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 IV**

August 27, 2020

*To*:

Hon. Steven G. Bauer
Circuit Court Judge
Dodge County Justice Facility
210 W. Center St.
Juneau, WI 53039

Kurt F. Klomberg
District Attorney
Dodge County
210 W. Center St.
Juneau, WI 53039

Lynn M. Hron
Clerk of Circuit Court
Dodge County Justice Facility
210 W. Center St.
Juneau, WI 53039

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Lane Fitzgerald
The Fitzgerald Law Firm
2031 Riverside Dr., Ste. A
Beloit, WI 53511-2907

Pierre R. Page 536019
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

---

2019AP888-CRNM State of Wisconsin v. Pierre R. Page (L.C. # 2016CF315)

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).**

Attorney Lane Fitzgerald, appointed counsel for Pierre Page, has filed a no-merit report seeking to withdraw as appellate counsel 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). Page was sent a copy of the report and has filed a response.[2] Upon consideration of the report, the response, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Page was initially charged with two counts of delivering cocaine, one count of delivering a controlled substance counterfeit, and three counts of delivering heroin, all as a second or subsequent offense and as a repeater. According to the complaint, Page sold crack cocaine to a confidential informant on two occasions, sold a counterfeit substance to the informant on a third occasion, and sold heroin to a different confidential informant on three separate occasions.

Subsequent to charging, the State moved to dismiss the cocaine and counterfeit substance counts because the informant who participated in those transactions had passed away. The circuit court granted the motion and dismissed those three counts.[3]

The three counts involving sale of heroin to the second informant proceeded to a jury trial. The jury found Page guilty on all three counts.

The circuit court sentenced Page as follows: seven and one-half years of initial confinement followed by five years of extended supervision on the first count; two and one-half years of initial confinement followed by five years of extended supervision on the second count, consecutive to the first count; and a withheld sentence with five years of probation on the third count, consecutive to the first two counts. Thus, Page received a total global sentence of ten years

[2] Page filed two documents that we construe together as his response.

[3] In his response to the no-merit report, Page alleges that this informant is still alive, and that the State lied about the informant's death because the State did not want to present the informant as a witness. These allegations, even if true, would not support further postconviction proceedings given that the charges involving this informant were dismissed.

of initial confinement, followed by ten years of extended supervision, followed by five years of probation.

We turn first to the sufficiency of the evidence. The no-merit report does not address this issue. However, based upon our independent review of the record, we conclude that the issue has no arguable merit.

When addressing sufficiency of the evidence, an appellate court will not overturn a conviction "unless 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). Without reciting all of the trial evidence here, we are satisfied that it was sufficient. By the close of trial, the only issue in serious dispute was the informant's credibility. Because no police officer witnessed the drug transactions, Page's guilt (or lack thereof) turned on whether the jury believed the informant's testimony that Page was the individual who sold him the heroin that police recovered from those transactions. The credibility of a witness is for the jury to decide and would not be a basis for Page to argue that the evidence was insufficient. *See* ***State v. Gomez***, 179 Wis. 2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993) ("It is the function of the jury to decide issues of credibility.").

The no-merit report addresses whether trial counsel was ineffective in two respects. To show ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "[t]he defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688.

To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

The no-merit report first addresses whether trial counsel was ineffective by failing to attack the informant's credibility. We agree with no-merit counsel that there is no arguable merit to this issue. Although trial counsel's cross-examination of the informant was brief, counsel focused on significant potential weaknesses in the informant's credibility, including that the informant had been convicted of two crimes, agreed to work with police to receive "consideration" on other charges, and admitted to using heroin daily and having an overdose during the time period that he was informing on Page. Nothing in the record indicates that there were other significant lines of attack that counsel failed to pursue.

The no-merit report next addresses whether trial counsel was ineffective by failing to call any witnesses. We agree with no-merit counsel that there is no arguable merit to this issue. The record does not support a claim that there were witnesses who could have provided testimony that was reasonably likely to change the outcome in Page's favor.

The remaining issue that the no-merit report addresses is whether the government violated Page's due process rights by failing to preserve evidence of text messages that the informant sent or received in setting up the drug transactions that formed the basis for the charges against Page. We agree with counsel that there is no arguable merit to this issue.

