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DISTRICT I

October 22, 2019

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

2016AP340-CRNM State of Wisconsin v. Anthony Durrell Houston
(L.C. # 2013CF3082)

Before Kessler, Dugan and Fitzpatrick, 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).

Anthony Durrell Houston appeals from a judgment convicting him of first-degree recklessly endangering safety with use of a dangerous weapon and possessing a firearm as a

felon. He also appeals the order denying, in part, his postconviction motion.¹ His appellate counsel, Donna Odrzywolski, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18) and *Anders v. California*, 386 U.S. 738 (1967).² Houston received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the no-merit report and an independent review of the record, we summarily affirm the judgment and the order because there is no arguable merit to any issue that could be pursued on appeal. *See* WIS. STAT. RULE 809.21.

The charges against Houston stemmed from a shooting at a Milwaukee night club. The complaint alleged that at approximately 2:00 a.m. a fight began inside the club. As security personnel escorted people outside, one security guard saw Houston fire a gun toward the front of the club. Another security guard sustained a gunshot wound to his leg as a result. One of the security guards who chased Houston saw him drop a handgun. According to the complaint, after being restrained by the security guards, Houston stated, “y’all ain’t gonna find it, I’m going to get out tonight.” Police officers subsequently recovered a gun that they found along Houston’s flight path. The complaint further alleged that Houston had a prior felony conviction.

The State charged Houston with one count of first-degree recklessly endangering safety by use of a dangerous weapon and one count of possessing a firearm as a felon. A jury found Houston guilty of both charges. On the charge of first-degree recklessly endangering safety, the circuit court sentenced Houston to three and one-half years of initial confinement and three years

¹ The Honorable Jonathan D. Watts presided over the jury trial and sentencing. The Honorable Frederick C. Rosa entered the order resolving Houston’s postconviction motion.

² All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

of extended supervision. On the charge of possessing a firearm as a felon, the circuit court ordered him to serve a consecutive sentence of three years of initial confinement and two years of extended supervision. The circuit court also imposed \$500 in DNA surcharges against Houston: one \$250 surcharge for each felony charge. Following a motion, the circuit court vacated one of the surcharges.³

This appeal follows.⁴ The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdicts. The report details the evidence that was presented at trial, which supports the jury's verdicts, and sets forth the applicable standard of review. We further conclude that no procedural errors occurred with respect to the jury selection, the colloquy concerning Houston's waiver of his right to testify, the jury instructions, and the arguments of counsel.⁵ The report concludes with a short discussion of whether the sentences were the result of an erroneous exercise of discretion or can be considered unduly harsh.

³ As to the remaining DNA surcharge, we note that in *State v. Williams*, 2018 WI 59, 381 Wis. 2d 661, 912 N.W.2d 373, the Wisconsin Supreme Court made clear that there is no arguable merit to challenging the imposition of the remaining DNA surcharge in this case on ex post facto grounds. *See id.*, ¶55.

⁴ This court previously granted counsel's motion to stay briefing pending our Supreme Court's decision in *State v. Scruggs*, 2017 WI 15, 373 Wis. 2d 312, 891 N.W.2d 786.

⁵ This court 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 Houston's case. The supreme court has since 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 Houston's trial.

We wish to elaborate on Houston's sentences. After listening to statements made by the attorneys, Houston's parents, and Houston, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, and its progeny.

The circuit court highlighted the overwhelming evidence against Houston and the fact that a security guard was shot as a result of Houston's conduct. The circuit court additionally stressed the need to protect the public from "this cancer of people shooting each other[.]" The circuit court noted that the gravity of the offense was aggravated given that Houston not only possessed a firearm as a felon but fired it while out in the community.

The circuit court explained that Houston faced a total of twenty-seven and one-half years of imprisonment for the two charges of which he was found guilty. Ultimately, the circuit court sentenced Houston to a total of six and one-half years of initial confinement and five years of extended supervision.⁶ The sentences are within the ranges authorized by law, *see State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and are not so excessive so

⁶ We observe that the complaint, information, and judgment of conviction referenced the wrong paragraph of the statute that sets forth the penalties for the use of a dangerous weapon enhancer. In count one, Houston was charged with first-degree recklessly endangering safety with use of a dangerous weapon, in violation of WIS. STAT. §§ 941.30(1) and 939.63(1)(c) (2013-14). For the dangerous weapon enhancer, the paragraph that should have been referenced was found at § 939.63(1)(b) (2013-14). However, the dangerous weapon enhancer never came into play given that Houston was sentenced well within the maximum time available on a charge of first-degree recklessly endangering safety. *See* WIS. STAT. § 973.01(2)(c) (providing that "the maximum term of confinement in prison ... may be increased by any applicable penalty enhancement statute"); *see also State v. Lasanske*, 2014 WI App 26, ¶11, 353 Wis. 2d 280, 844 N.W.2d 417 (explaining that "for a felony, an enhancement lengthens the otherwise applicable maximum term of confinement in prison" (internal quotation marks omitted)). We conclude that there is no issue of arguable merit related to the references to the wrong paragraph.

as to shock the public's sentiment, *see Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

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 Houston further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and the order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Donna Odrzywolski is relieved from further representing Anthony Durrell Houston 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