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May 23, 2019

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

2018AP1477-CRNM State of Wisconsin v. Renault Griffin, Jr. (L.C. # 2017CF7)

Before Reilly, P.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).

Renault Griffin, Jr., appeals from a judgment of conviction for robbery of a financial institution and bail jumping, as a habitual criminal. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),[1] and ***Anders v. California***, 386 U.S. 738

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

(1967). Upon consideration of the no-merit report, supplemental no-merit report, and Griffin's substitute response,[2] and after conducting an independent review of the record, the judgment is summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Griffin pointed a firearm at a clerk and robbed a credit union of $550. He was taken into custody two days later and admitted robbing the credit union. He was carrying at least one bill with a serial number of a bill stolen from the credit union. He was also in possession of cocaine. Griffin was charged as a repeat offender with robbery of a financial institution, misdemeanor possession of cocaine, and two counts of bail jumping. Griffin entered a no contest plea under an agreement by which the prosecution dropped the repeater enhancer on the robbery charge and dismissed as read ins the other two charges and a hit and run criminal traffic charge in another case. Griffin stipulated to $450 in restitution on the traffic charge. The prosecution agreed to recommend seventeen to twenty years of initial confinement and to be silent as to whether the sentence should run concurrent with or consecutive to a sentence Griffin was already serving. The prosecution complied with the plea agreement at sentencing. On the robbery conviction, Griffin was sentenced to twenty years' initial confinement and ten years' extended supervision. A consecutive term of two years' initial confinement and three years' extended supervision was imposed on the bail jumping conviction. The sentence was made concurrent with a sentence Griffin was already serving.

[2] On October 4, 2018, Renault Griffin, Jr. filed a short response to the no-merit report which only questioned why he had not been made eligible for early release programs. WIS. STAT. RULE 809.32(1)(e). On November 5, 2018 counsel filed a supplemental no-merit report addressing that query and served a copy on Griffin. RULE 809.32(1)(f). In February, 2019, after the appeal had been submitted to the court, Griffin sought and was granted an opportunity to file a substitute response. The substitute response was timely filed.

The no-merit report addresses the potential issues of whether Griffin's plea was knowingly, voluntarily, and intelligently entered and whether the sentence was the result of an erroneous exercise of discretion or unduly harsh or excessive. In his response, Griffin asserts that because no one was hurt during the robbery, he should have been made eligible for challenge incarceration or earned release programs. He also believes that the sentencing court relied on improper facts and made improper factual interpretations.[3] Both the no-merit report and supplemental no-merit report address the sentencing court's exercise of discretion and determination that Griffin was not eligible for early release programs. The sentence was driven by the gravity of the offense in causing terror in another person, the fact that Griffin, at twenty-nine years old, had a long criminal history and past failures on supervision, and the court's recognition that the protection of the public required incarceration. Griffin's disagreement with the weight the sentencing court assigned to mitigating and aggravating factors does not make a challenge to the sentence arguably meritorious. This court is satisfied that the reports properly analyze the potential appellate issues from the plea taking and sentencing as without merit, and this court will not discuss them further.

Griffin suggests that the judge should have recused himself because upon hearing the name of the victim of the read-in hit and run offense, the judge commented, "I believe I went to high school with Mr. [A]." Griffin believes his attorney should have immediately objected on the ground of bias, requested an evidentiary hearing, and filed a motion for recusal for cause. He contends that "a reasonable, well-informed person knowledgeable about judicial ethics standards

[3] Griffin believes the sentencing court "denied the existence of all mitigating factors, or if he could not deny the existence, he would somehow warp them to be an aggravating factor instead." Specifically, Griffin argues the court minimized the trauma Griffin suffered as a victim of child molestation, relied too heavily on Griffin's gang membership as a youth, ignored that Griffin left the gang life a decade before this crime, disregarded that Griffin only used a BB gun in the robbery and never put the clerk's life in danger, and failed to appreciate the impact Griffin's post-traumatic stress disorder and prior traumatic brain injury had on his mental state and in causing his "cry for help" by robbing a financial institution with a GPS ankle monitor on.

and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge's ability to be impartial." He also claims that the judge's "extreme departure" from the sentencing recommendations in the presentence investigation report (PSI) and from the defense reflects that the judge was biased due to his "relationship" with the victim of the read-in charge.

