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September 12, 2019

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

2018AP598-CRNM State of Wisconsin v. Carlos Columbus McDaniels
(L.C. # 2016CF1247)

Before Brash, P.J.[1]

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).

Carlos Columbus McDaniels appeals a judgment entered after a jury found him guilty of the misdemeanor offense of intimidating a witness. Appellate counsel, Attorney Megan Kaldunski, filed a no-merit report pursuant to WIS. STAT. RULE 809.32, and ***Anders v.***

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

California, 386 U.S. 738 (1967). McDaniels filed a response. Based upon our independent review of the record, the no-merit report, and McDaniels's response, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm.[2] *See* WIS. STAT. RULE 809.21.

On March 24, 2016, the State filed a criminal complaint alleging that McDaniels shot C.L.J. on January 1, 2016, while attending a New Year's Eve party at her home. The State also alleged that McDaniels later sought to persuade C.L.J. either not to come to court or to make statements exonerating him. The State went on to allege that McDaniels had been convicted of a felony within the previous five years, and the State supported that allegation with a certified copy of a judgment of conviction attached to the complaint. Based on the foregoing, the State charged McDaniels with three crimes as a repeat offender: the felony offenses of first-degree reckless injury by use of a dangerous weapon and possession of a firearm while a felon, and the misdemeanor offense of intimidating a witness.

The matters proceeded to trial on March 29, 2017. The jury acquitted McDaniels of the two felonies but convicted him of the misdemeanor. Following receipt of the verdicts, the circuit court found that McDaniels was a repeat offender. At sentencing, he faced maximum penalties of a $10,000 fine and a two-year term of imprisonment. *See* WIS. STAT. §§ 940.42 (2015-16), 939.62(1)(a) (2015-16), 939.51(3)(a) (2015-16). The circuit court imposed an eighteen-month

[2] By order dated December 17, 2018, we placed this appeal on hold until resolution of a then-pending supreme court case involving challenges to WIS JI—CRIMINAL 140, which the circuit court used in the instant case to instruct the jury regarding the State's burden of proof. The supreme court released its decision on May 31, 2019, and rejected the challenges to WIS JI—CRIMINAL 140. *See* ***State v. Trammell***, 2019 WI 59, ¶¶1-2, 387 Wis. 2d 156, 928 N.W.2d 564. ***Trammell*** therefore does not provide McDaniels with an arguably meritorious basis for postconviction relief. Accordingly, we lift the hold previously imposed and proceed to resolve this appeal.

term of imprisonment bifurcated as one year of initial confinement and six months of extended supervision, and the circuit court ordered McDaniels to serve the sentence consecutively to a previously imposed sentence that he was already serving.

We first consider an issue that is not addressed in the no-merit report, namely, whether the State presented sufficient evidence at trial to sustain McDaniels's conviction for intimidating a witness. Before the jury could find McDaniels guilty of that crime, the State was required to prove beyond a reasonable doubt that: (1) C.L.J. was a witness; (2) McDaniels attempted to dissuade her from attending or giving testimony at a proceeding authorized by law; and (3) McDaniels acted knowingly and maliciously. *See* WIS. JI—CRIMINAL 1292; WIS. STAT. § 940.42 (2015-16).

C.L.J. testified that after McDaniels shot her on January 1, 2016, she received a telephone call from his mother on January 8, 2016, asking whether C.L.J. planned to "press charges against" him. C.L.J. said that during the call, McDaniels took the telephone from his mother and directed C.L.J. to tell the police that "somebody else" other than McDaniels shot her. He also told her to say that "it was someone that came in the house with a gun." C.L.J. explained that she recognized McDaniels's voice because she is related to him and has known him "since he was in diapers."

Next, a detective testified that during March 2016, McDaniels made recorded telephone calls in which he asked several of his associates to tell C.L.J. either to "say what [McDaniels] told her to say" or not to come to court to testify. The State then played excerpts of those telephone calls for the jury.

When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. "We may not reverse unless the evidence is so insufficient in probative value and force that as a matter of law, no reasonable fact finder could have determined guilt beyond a reasonable doubt." ***Id.*** In light of our deferential standard of review, an appellate challenge to the sufficiency of the evidence would lack arguable merit.

Appellate counsel also did not discuss whether McDaniels could pursue an arguably meritorious claim that he was denied the right to testify on his own behalf. The record reveals that the circuit court conducted a colloquy with McDaniels and established that he understood his right to testify, he had discussed that right with his trial counsel, and he had knowingly and voluntarily chosen not to testify. The colloquy satisfied the requirements for a valid waiver of the right to testify. *See* ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. Further proceedings to pursue this issue would be frivolous within the meaning of ***Anders***.

We next consider whether McDaniels could pursue an arguably meritorious claim that he was denied a speedy trial. Both McDaniels and his appellate counsel discuss this question at some length.

McDaniels made a speedy trial demand immediately following his preliminary examination on April 1, 2016, but his trial did not commence within ninety days as required by WIS. STAT. § 971.10(2)(a) (2015-16). The only remedy for that statutory violation is release on bond pending trial. *See* § 971.10(4) (2015-16); *see also* ***State ex rel. Rabe v. Ferris***, 97 Wis. 2d 63, 68, 293 N.W.2d 151 (1980). McDaniels, however, was not eligible for release on bond at any time during the pendency of this case. The record shows that at the time the State filed the

complaint in this matter, he was in jail pursuant to a hold imposed for a suspected violation of his community supervision in a separate proceeding, Milwaukee County case No. 2011CF4842, and he remained subject to that hold until June 2016, when his supervision was revoked and he began serving a two-year term of confinement in that matter. Accordingly, further consideration of a claim for relief under § 971.10 would lack arguable merit.

