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/IV

November 7, 2019

To:

Hon. Carolina Stark
Circuit Court Judge
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
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

Scott E. Rosenow
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Dontreal Deshawn Nelson 507827
Waupun Correctional Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2016AP635-CRNM State of Wisconsin v. Dontreal Deshawn Nelson
(L.C. # 2013CF5295)

Before Fitzpatrick, P.J., Graham and Nashold, 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).

Dontreal Nelson appeals a judgment convicting him of one count of burglary, as well as an order denying his motion for postconviction relief. His appointed counsel, Pamela Moorshead, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),[1] and

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

Anders v. California, 386 U.S. 738 (1967). The no-merit report discusses whether the imposition of a DNA surcharge violated the *ex post facto* clause of the state and federal constitutions and whether the evidence at trial was sufficient to support the conviction. The no-merit report also discusses whether the circuit court erroneously exercised its sentencing discretion, whether trial counsel provided ineffective assistance, and whether the circuit court committed any reversible error. Nelson was provided a copy of the report but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.[2]

We first address whether the circuit court erred in denying Nelson's motion to vacate the $250 DNA surcharge imposed in this case. In his postconviction motion, Nelson argued that the DNA surcharge violated the *ex post facto* clause of the state and federal constitutions. In ***State v. Williams***, 2018 WI 59, ¶43, 381 Wis. 2d 661, 912 N.W.2d 373, the Wisconsin Supreme Court held that the imposition of the mandatory DNA surcharge does not constitute an *ex post facto* violation. Accordingly, any challenge to the circuit court's denial of Nelson's motion to vacate the surcharge would be without arguable merit.

---

[2] This court previously placed this appeal on hold because the Wisconsin Supreme Court granted a petition for review in ***State v. Trammell***, 2017AP1206, unpublished slip op. (WI App May 8, 2018). *See* ***State v. Trammell***, 2018 WI 111, 384 Wis. 2d 465, 922 N.W.2d 295. The order noted that here, at trial, jury instruction WIS JI-CRIMINAL 140 was given to the jury, and that the supreme court granted review in ***Trammell*** to address whether the holding in ***State v. Avila***, 192 Wis. 2d 870, 535 N.W.2d 440 (1995)—that it is "not reasonably likely" that WIS JI-CRIMINAL 140 reduces the State's burden of proof—is good law; or whether ***Avila*** should be overruled on the ground that it stands rebutted by empirical evidence. 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." ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

The no-merit report also addresses whether the evidence was sufficient to support the jury verdict. A claim of insufficiency of the evidence requires a showing that "the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). In order for the jury to find Nelson guilty of burglary, the State was required to prove beyond a reasonable doubt that Nelson intentionally entered a building or dwelling without the consent of the person in lawful possession of it, with the intent to steal or commit a felony. *See* WIS. STAT. § 943.10(1m)(a).

At trial, A.S. testified that she came home one day to find that her front door had been kicked in and was partially hanging off the hinge. She testified that she began to call the police and saw Nelson exiting the house through a side door, carrying a lock box. Two televisions, a computer, and a video game console were missing from A.S.'s residence. A.S. testified that she recognized Dontreal from the neighborhood, and that he had asked her for change and "hit on" her on occasions.

Police officer Randall Perez, who responded to A.S.'s call, also testified at trial. Perez testified that he observed "extensive ransacking" within A.S.'s residence and furniture tipped over. Detective Scott Freiburger, the officer who interviewed Nelson, testified that Nelson first denied the burglary and denied any familiarity with the area, but later admitted watching A.S. leave, kicking open her door, and stealing a television from her house.

Nelson also testified on his own behalf, after the court confirmed through a colloquy that he understood that he had a right to remain silent and was waiving that right. Nelson testified

that he had seen A.S. in the neighborhood and exchanged phone numbers with her. Nelson also testified that he and A.S. had had a romantic relationship about a week prior to the burglary incident, and that they got into an argument on the morning of the incident.

Nelson's testimony differed from the version of events described in the testimony of other witnesses, and the jury elected not to believe Nelson's version. It is the jury's responsibility to resolve conflicts and inconsistencies in the evidence and to judge credibility. ***State v. Pankow***, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988). Generally, it is not the province of the reviewing court to determine issues of credibility, and nothing in the no-merit report suggests that we should do so here. ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). Based on all of the above, we agree with counsel that any challenge to the sufficiency of the evidence would be without arguable merit.

The no-merit report also addresses whether there would be any arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the court explained that it considered facts pertinent to the standard sentencing factors and objectives, including Nelson's character, the seriousness of the offense, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & n.11, 270 Wis. 2d 535, 678 N.W.2d 197. The court imposed a ten-year bifurcated sentence, consisting of five years of initial confinement and five years of extended supervision, out of a maximum possible bifurcated sentence of twelve and a half years. *See* WIS. STAT. §§ 943.10(1m)(a) (classifying burglary as a

Class F felony); 973.01(2)(b)6m and (d)4 (providing maximum terms of seven and one-half years of initial confinement and five years of extended supervision for a Class F felony).

There is a presumption that a sentence "well within the limits of the maximum sentence" is not unduly harsh, and the sentence imposed here was not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***State v. Grindemann***, 2002 WI App 106, ¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted). We are satisfied that, under the circumstances, there would be no arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion.

The no-merit report also concludes that there would be no arguable merit to any claim of ineffective assistance of trial counsel. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficiency prejudiced the defense). On our own independent review of the record, we agree.

Finally, the no-merit report concludes that there would be no arguable merit to a claim that the circuit court committed reversible error. Our review of the record leads us to the same conclusion. We have found no other arguable basis for reversing the judgment of conviction, and we conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Pamela Moorshead is relieved of any further representation of Dontreal Nelson in this matter. *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