To show a due process violation based on failure to preserve evidence, a defendant must establish that a government official either (1) "failed to preserve … evidence that is apparently exculpatory," or (2) "acted in bad faith by failing to preserve evidence which is potentially

exculpatory." *See* ***State v. Greenwold***, 189 Wis. 2d 59, 67, 525 N.W.2d 294 (Ct. App. 1994). "[A]pparently exculpatory" in this context requires that the evidence "'possess[ed] an exculpatory value that was apparent to those who had custody of the evidence.'" *See* ***State v. Munford***, 2010 WI App 168, ¶21, 330 Wis. 2d 575, 794 N.W.2d 264 (quoted source omitted).

Here, the circuit court held an evidentiary hearing on the investigating officers' failure to preserve text messages from the informant's phone. The officer who was in charge of the investigation of Page testified that the informant was instructed to use his own personal phone to set up the drug transactions with Page as he normally would; that the officer never viewed or possessed the text messages; and that there were no copies of text messages in the case files. A sheriff's detective who was involved in the investigation similarly testified that he never viewed or collected the text messages, and that no text messages existed in his office's files. The circuit court determined that the police had not destroyed text message evidence, but rather had only failed to collect the text message evidence. The court also determined that the text messages were not apparently exculpatory and instead would have been inculpatory. The court further determined that the officers' conduct was not in bad faith.

The no merit-report does not discuss the standard of review that applies to the circuit court's determinations on this due process issue. Regardless, we agree with counsel's implicit conclusion that there is no arguable merit to further proceedings on the issue under any standard of review. There is no factual support in the record to argue that the text messages were apparently exculpatory or that the officers acted in bad faith.

Our review of the record discloses no other issues of arguable merit with respect to events before or during trial. We see no basis in the record to pursue a challenge to the circuit court's

pretrial rulings, the circuit court's evidentiary rulings at trial, the jury instructions, or arguments made to the jury.

We turn to Page's arguments in his response to the no-merit report. Page first argues that he was arrested without probable cause. Even if Page's arrest could be challenged on that basis, we conclude that further postconviction proceedings on this potential suppression issue would be frivolous. Nothing in the record or in Page's response indicates that Page's arrest led to any evidence used to secure his conviction.

Next, Page points out that he is black and argues that having an all-white jury violated his constitutional rights. The United States Supreme Court has stated that a defendant "has no right to a 'petit jury composed in whole or in part of persons of [the defendant's] own race.'" ***Powers v. Ohio***, 499 U.S. 400, 404 (1991) (quoted source omitted). A defendant "*does* have the right to be tried by a jury whose members are selected by nondiscriminatory criteria." ***Id.*** (emphasis added). Here, however, there is nothing in the record or in Page's response to support a claim that jurors were selected based on discriminatory criteria. Thus, there is no arguable merit to this issue.

Page next argues that the jury was unconstitutionally biased against him because most of the jurors had a relationship to law enforcement. This argument similarly has no support in the record. Although several individuals in the jury pool stated that they were correctional officers or that they had a close relationship with someone in law enforcement, none of those potential jurors served on the jury.[4] We see no other arguable basis to challenge the composition of the jury.

[4] One juror who stated that she had two cousins who were police officers served on the jury.

Page next asserts that the circuit court judge was not impartial. We see nothing in the record to support a claim of judicial bias or partiality, and Page makes no specific allegations to support such a claim. There is no arguable merit to this issue.

We turn to sentencing. The no-merit report does not address sentencing. However, based upon our independent review of the record, we see no non-frivolous ground on which Page might challenge the circuit court's exercise of its sentencing discretion. The court discussed the required sentencing factors along with other relevant factors, and the court did not rely on any inappropriate factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197.

Page argues that his sentence was cruel, unusual, and excessive. But the overall sentence was well within the total maximum, and the circuit court provided a reasonable explanation for the sentence chosen. Among other considerations, the court reasonably relied on Page's history of criminal drug charges, including charges suggestive of ongoing drug dealing. Page could not argue that his sentence "shock[ed] public sentiment and violate[d] the judgment of reasonable people concerning what is right and proper under the circumstances." *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Finally, Page appears to claim that he was sentenced based on his race or ethnicity. As with other potential issues Page raises, there is nothing in the record to support this claim, and Page makes no specific allegations to support the claim. Thus, there is no arguable merit to this issue.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Lane Fitzgerald is relieved of any further representation of Pierre Page 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*