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January 9, 2019

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

2018AP439-CRNM	State of Wisconsin v. Markice D. Posey (L.C. #2016CF96)
2018AP440-CRNM	State of Wisconsin v. Markice D. Posey (L.C. #2016CM251)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Markice D. Posey appeals from judgments of conviction for the felony crimes of strangulation and substantial battery, and the misdemeanor crimes of battery by use of a dangerous weapon, violation of a domestic abuse temporary restraining order, contempt of court,

bail jumping, disorderly conduct, and two counts of intimidation of a victim. 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). Posey has filed two responses to the no-merit report and counsel has filed a supplemental no-merit report. RULE 809.32(1)(e)(f). Upon consideration of these submissions and an independent review of the records, the judgments are summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Posey beat up his girlfriend by punching and kicking her, choking her, hitting her with a wooden cane, poking the tip of a knife in her neck and chest area, and threatening her saying, “Tonight is your night to die bitch!” At different points during the incident, Posey took breaks to eat and use the bathroom and then resumed his attack. At some point, he took the battery out of the house phone because he did not want the victim to call the police. The victim was knocked unconscious at the end of the assault. Posey sent a text message from the victim’s phone saying he had just killed her. Posey then left the residence. The victim regained consciousness and called the police. Posey was arrested and placed under an order to have no contact with the victim. Posey was charged with ten crimes, including second-degree recklessly endangering safety, all with repeater, domestic repeater, and domestic abuse enhancers. While in jail, Posey tried to phone the victim on twelve occasions and he twice contacted a friend to get in touch with the victim and tell her to say there was just a verbal altercation between them. Posey was then charged in a separate case with misdemeanor bail jumping, violation of a domestic abuse temporary restraining order, two counts intimidation of a victim, and fourteen counts of

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

contempt of court, all as a repeater. A plea agreement was reached and the prosecution agreed to recommend eight years' initial confinement and be free to argue on the length of extended supervision. Posey entered no contest pleas to nine crimes, all as a repeater, and five as an act of domestic abuse. All other charges, including those in a third case and uncharged referrals, were dismissed as read-ins at sentencing. Posey was sentenced to consecutive sentences totaling ten years' initial confinement and six years' extended supervision. A six month consecutive jail sentence was also imposed.

The no-merit report examines the sufficiency of the criminal complaints, whether Posey's no contest pleas were knowingly, voluntarily, and intelligently entered, and whether the sentences were authorized by law, the result of an erroneous exercise of discretion, unduly harsh or excessive, or based on inaccurate information.² 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.

In his first response Posey claims that his trial counsel was ineffective for not investigating the intimidation of a victim charge which is based on the victim's report that Posey took the battery out of the house phone so she could not call the police. He believes the evidence was insufficient for a conviction because the victim's claim that he removed the battery is

² In addition, the no-merit report concludes that no issues of arguable merit exist from proceedings relating to Posey's desire to assert a not guilty by reason of mental defect plea and evaluation of Posey's competency to proceed. We need not address these proceedings because Posey's no contest pleas waived the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

contradicted by the fact that she used that same phone to call the police after regaining consciousness. His claim does not allow for the possibility that the battery was replaced in the phone before it was used to call the police. Additionally, these were facts known to Posey when he entered his pleas and he decided to not put the State to its burden of proof.³ Further, we summarily reject Posey's claim that there was no evidence that he was guilty of intimidating the victim either by removing the battery or the subsequent letter he wrote the victim. A permissible inference from those acts is that Posey intended to influence the victim's report of the assault. No issue of arguable merit exists from Posey's convictions for intimidation of a victim.

Posey now claims that he was on prescription medication at the time he entered his pleas and that the side effects of the medication caused him to be confused and unable to understand what was going on in court.⁴ The record reflects that during the plea colloquy, Posey affirmed the prescription medicine was helping him and that he understood the proceeding.

He claims the plea agreement was breached because he was sentenced to ten years of confinement when he believed he was getting eight years of confinement. Although the prosecution agreed to cap its sentencing recommendation at eight years of confinement, the circuit court informed Posey that the court was not bound by any party's sentencing

³ Posey claims that a police officer lied in his testimony during the preliminary hearing and "who knows what else he lied about and persuaded the victim to lie about." Again, Posey elected not to put the State to its burden of proof.

⁴ The assertion of this claim is confounding since Posey repeatedly informed the circuit court that he wanted to take the plea deal and get the case resolved. In his no-merit response, Posey indicates, "I'm not looking for a plea withdraw, but I'm [] looking for a sentence modification at least for the 8 yrs that I took a cap plea for and were promise[d] and didn't get."

recommendation. Posey acknowledged his understanding that the court could sentence him to a greater amount of time. There is no merit to a claim that the plea agreement was breached.

Posey asserts his *Miranda*⁵ rights were violated because he was never read his rights when he was arrested. Even if true, it does not give rise to any issue for appeal. The giving of *Miranda* warnings is not required when a suspect is simply taken into custody. *State v. Hambly*, 2008 WI 10, ¶22, 307 Wis. 2d 98, 745 N.W.2d 48.

Posey's second response is largely focused on his claim that he could not have been convicted of both substantial battery and misdemeanor battery from the assault. He raised this question during the plea colloquy. As the circuit court correctly explained, two separate acts occurred, separate in time, and with two separate results—a substantial battery rendering the victim unconscious and a battery with the wooden cane causing bodily harm. The supplemental no-merit report also correctly explains that two convictions can arise from separate volitional acts. The two separate battery convictions are proper. Contrary to Posey's belief, trial counsel was not ineffective for not challenging the charging of two batteries.

Finally, Posey suggests that the circuit court judge was required to recuse himself after he commented that he was not going to allow Posey to manipulate the system for the purpose of delay. Posey claims this showed actual bias by the judge. A motion for recusal was filed before entry of Posey's no contest pleas. During the plea colloquy, the circuit court addressed Posey

⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

personally about the entry of his pleas with the motion undecided and about the withdrawal of the motion. Posey waived a claim for recusal.

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

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Erica L. Bauer is relieved from further representing Markice D. Posey in these appeals. *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