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October 4, 2018

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

2017AP2035-CRNM State of Wisconsin v. Loteria L. Harris (L.C. # 2015CF4985)

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

Attorney Jeffrey W. Jensen, appointed counsel for Loteria Harris, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses: (1) the

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

sufficiency of the evidence to support the jury verdicts; (2) whether there would be arguable merit to a challenge to the sentence imposed by the circuit court; and (3) whether there would be arguable merit to a claim of ineffective assistance of trial counsel. Harris has responded to the no-merit report. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

Harris was convicted, after a jury trial, of possession of more than 15 grams but not more than 40 grams of cocaine with intent to deliver, as party to a crime and while possessing a dangerous weapon; felon in possession of a firearm; and carrying a concealed weapon. The court sentenced Harris to a total of four years of initial confinement and three years of extended supervision, consecutive to any sentences in other cases.

The no-merit report addresses whether the evidence was sufficient to support the convictions. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). We agree with counsel's assessment that there would be no arguable merit to an argument that that standard has been met here. The evidence at trial, including testimony by the arresting officers, a State Crime Laboratory analyst, and a police detective "recognized as a drug recognition expert," was sufficient to support the jury verdicts.

Next, the no-merit report addresses whether a challenge to Harris's sentence would have arguable merit. Our review of a sentence determination begins "with the presumption that the

trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Harris's character and criminal history, the seriousness of the offenses, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court sentenced Harris to a total of four years of initial confinement and three years of extended supervision, consecutive to sentences in any other cases. The sentence was within the maximum Harris faced and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'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'" (quoted source omitted)). We discern no erroneous exercise of the court's sentencing discretion.

Finally, the no-merit report addresses whether there would be arguable merit to a claim of ineffective assistance of trial counsel. Specifically, postconviction counsel addresses whether there would be arguable merit to a claim of ineffective assistance of trial counsel for: (1) failing to object to the State's use of evidence that two bottles of cough syrup containing codeine and promethazine were found along with the cocaine and firearm in Harris's bag or (2) failing to move to suppress evidence obtained during Harris's arrest. We agree with postconviction counsel that a claim of ineffective assistance of trial counsel would lack arguable merit. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel

must show that counsel's performance was deficient and that the deficiency prejudiced the defense).

Postconviction counsel concludes that a claim of ineffective assistance of trial counsel for failing to object to the cough syrup evidence on grounds that the evidence was irrelevant or that its probative value was outweighed by the danger of unfair prejudice would lack arguable merit. We agree. The evidence, that Harris possessed cough syrup containing codeine and promethazine along with the cocaine and firearm in her bag, was relevant because it supported the State's theory that Harris knew the items were in the bag and that she intended to deliver the cocaine. *See* WIS. STAT. §§ 904.01 and 904.02 (evidence is generally admissible if it is relevant; evidence is relevant if it has any tendency to make the existence of any fact of consequence to the determination of the action more probable). The State presented evidence that a person who is carrying drugs for personal use would typically carry only one type of drug; that cough syrup with codeine and promethazine is a controlled substance commonly known as "lean"; and that Harris stated in a recorded jail call that her bag contained "dope," "lean," and a gun. In light of the evidence as a whole, it would be wholly frivolous to argue that the probative value of the cough syrup evidence was substantially outweighed by the danger of unfair prejudice or any other consideration that would render the evidence inadmissible. *See* WIS. STAT. § 904.03. Trial counsel was not ineffective for failing to raise a meritless objection to the cough syrup evidence. *See* ***State v. Swinson***, 2003 WI App 45, ¶59, 261 Wis. 2d 633, 660 N.W.2d 12 (providing that "counsel's failure to bring a meritless motion does not constitute deficient performance").

Postconviction counsel also concludes that a claim that trial counsel was ineffective by failing to investigate how police were summoned to the hotel and failing to move to suppress on that basis would lack arguable merit. Harris asserts in her no-merit response that her trial

counsel was ineffective by failing to move to suppress the evidence obtained after her arrest in the hotel lobby. Harris asserts that her trial counsel should have investigated which hotel employee alerted police that Harris was at the hotel and that counsel should have moved to suppress the evidence on grounds that the hotel employee did not have probable cause to believe Harris was committing a crime. Harris also asserts that her right to confrontation was violated because she did not have the opportunity to cross-examine the hotel employee. Harris argues that the police search of her hotel room was unlawful.

Harris was arrested in the hotel lobby pursuant to an arrest warrant. The actions of a private citizen in summoning the police to the hotel would not give rise to a claim that Harris's constitutional rights were violated when she was arrested and her bag was searched. *See* ***State v. Payano-Roman***, 2006 WI 47, ¶17, 290 Wis. 2d 380, 714 N.W.2d 548 (explaining that the Fourth Amendment applies only to government action, and that the constitutional protections against unreasonable searches and seizures are not implicated by actions of private citizens). The State did not introduce any testimony or testimonial statements by a hotel employee in its case against Harris, and thus Harris's right of confrontation was not implicated. Finally, no evidence was admitted of evidence recovered from Harris's hotel room, and thus there would have been no basis for an argument to suppress evidence due to an unlawful search.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgments of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction are affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jeffrey W. Jensen is relieved of any further representation of Loteria Harris 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