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DISTRICT IV

November 19, 2019

To:

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

2017AP2107-CRNM State of Wisconsin v. Artavia Polk (L.C. # 2016CF196)

Before Blanchard, Kloppenburg 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).

Attorney Jeremy Newman, appointed counsel for Artavia Polk, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738 (1967).

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

Counsel provided Polk with a copy of the report, and both counsel and this court advised him of his right to file a response. Polk has not responded. We conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

Polk was convicted of one count of expelling bodily substances by a prisoner. The court imposed a sentence of three years of initial confinement and two years of extended supervision.

The no-merit report addresses whether the evidence was sufficient to find Polk guilty in the first phase of the trial. We affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Credibility of witnesses is for the trier of fact. *Id.* at 504.

Without attempting to recite the evidence in detail here, the testimony of the prison staff witnesses was sufficient. The testimony was not inherently incredible and, if believed by the jury, was sufficient to meet every element of the charge.

The no-merit report addresses whether the evidence was sufficient in the second phase to support the verdict rejecting Polk's mental disease or defect defense. It was Polk's burden to prove that defense to a reasonable certainty by the greater weight of the credible evidence. WIS. STAT. § 971.15(3).

Although the jury found that Polk had a mental disease or defect, the jury also found that he did not lack the capacity to appreciate the wrongfulness of his conduct or to conform that conduct to the law. It would be frivolous to argue that the second part of the verdict was not

supported by the evidence, in light of Polk's testimony about his reason for spitting at the nurse, and the expert testimony that did not support the defense.

The no-merit report addresses whether a proper waiver of Polk's right to testify occurred in phase one, and of his right not to testify in phase two. For the reasons described in the no-merit report, the record does not show arguable merit in either situation.

The no-merit report addresses whether the circuit court erred by having Polk removed from the courtroom twice due to Polk's misconduct. There is no reasonable argument that Polk's behavior was not a proper basis for removal.

The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. See *State v. Gallion*, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

Our review of the record discloses no other potential issues for appeal.

Attorney Tristan Breedlove has replaced counsel who filed the original no-merit report.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Breedlove is relieved of further representation of Polk 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