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November 14, 2018

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

2017AP1569-CRNM State of Wisconsin v. M.L.T. Dale (L.C. #2014CF751)

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).

M.L.T. Dale appeals from a judgment of conviction for two counts of first-degree recklessly endangering safety by use of a dangerous weapon, attempted first-degree intentional homicide by use of a dangerous weapon, felon in possession of a firearm, and felony bail jumping, all as a repeat offender. He also appeals from an order denying his postconviction motion for sentence modification. 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). Dale has filed a response to the no-merit report claiming his sentence is unduly harsh. Upon consideration of these submissions and an independent review of the record, the judgment and order are summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Dale entered a crowded bar and aimed his gun at a male bar patron. The gun did not fire and the intended target attempted to flee. Dale continued to point the gun and pull the trigger, discharging two or three gunshots. The targeted person also had a gun in the bar and fired one shot toward Dale. When the shooting was over, Terriana Cecil was dead on the floor of the bar, a victim of a gunshot to the head. It was not known which shooter's bullet struck Cecil. Later that evening, Dale turned himself into police knowing he was wanted with respect to the shooting at the bar. After the preliminary hearing, the information charged Dale with first-degree reckless homicide by use of a dangerous weapon, attempted first-degree intentional homicide by use of a dangerous weapon, two counts of first-degree recklessly endangering safety by use of a dangerous weapon, felon in possession of a firearm, two counts felony bail jumping, and misdemeanor bail jumping, all as a repeat offender.

Under a plea agreement, the charge involving the death of Cecil was amended to first-degree recklessly endangering safety by use of a dangerous weapon, as a repeat offender, and one of the two counts of first-degree recklessly endangering safety of other bar patrons was dismissed, as was one count of felony bail jumping and misdemeanor bail jumping. Dale entered

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

a guilty plea to the crimes of which he is convicted. He was sentenced to ten years' initial confinement and five years' extended supervision on the first-degree recklessly endangering safety conviction related to Cecil's death, and a consecutive term of fifteen years' initial confinement and ten years' extended supervision on the attempted first-degree intentional homicide conviction. The sentences on the other convictions were imposed concurrently.

A postconviction motion for sentence modification was filed. It argued that the sentencing court had erroneously exercised its discretion by not giving special consideration for the mitigating factors that Dale turned himself into police, Dale took responsibility for the crimes by entering guilty pleas in a relatively fast time frame and not prolonging the effects of legal proceedings on the victim's family, and Dale expressed remorse and apologized to the victim's family. The motion noted that Dale had received a longer sentence than the second shooter in the bar. The motion also argued that the second shooter's shorter sentence in light of that defendant's failure to take responsibility and apologize to the victim's family was a new factor justifying a reduction in Dale's sentence. The postconviction motion was denied.

The no-merit report addresses the potential issues of whether Dale's guilty plea was knowingly, voluntarily, and intelligently entered, whether the sentence was the result of an erroneous exercise of discretion, and whether the motion for sentence modification based on an erroneous exercise of discretion was properly denied. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

We note the sentencing court mentioned parts of the COMPAS assessment incorporated into the presentence investigation report. From the assessment the court observed that Dale has

antisocial friends, lacks a school and work history, has criminality issues in his family, has an antisocial personality and attitude problems, is a member of a gang, has a high-risk lifestyle, and has a high risk to reoffend. In *State v. Loomis*, 2016 WI 68, ¶8, 371 Wis. 2d 235, 881 N.W.2d 749, the court rejected a defendant's claim that using a COMPAS report at sentencing violates due process. However, the court in *Loomis* prohibited the COMPAS risk assessment from being used to determine whether an offender should be incarcerated, the severity of the sentence, or whether an offender can be supervised safely and effectively in the community. *Id.*, ¶98. Here the court used the COMPAS assessment only in relation to determining Dale's character and its use was not directly determinative of whether or not to incarcerate Dale or the length of the sentence. There would be no arguable merit to a claim that the sentencing court's use of the COMPAS report was improper or denied Dale due process.

We also conclude there is no arguable merit to a claim that the motion for sentence modification based on a new factor should have been granted. Dale attempted to present the sentence imposed on the second shooter in the bar as a new factor. A new factor "refers to a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). It is true that the second shooter was sentenced by another court approximately six months after Dale and the sentence imposed on that defendant was not known to the court at the time of Dale's sentencing. However, the new information must also be highly relevant to sentence. Here the sentence received by the less apologetic second shooter was not relevant. "There is no requirement that defendants convicted of committing similar crimes must receive equal or similar sentences." *State v. Lechner*, 217

Wis. 2d 392, 427, 576 N.W.2d 912 (1998). Rather, “[t]he sentencing court must assess the crime, the criminal, and the community, and no two cases will present identical factors.” *Id.* The record demonstrates that the court did just that. As the postconviction court noted, it was not bound by the sentence imposed by another court when the circumstances for each defendant were different.² No new factor was presented.

In his response, Dale expresses his belief that he received a very harsh sentence. When a defendant argues that his or her sentence is excessive or unduly harsh, a court may find an erroneous exercise of sentencing discretion “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.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The court properly exercised its sentencing discretion; it heard and considered the mitigating factors that Dale cited in his postconviction motion and repeated in his response—that he turned himself in, that he did not go to trial, that he was very remorseful, that he apologized to the victim’s family. Under the circumstances of this case, it cannot reasonably be argued that Dale’s sentence is so excessive as to shock public sentiment.

² The second shooter was convicted of second-degree reckless homicide by use of a dangerous weapon and felon in possession of a firearm. He received a global sentence of twenty years’ initial confinement and ten years’ extended supervision.

Our review of the record discloses no other potential issues for appeal.³ Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Dale further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and the order denying the postconviction motion are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Scott Szabrowicz is relieved from further representing M.L.T. Dale in this appeal. *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

³ We also conclude that there is no arguable merit to a claim that the sentencing court should have granted Dale's request to correct the "Agent's Impressions" section of the presentence investigation report. Dale objected to the statement in the report that Dale "now stands before the Court for some very heinous offenses, one of which resulted in the death of an innocent bystander." Dale argued that it appeared that the report's author believed that Dale's shots had killed the victim when that was not true. The court properly noted that the reference was not in the factual section of the report and it was comfortable leaving the statement as written. Moreover, it was well known to the court that Dale had not directly shot the victim.