



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 I

July 17, 2019

To:

Hon. T. Christopher Dee
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233-1425

John Barrett
Clerk of Circuit Court
821 W. State Street, Room G-8
Milwaukee, WI 53233

David Del Busto
1345 N. Jefferson St., #369
Milwaukee, WI 53202

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

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

Modesto Javier Melendez
1900 16th. St.
Community Oriented Policing
Racine, WI 53404

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

2017AP1904-CRNM State of Wisconsin v. Modesto Javier Melendez
(L.C. # 2015CF663)

Before Kessler, Brennan and Dugan, 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).

Modesto Javier Melendez appeals from a judgment of conviction, entered after a jury trial, for one count of operating a vehicle without the owner's consent, as a repeater, contrary to

WIS. STAT. §§ 943.23(3) and 939.62(1)(b) (2015-16).¹ His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Melendez was informed of his right to file a response to the no-merit report and has not responded. We have independently reviewed the record and the no-merit report as mandated by *Anders*. We conclude that there is no issue of arguable merit that could be pursued on appeal. We summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

The complaint alleged that two police officers observed a vehicle without license plates drive past their squad car and park on the street. After the driver, Melendez, exited the vehicle, the officers approached him. Melendez told the officers that he did not have license plates on the vehicle because he had just purchased it, but he was not able to provide proof of ownership. The officers determined that the vehicle had been reported stolen and that Melendez was on probation for operating a vehicle without the owner's consent. They collected from Melendez "two filed/shaved '[b]ump keys'" that can be used to start a variety of vehicles.

Prior to trial, the State moved to admit other acts evidence of Melendez's three prior convictions for operating a vehicle without the owner's consent. *See* WIS. STAT. § 904.04(2). Melendez opposed the motion. The trial court analyzed the motion using the three-step

¹ This court previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review in *State v. Trammell*, 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). At issue in *Trammell* was the continued viability of jury instruction WIS JI—CRIMINAL 140, an instruction that was given in Melendez's case. The supreme court has now issued a decision in *Trammell*, holding "that WIS JI—CRIMINAL 140 does not unconstitutionally reduce the State's burden of proof below the reasonable doubt standard." *See State v. Trammell*, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564. Consequently, there would be no arguable merit to pursue postconviction proceedings based on the use of jury instruction WIS JI—CRIMINAL 140 at Melendez's trial.

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

framework outlined in *State v. Sullivan*, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998).² The trial court found that the use of bump keys in two of the prior crimes was evidence of preparation, plan, motive, and opportunity. The trial court concluded that the evidence concerning the two crimes where bump keys were used was properly admitted under *Sullivan*, but it rejected the State's request to introduce evidence concerning the third crime, which did not involve bump keys.

The parties began jury selection in February 2016. Before the jury was selected, the State learned of additional police reports that had not been disclosed to the State or the defense. The defense indicated that it wanted to try to interview one of the witnesses mentioned in one of the reports, so the trial court adjourned the trial.³ The trial court reduced Melendez's bail and he was released on a personal recognizance bond. The trial was rescheduled for June 2016, but it was delayed after Melendez failed to appear for two hearings.

In July 2016, the fourth attorney appointed to represent Melendez moved to withdraw at Melendez's request, based on communication issues. The trial court denied the motion, noting that Melendez had prior appointed lawyers and could not keep getting new ones.⁴ It urged Melendez to work with trial counsel.

² The Honorable Mark A. Sanders decided the other acts motion and presided over the February 2016 proceedings.

³ Subsequently, the parties discovered that the police reports were related to a different case involving the defendant, so there were no additional proceedings concerning those reports.

⁴ The Honorable T. Christopher Dee presided over this motion, the jury trial, and sentencing.

The case went to trial in October 2016. The vehicle's owners, two police officers, and Melendez testified. The jury found Melendez guilty. He was sentenced to thirty months of initial confinement and thirty months of extended supervision. The trial court subsequently amended the term of extended supervision to twenty-four months after the Department of Corrections notified the trial court that the maximum term of extended supervision for the crime was twenty-four months. The trial court set restitution at zero based on the lack of a restitution claim from the vehicle's owner. The trial court found Melendez ineligible for the Challenge Incarceration Program because Melendez had previously been convicted of the same crime three times.

The no-merit report addresses three issues: (1) whether there was sufficient evidence to support the jury's verdict; (2) whether Melendez was denied the effective assistance of trial counsel; and (3) whether the trial court imposed "a harsh and excessive sentence." 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.

Although the no-merit report does not specifically discuss other aspects of the jury trial, our review of the record leads us to conclude that no other issues of arguable merit exist. With respect to the trial court's analysis of the State's other acts motion, we conclude there would be no arguable merit to challenging the trial court's exercise of discretion. We also reviewed the jury selection process, the parties' opening and closing statements, and the jury instructions. We have not identified any issues of arguable merit to pursue.

We also considered the trial court's exchanges with the defendant, who at times expressed frustration with the proceedings and claimed he did not understand what was happening.⁵ The trial court asked numerous questions designed to ascertain Melendez's understanding of the proceedings, and, ultimately, Melendez indicated that he wished to continue with the trial. The trial court found that there was no basis to doubt Melendez's competency, and the parties agreed. In its interactions with Melendez, the trial court displayed patience and restraint as it attempted to address his concerns and move forward with the trial. There would be no arguable merit to challenging the fairness of the trial based on the trial court's interactions with Melendez.

There being no arguably meritorious issues for appeal, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Melendez further in this appeal.⁶

Upon the foregoing reasons,

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

⁵ The no-merit report noted that “[a]t times, Mr. Melendez was combative with the [j]udge and disruptive in court.” We observe that Melendez frequently used profanity and claimed that his rights were being violated. However, he ultimately participated in the trial, including taking the stand in his own defense, as detailed in the no-merit report.

⁶ A copy of this decision is being sent to both Melendez's last known address and the Milwaukee Secure Detention Facility because online Department of Corrections records indicate that Melendez, who was released on extended supervision in October 2017, may now be at that facility.

IT IS FURTHER ORDERED that Attorney David Del Busto is relieved from further representing Modesto Javier Melendez 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