidence. There was nothing improper about admitting or relying upon the officer's testimony as to his own observations.

Howard asserts that defense counsel was ineffective for failing to call Howard's girlfriend to testify at trial, because Howard views the girlfriend as a "key witness" whose credibility could have been impeached. However, Howard provides us with no reason to believe that the girlfriend would have provided testimony favorable to Howard. To the contrary, based upon her statements to police, she could have provided additional inculpatory testimony. Nor was there any need to impeach the girlfriend, since her statements were not introduced at trial.

Howard complains that he was required to wear a "stun-gun belt" at trial. However, the circuit court noted on the record that Howard appeared at trial in civilian clothing, wearing an "RACC belt," which the court described as an "electronic control device," that was not visible.

[2] Howard also complains that the girlfriend, probation agent, and the officers who conducted the search did not testify at his revocation proceedings, but the revocation is not before us on this appeal.

Because the jury could not see the belt, the belt could not have affected the jury's view of Howard, and therefore did not violate Howard's due process rights.

A challenge to Howard's sentence would also lack arguable merit. The record shows that the circuit court considered relevant sentencing factors and rationally explained their application to this case, emphasizing that heroin is a particularly dangerous drug associated with many overdose deaths and that Howard had a significant criminal history, but acknowledging that he had also taken some positive steps in his life. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court imposed a three-year term of probation, as had been requested by the defense. The court also awarded 162 days of sentence credit as stipulated by the parties and imposed standard costs and conditions of supervision.

The period of probation imposed did not exceed the maximum available penalty. *See* WIS. STAT. §§ 961.41(3g)(am) (classifying possession of narcotic drugs as a Class I felony); 973.09 (setting term of probation for a felony at not less than one year and not more than the greater of three years or the initial period of confinement). Furthermore, the court imposed a term of probation in accordance with the defendant's own recommendation. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he affirmatively approved).

Finally, Howard asserts that appellate counsel failed to fully research the law and the record on review. However, as we have just explained, the issues that Howard wishes to raise on appeal lack arguable merit. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Steven Zaleski is relieved of any further representation of Joseph Howard in this matter pursuant to 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