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November 19, 2019

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

2018AP1151-CRNM State of Wisconsin v. Ronald S. Horan (L.C. # 2014CF377)

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 Philip J. Brehm, appointed counsel for Ronald S. Horan (Ronald), has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18);¹ *Anders v. California*, 386 U.S. 738, 744 (1967). The no-merit report addresses whether

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

there would be arguable merit to further proceedings based on claims of: (1) insufficiency of the evidence to support the jury verdict; (2) the denial of Ronald's postconviction motion for a new trial, and whether he received the ineffective assistance of trial counsel; (3) the circuit court's exercise of discretion at sentencing; or (4) a new factor warranting sentence modification.² Ronald was sent 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.

Ronald was charged with second-degree reckless homicide for causing the death of his brother, Tracy Horan. Ronald lived on the top floor of a three-apartment house. Ronald's front door is situated at the top of a steep flight of stairs with no landing. On August 7, 2014, Ronald and Tracy were drinking together in Ronald's apartment. They got into an argument and Ronald told Tracy to leave. As Tracy was going out the door, Ronald slammed the door shut. Ronald heard a thump or series of thumps. Tracy had fallen down the stairs and died almost immediately as the result of a broken neck. At some point, Ronald found Tracy dead on the stairs, buried his body outside, and called 911. He made a number of different statements to law enforcement, including that he intended to hit Tracy "in the ass with the door." The jury found Ronald guilty as charged, and the circuit court imposed seven years of initial confinement

² Because Ronald filed a postconviction motion for a new trial, we will review the denial of that motion and any preserved issues, including the sufficiency of the evidence. *See* WIS. STAT. RULE 809.30(2)(h) (requiring a postconviction motion before the filing of a notice of appeal "unless the grounds for seeking relief are sufficiency of the evidence or issues previously raised"). Ronald's postconviction motion did not raise any sentencing issues. Although it is arguable whether any potential sentencing issues would be preserved in the absence of a postconviction motion raising these issues in the circuit court, *see State v. Scherreiks*, 153 Wis. 2d 510, 516, 451 N.W.2d 759 (Ct. App. 1989), we choose to address the potential sentencing issues discussed in counsel's no-merit report.

followed by eight years of extended supervision, to run consecutive to the post-revocation sentence he was then serving.

Appointed postconviction counsel filed a motion for a new trial alleging that trial counsel provided ineffective assistance by (1) failing to move to suppress Ronald's pretrial statement, (2) allowing the jury to hear that Ronald was in prison at the time of trial, and (3) allowing the jury to hear that Ronald was on probation at the time of the offense. Following an evidentiary *Machner*³ hearing, the circuit court denied the motion. This no-merit appeal follows.

Appellate counsel's no-merit report first addresses whether there exists an arguably meritorious challenge to Ronald's conviction based on the sufficiency of the evidence. We must affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that as a matter of law 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). The credibility of the witnesses and the weight of the evidence is for the jury. *Id.* at 504. The no-merit report sets forth the essential elements of the offense and explains how the evidence at trial satisfied each element. We agree with counsel's analysis and conclusion that a challenge to the sufficiency of the evidence would lack arguable merit, and we will not discuss this point further.

Next, the no-merit report discusses the potential issue of whether Ronald is entitled to a new trial based on the ineffective assistance of trial counsel. Appointed counsel filed a

³ *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979) (where a defendant claims he or she received the ineffective assistance of trial counsel, a postconviction hearing "is a prerequisite ... on appeal to preserve the testimony of trial counsel").

postconviction motion challenging trial counsel's failure to seek suppression of an incriminating pretrial statement made by Ronald, and trial counsel's failure to object to evidence that Ronald was in prison at the time of the trial and on probation at the time of the offense. At a *Machner* hearing, based on trial counsel's testimony Ronald withdrew the ineffective assistance claim concerning the admission of his pretrial statement. When asked about why he had elicited testimony that Ronald was in prison, trial counsel testified: "I felt that the jury had to know that he was suffering some type of punishment so that they wouldn't worry about he has to be punished for killing his brother" As to not objecting to the evidence that Ronald was on probation at the time of the offense, trial counsel testified that he wanted the jury to know those circumstances to help explain Ronald's extremely odd behavior after the incident, including his delayed reporting and attempt to bury Tracy's body. The circuit court determined that trial counsel's performance was neither deficient nor prejudicial.

We agree with the analysis and conclusion in counsel's no-merit report that there is no meritorious challenge to the circuit court's denial of Ronald's postconviction motion. The circuit court's findings that trial counsel made a strategic decision to let in evidence of Ronald's status on probation and in prison are not clearly erroneous and are well supported by the record, including trial counsel's conduct at trial and his testimony at the *Machner* hearing. Further, we agree with appellate counsel's conclusion that the record before us does not support any other non-frivolous claim that Ronald was denied the effective assistance of trial counsel.⁴

⁴ As to matters beyond the record, appellate counsel asserts that he "is not aware of any other actions or inactions by trial counsel that would be reasonably characterized as ineffective assistance of counsel." Ronald has not filed a response disputing appellate counsel's determination.

Appellate counsel's no-merit report also addresses whether the circuit court properly exercised its sentencing discretion. The record reveals that the court's sentencing decision had a "rational and explainable basis." See *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (quoted source omitted). In fashioning its sentence, the circuit court considered the gravity of the offense, Ronald's character and history, and the need to protect the public. See *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court focused on the aggravating nature of Ronald's continued use of alcohol, as it "goes to your character as well as the gravity [of the offense]," and the need for public protection, noting that Ronald's lengthy criminal history included assaults of minor females and that "[a]lcohol was a factor in each of his cases." The court determined that prison was necessary:

One of his greatest hurdles of community supervision despite having received AODA treatment on several occasions he's had numerous violations related to alcohol consumption. His prior record and recent behavior exhibits Mr. Horan—Mr. Horan can be a danger to the community while he's intoxicated. And you continue to drink. It continues to make you a danger to society.

This is a demonstrably proper exercise of discretion. Further, under the circumstances of this case, it cannot reasonably be argued that Ronald's fifteen-year bifurcated sentence, which is well below the maximum of twenty-five years, is so excessive as to shock public sentiment. See *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Additionally, appellate counsel asserts that he "is unaware of any fact or set of facts" that would constitute meritorious grounds for a sentence modification. Ronald has not filed a response disputing this characterization. We agree with appellate counsel that a challenge to Ronald's sentence would lack arguable merit.

Our independent review of the record discloses no other potential issues for appeal. There were no objections made during jury selection or closing argument, the circuit court's

evidentiary rulings were proper, and the court engaged Ronald in a legally sufficient colloquy about his decision to testify. The circuit court properly denied Ronald's motions to dismiss and for a directed verdict brought at the close of the State's case, and again, after the defense rested. Although Ronald objected to the use of WIS JI—CRIMINAL 140, the propriety of the pattern language disputed by Ronald was approved in *State v. Trammell*, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564. There exists no arguably meritorious challenge to the use of WIS JI—CRIMINAL 140 in Ronald's case.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment and order, and discharges appellate counsel of the obligation to further represent Ronald S. Horan on appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Philip J. Brehm is relieved from further representing Ronald S. Horan 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