"The right to an impartial judge is fundamental to our notion of due process." ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385. Whether a judge was unbiased is a question of constitutional fact that we review independently. ***State v. Neuaone***, 2005 WI App 124, ¶16, 284 Wis. 2d 473, 700 N.W.2d 298. We presume that a judge has acted fairly, impartially, and without bias. ***Goodson***, 320 Wis. 2d 166, ¶8. The party asserting judicial bias has the burden to show, by a preponderance of the evidence, that the judge was biased or prejudiced. ***Neuaone***, 284 Wis. 2d 473, ¶16.

Although a judge may be either subjectively or objectively biased, *see* ***Goodson***, 320 Wis. 2d 166, ¶8, only objective bias is at issue here.[4] Objective bias can exist in two situations: (1) where there is an appearance of bias or partiality; and (2) where objective facts demonstrate that a judge treated a party unfairly. ***Id.***, ¶9. The appearance of bias or partiality constitutes objective bias when a reasonable person could conclude "that the average judge could not be trusted to 'hold the balance nice, clear, and true' under all the circumstances." ***Id.*** (citation omitted).

[4] Subjective bias measures the judge's own perception of his or her impartiality. *See* ***State v. Rochelt***, 165 Wis. 2d 373, 378, 477 N.W.2d 659 (Ct. App. 1991). Here the judge indicated that the fact that the victim was a high school classmate "doesn't affect my judgment here." Determining that he could be impartial was all the judge was required to do. ***State v. Harrell***, 199 Wis. 2d 654, 664, 546 N.W.2d 115 (1996).

We conclude that no issue of arguable merit exists from the fact that the judge recognized that the victim of the hit and run traffic offense was a high school classmate. Contrary to Griffin's speculation, nothing on the record suggests the judge had any kind of on-going friendship or even acquaintance-ship with the victim. There is nothing that a reasonable lay observer would interpret as creating an influential relationship between the victim and judge or the appearance of bias.[5] That the judge sentenced Griffin to more time than that recommended by the PSI or defense is not a demonstration of bias because the sentence was demonstrably a proper exercise of discretion. There is nothing to overcome the presumption that the judge was unbiased. Trial counsel was not ineffective for not moving for recusal.

Griffin believes that the sentence modification should be pursued because the sentence does not match the sentencing court's goal to essentially "zero out" the bail jumping sentence. Griffin argues that the bail jumping sentence added two years to his sentence because it was made consecutive to the sentence on the robbery conviction and that the result directly contradicts the court's intention. The court's stated intention to "zero out" the bail jumping sentence was made in the context of making the sentence in this case concurrent to sentences already imposed. The sentencing court was informed that Griffin had a mandatory release date of May 19, 2020 on the sentence he was currently serving. That date was more than two years out from the sentencing. Essentially, by imposing the sentence in this case concurrent to the sentence Griffin was already serving, Griffin would not serve any extra time for the bail jumping conviction for which the court imposed two years of initial confinement. Griffin's belief that the

[5] Griffin casts aspersions in the timing of the judge's revelation that the victim was a high school classmate. He writes "the fact that the judge didn't bring this up until the last minute casts doubt as to whether he was truly uneffected [sic] by this link." The record shows that not until the plea hearing on October 16, 2017 was the judge made aware that the hit and run charge was going to be part of a global plea resolution and that the case would be before him. Sentencing on January 19, 2018 was the first time the judge was made aware of the victim's name in the hit and run case.

sentence did not "zero out" the bail jumping confinement is misplaced. There is no merit to a claim that the sentence did not match the court's intent.

Finally, Griffin contends his trial and appellate attorney should have told him about the option to move for sentence modification within ninety days of sentencing and that he is left uncertain about what option he has left. Griffin's complaint does not present an issue of arguable merit. A person who opts to file a motion for sentence modification within ninety days waives his or her right to pursue a postconviction motion or appeal under WIS. STAT. RULE 809.30. *See* WIS. STAT. § 973.19(5). Griffin opted to pursue relief under RULE 809.30 by filing a timely notice of intent to pursue postconviction relief. That a motion for sentence modification was not filed within ninety days is of no consequence because if Griffin had grounds for such a motion, it could have been filed it under RULE 809.30(2)(h). However, by this appeal we conclude that there was no arguable merit to a motion for sentence modification. Nothing was lost to Griffin by not knowing he could instead opt to seek just sentence modification within ninety days of sentencing. *See* ***State v. Cummings***, 199 Wis. 2d 722, 747 n.10, 546 N.W.2d 406 (1996) ("It is well established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.").

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Bradley J. Lochowicz is relieved from further representing Renault Griffin, Jr., 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