In addition to the right afforded by WIS. STAT. § 971.10 (2015-16), McDaniels also had a constitutional right to a speedy trial, and the remedy for a violation of that right is dismissal of the charges. *See* ***Rabe***, 97 Wis. 2d at 67. Accordingly, we have considered whether McDaniels could pursue an arguably meritorious claim that he suffered a violation of his constitutional right to a speedy trial when his trial began one year and five days after the State filed the complaint against him. We conclude that he could not do so.

An appellate court reviews *de novo* whether a defendant has been denied the constitutional right to a speedy trial. *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 508, 588 N.W.2d 89 (Ct. App. 1998). The question involves the application of a four-part test in which a reviewing court balances: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted the right to a speedy trial; and (4) whether the defense was prejudiced by the delay. *See* ***Barker v. Wingo***, 407 U.S. 514, 530 (1972). The length of the delay is a threshold consideration, however, and the period must be presumptively prejudicial before a court undertakes an inquiry into the remaining three factors. *See* ***State v. Leighton***, 2000 WI App 156, ¶7, 237 Wis. 2d 709, 616 N.W.2d 126. In Wisconsin, twelve months of pretrial delay is "the bare minimum needed to trigger the presumption of prejudice." *See* ***Borhegyi***, 222 Wis. 2d at 518. In determining the length of the delay, the court considers only the periods of delay attributable to the State. *See* ***Norwood v. State***, 74 Wis. 2d 343, 354, 246 N.W.2d 801 (1976).

The court does not count delay caused by the defendant. *See* ***State v. Urdahl***, 2005 WI App 191, ¶26, 286 Wis. 2d 476, 704 N.W.2d 324.

In this case, the charges arose on March 24, 2016, and trial began on March 29, 2017. We need not examine here each portion of the delay to determine whether the State or McDaniels was the responsible party. It will suffice to say that in August 2016, McDaniels's trial counsel scheduled the matter for trial on December 14, 2016, a date that was eight months and twenty days after the charges arose. On the trial date, the State advised that it was ready to proceed but McDaniels's trial counsel moved for an adjournment. Trial counsel explained that he was not prepared for trial as a consequence of his competing professional obligations. McDaniels was present in the courtroom, and he advised the circuit court on the record that he did "not really" have any objection to his counsel's request for an adjournment. The matter was then set for trial on March 29, 2017, the earliest available date that counsel could accommodate. Accordingly, McDaniels was responsible for the entirety of the delay after December 14, 2016, while the State was responsible for approximately eight and one-half months of delay at the most.[3] The period of delay relevant to the constitutional analysis was therefore significantly less than one year and was not presumptively prejudicial. *See* ***Borhegyi***, 222 Wis. 2d at 518. No further inquiry is required: McDaniels did not suffer a violation of his constitutional right to a speedy trial. *See* ***Norwood***, 74 Wis. 2d at 357-58. Pursuit of this issue would be frivolous within the meaning of ***Anders.***

[3] The record suggests that McDaniels was responsible for a portion of the delay between March 24, 2016, and December 14, 2016. For purposes of determining whether he has an arguably meritorious claim that he was denied the right to a speedy trial, however, we assume without deciding that the State was responsible for the first eight months and twenty days of delay in this case.

We next consider whether McDaniels could mount an arguably meritorious challenge to the circuit court's exercise of sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We agree with appellate counsel that he could not do so. The circuit court indicated that deterrence, punishment, and protection of the public were the primary sentencing goals, and the circuit court discussed the sentencing factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. The sentence that the circuit court selected was well within the maximum sentence allowed by law and cannot be considered unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507.

McDaniels nonetheless asserts that he could pursue an arguably meritorious claim for relief because, during the sentencing proceeding, the circuit court described his crime as serious and mentioned the charges for which he was acquitted. He suggests that these remarks reflect judicial bias. McDaniels is mistaken. The circuit court is required to consider the gravity of the offense when deciding the appropriate sentence to impose, *see* ***Gallion***, 270 Wis. 2d 535, ¶65, and may consider crimes for which a defendant has been acquitted when making the sentencing decision, *see* ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341.

Finally, we agree with appellate counsel that McDaniels could not pursue an arguably meritorious claim that he should receive credit towards the service of his sentence for his time in custody prior to his trial. The sentence in this case is consecutive to McDaniels's sentence in Milwaukee County case No. 2011CF4842, and the record is clear that McDaniels was in custody in connection with the latter case throughout the proceedings in the instant matter. When sentences are consecutive, "dual credit is not permitted [and] the time in custody is to be credited to the sentence first imposed.... Credit is to be given on a day-for-day basis, which is not to be

duplicatively credited to more than one of the sentences imposed to run consecutively." ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). Accordingly, McDaniels is not eligible for sentence credit here.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings in this matter would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the hold previously imposed in this matter is lifted.

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

IT IS FURTHER ORDERED that Attorney Megan Kaldunski is relieved of any further representation of Carlos Columbus McDaniels on 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