



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

August 19, 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

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

Pamela Moorshead
Assistant State Public Defender
735 N. Water St., Ste 912
Milwaukee, WI 53202-4116

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

Westley L. Furlow 660898
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2018AP1704-CRNM State of Wisconsin v. Westley L. Furlow (L.C. # 2016CF4371)

Before Kessler, Brennan, 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).

Westley L. Furlow appeals from a judgment of conviction for armed robbery with use of force as a party to a crime. 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 (1967). Furlow has filed

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

multiple documents in response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, the judgment is summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Furlow was found guilty by a jury. The victim testified that he was on his way home after work and got off the bus at approximately 1:00 a.m. As he went into a take-out restaurant to get food, he noticed two men on a nearby street corner. When he came out of the restaurant, he crossed the street to avoid the two men. But the men followed and confronted the victim. One man took the bag of food. The other man, identified as wearing a white tee shirt and khaki pants, put a gun to the victim's stomach and demanded everything the victim had. After the victim emptied his pockets, the two men got into a maroon Nissan Altima. The victim reported the crime to police and described what the men were wearing and the car. Patrol officers saw the maroon Altima and attempted to make a traffic stop. A man wearing a white tee shirt and khaki pants exited the vehicle and ran from police. During pursuit by an officer, the man dropped what turned out to be a plastic BB gun. Furlow was the man pursued and arrested by police. From a photo array presented to him a few hours after the robbery, the victim identified Furlow as the gunman. The victim confirmed the identification at trial.

After trial, Furlow requested and was granted new counsel before sentencing. Furlow refused to participate in the preparation of a presentence investigation report. The sentencing court noted that Furlow had prior periods of incarceration in Illinois, prior parole violations, and mental health issues. Furlow was sentenced to thirteen years of initial confinement and fifteen years of extended supervision. Although 392 days of sentence credit was granted at sentencing,

when the Department of Corrections demonstrated to the sentencing court a calculation error, the judgment of conviction was amended to reduce sentence credit to 385 days.²

The no-merit report addresses the potential issues of whether the evidence was sufficient, whether the trial court made errors during the trial, whether trial counsel was effective, and whether the sentence was the result of an erroneous exercise of discretion. 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.

The no-merit report fails to discuss other components of a jury trial which must be examined for the existence of potential appellate issues, e.g., pretrial rulings, jury selection, evidentiary objections during trial, confirmation that the defendant's waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening statements and closing arguments. We have specifically considered whether any of these other aspects of the jury trial gives rise to any issue of arguable merit and conclude they do not.³ Potential jurors were struck

² The judgment of conviction does not reflect that Furlow was convicted as a party to a crime. It is an inconsequential omission.

³ Counsel has a duty to review the entire record for potential appellate issues. A no-merit report serves to demonstrate to the court that counsel has discharged his or her duty of representation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. See *McCoy v. Wisconsin Court of Appeals*, 486 U.S. 429, 438 (1988). Appointed counsel is reminded that a no-merit report must satisfy the discussion rule which requires a statement of reasons why the appeal lacks merit by a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. *Id.* at 440. Although this court has the duty to make an independent review of the entire record, it places an unreasonable burden on the court when counsel fails to provide the necessary groundwork for consideration of potential issues. It is important that the no-merit report provide a basis for a determination that the no-merit procedure has been complied with. See *State v. Allen*, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124 (when an issue is not raised in the no-merit report, it is presumed to have been reviewed and resolved against the defendant so long as the court of appeals follows the no-merit procedure). Counsel is admonished to make a complete discussion of all aspects of a jury trial in future no-merit reports.

for cause by agreement of the parties, there was no improper argument made in opening or closing arguments, a sufficient colloquy was conducted with Furlow about his decision not to testify, the jury instructions were proper, the court's rulings on the defense motions for dismissal at the close of the prosecution's case and for a directed verdict were proper, and the jury was polled when the verdict was delivered to confirm that the verdict was unanimous. Also, the amount of sentence credit was properly reduced.

Furlow's submissions in response to the no-merit report focus on what he believes to be false and inconsistent evidence against him. He asserts that he had nothing to do with the crime, that he does not meet the victim's description of the gunman, and that he was not pictured in the picture the victim picked from the photo array. He simply disagrees with the assessment the jury made of the evidence. We defer to the jury's function of weighing and sifting conflicting testimony. *See State v. Wilson*, 149 Wis. 2d 878, 894, 440 N.W.2d 534 (1989).

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 Furlow 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 Pamela Moorshead is relieved from further representing Westley L. Furlow 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