



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

August 22, 2018

To:

Hon. Jodi L. Meier
Circuit Court Judge
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

Michael D. Graveley
District Attorney
912 56th St.
Kenosha, WI 53140-3747

Bradley J. Lochowicz
Seymour, Kremer, Koch, Lochowicz &
Duquette
P.O. Box 470
Elkhorn, WI 53121-0470

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Deareal T. Lott, #566756
Green Bay Corr. Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2017AP2478-CRNM State of Wisconsin v. Deareal T. Lott (L.C. # 2015CF1157)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).

Deareal T. Lott appeals from a judgment of conviction for armed robbery and felon in possession of a firearm, both as a repeater. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16),¹ and *Anders v. California*, 386 U.S. 738 (1967).

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

Lott received a copy of the report, was advised of his right to file a response, and has elected not to do so.² Appellate counsel has also filed a supplemental no-merit report as required by this court's May 17, 2018 order. Upon consideration of the reports and an independent review of the record, we conclude that there is no arguable merit to any challenge to the jury's verdicts or the sentence. However, as the supplemental no-merit report acknowledges, there is arguable merit to a claim that Lott's right to counsel was violated at the restitution hearing. Therefore, we accept the no-merit conclusion on the issues discussed in the no-merit report and this opinion, but dismiss the appeal and extend the time for Lott to file a WIS. STAT. RULE 809.30 postconviction motion on the arguably meritorious restitution issue. In the event that a second no-merit appeal is filed after a decision on a postconviction motion, the no-merit review will be limited to issues raised by the postconviction motion.³ Cf. *State v. Scaccio*, 2000 WI App 265, ¶8, 240 Wis. 2d 95, 622 N.W.2d 449 (the logic behind the rule that a postrevocation appellant cannot challenge the original conviction is that the appellant already had an opportunity to raise any issues relating to the conviction in a first direct appeal); *State v. Tobey*, 200 Wis. 2d 781, 784, 548 N.W.2d 95 (Ct. App. 1996) (cannot raise issues not pursued from original conviction and sentence because of dissatisfaction with the sentence imposed after probation revocation). See WIS. STAT. RULE 809.21.

² On May 25, 2018, the time for Lott to file a response to the no-merit report was extended to July 10, 2018. Lott has not filed a response.

³ We recognize that in accepting the no-merit conclusion on the jury trial and sentencing issues, we are conducting a partial no-merit review. Although an appellant is not entitled to a partial no-merit review, this court conducts partial no-merit reviews in some cases. *State ex rel. Ford v. Holm*, 2006 WI App 176, ¶¶6, 9-12, 296 Wis. 2d 119, 722 N.W.2d 609. A partial no-merit review is appropriate in this case because the court reviewed the entire record, including the transcript of the four-day jury trial, before discovering the potential issue from the transcript of the restitution hearing, which was originally missing from the record. A partial no-merit review in this circumstance promotes judicial economy.

Lott was charged with robbing a gas station. He pointed a gun at the clerk, demanded she open the cash drawer, and reached into the drawer for the cash. He was identified from the station's surveillance video. His pretrial motion to suppress the identification was denied. He presented an alibi defense at his jury trial through the testimony of his grandmother and sister. After he was found guilty of armed robbery and felon in possession of a firearm, Lott was sentenced to consecutive prison terms totaling fifteen years, six months' initial confinement and seven years' extended supervision. At sentencing, Lott's attorney requested that a restitution hearing be set to address the inclusion of a security system in the victim's restitution request. Nearly two months after sentencing, Lott appeared without counsel at a restitution hearing before a court commissioner. Restitution was ordered in the amount of \$8,446.14.

The no-merit report addresses the potential issues of whether there were errors in jury selection, whether Lott's custodial statement was properly admitted, whether the police officers' identification of Lott was suggestive or unreliable, whether the trial court erred in denying Lott's requested amendment to the burden of proof jury instruction, whether there was sufficient evidence to support the jury's verdicts, whether the sentence was the result of an erroneous exercise of discretion or unduly harsh, and whether it was error for restitution to include the costs of a surveillance system. Based on the discussion of the issues in the no-merit report and our independent review, this court is satisfied the issues raised in the no-merit report are without merit, and this court will not discuss them further.

We have also reviewed the record for potential issues that might arise in a jury trial which are not discussed in the no-merit report. Specifically, we have considered whether there is any arguable merit to challenge the rulings on evidentiary objections during trial, Lott's waiver of his right to testify, the jury instructions, the propriety of opening statements and closing arguments,

and the handling of the three jury questions, including whether it was acceptable for Lott's trial counsel to waive Lott's appearance in the courtroom when the questions were discussed. We conclude these parts of the jury trial do not give rise to any arguably meritorious appellate claim.

Having been sentenced to prison, Lott was in custody when the restitution hearing was held on July 21, 2017. When asked if he had been in touch with his trial counsel about the restitution hearing, Lott indicated he did not know if counsel was still representing him. Lott's request for counsel was denied. After informing Lott, "You're not entitled to have a lawyer for this. This is a civil proceeding," the court commissioner heard testimony from the victim. WISCONSIN STAT. § 973.20(14)(b) provides that at a hearing to determine restitution, "[t]he office of the state public defender is not required to represent any indigent defendant unless the hearing is held at or prior to the sentencing proceeding, the defendant is incarcerated when the hearing is held or the court so orders." There was no colloquy with Lott during the restitution hearing to obtain his waiver of his statutory right to counsel. Arguably, the violation of the statutory right to counsel is structural error and considered per se prejudicial. See *State v. Shirley E.*, 2006 WI 129, ¶62, 298 Wis. 2d 1, 724 N.W.2d 623. Even if a harmless error analysis applies to the denial of the statutory right to counsel at the restitution hearing, it is the State's burden to prove an error was harmless. *State v. Sherman*, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500. We cannot conclude that further postconviction proceedings would be without merit.

We accept the no-merit report in part, reject the no-merit conclusion in part, dismiss this appeal, deny counsel's motion to withdraw, and extend the time to file a postconviction motion.⁴ Although we will not conduct a second and subsequent no-merit review of the trial and sentencing issues discussed in the no-merit report and this opinion, appointed counsel is not precluded from raising any other issue in the postconviction motion that counsel now concludes has arguable merit.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is accepted in part and rejected in part, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion is reinstated and extended to thirty days after remittitur.

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

Sheila T. Reiff
Clerk of Court of Appeals

⁴ Appellate counsel's supplemental no-merit report does not indicate whether or not Lott wishes to pursue a postconviction motion challenging restitution. Lott may agree to forego a postconviction motion. See *State ex rel. Flores v. State*, 183 Wis. 2d 587, 617, 516 N.W.2d 362 (1994).