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September 9, 2020

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

2018AP2290-CRNM State of Wisconsin v. Frank Hayes, Jr. (L.C. # 2017CF4500)

Before Brash, P.J., Dugan and White, J.J.

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).

Frank Hayes, Jr., appeals the judgment convicting him of second-degree recklessly endangering safety with use of a dangerous weapon and of possession of a firearm by a felon.

See WIS. STAT. §§ 941.30(2), 939.63(1)(b), 941.29(1m)(a) (2017-18).¹ His appellate counsel, Leon W. Todd, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Hayes filed a response and appellate counsel filed a supplemental no-merit report, to which Hayes also responded.² *See* RULE 809.32(1)(e) & (f). Upon consideration of these submissions and an independent review of the record as mandated by *Anders*, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

The criminal complaint charged Hayes with one count of first-degree recklessly endangering safety while using a dangerous weapon and one count of being a felon in possession of a firearm. The charges stemmed from an altercation that Hayes had with a security guard at a gas station.

According to the complaint, a police officer viewed a video from a security camera at the gas station. The video, as described in the complaint, showed Hayes exchange words with the security guard, leave the store, and return a short time later holding a gun in his hands, which he pointed at several people who were by the gas pumps. The security guard retrieved his gun and the two men shot at each other. The complaint further alleged that Hayes had thirteen prior felony convictions.

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted. The Honorable David A. Hansher presided over the plea hearing. The Honorable T. Christopher Dee sentenced Hayes and entered the judgment of conviction.

² This court accepted Hayes's additional response and the addendum to the same.

Ultimately, Hayes pled guilty to the amended charge of second-degree recklessly endangering safety while using a dangerous weapon and to being a felon in possession of a firearm. Pursuant to the plea agreement, the State agreed to recommend a “moderate” prison sentence. The circuit court noted that this was the first time it had ever heard the term “moderate prison,” and it went on to accept Hayes’s pleas.

At sentencing, the State played the video of the incident. After listening to the parties’ remarks, the circuit court ordered Hayes to serve the following consecutive sentences: eight years of confinement and four years of extended supervision on the recklessly endangering safety charge; and five years of confinement and four years of extended supervision for possessing a firearm as a felon.

The no-merit report addresses the potential issues of whether Hayes’s pleas were knowingly, voluntarily, and intelligently entered and whether the circuit court properly exercised its discretion during sentencing. The supplemental no-merit report addresses Hayes’s claims that the security video that the police obtained from the gas station may have been tampered with and that his trial counsel was ineffective for failing to challenge its validity. The supplemental no-merit report also discusses Hayes’s claim that his trial counsel was ineffective for referencing at sentencing that Hayes had consumed alcohol on the day of the offenses. This court is satisfied that the no-merit report and the supplemental no-merit report properly conclude that the issues they address are without merit, and we discuss them further only to briefly elaborate on a few points. We also discuss some of the various issues Hayes presents in his filings.

Though it is difficult to read, it appears that the plea questionnaire misstated the term of imprisonment that Hayes faced for being a felon in possession of a firearm. The plea

questionnaire indicates that Hayes faced five years, when in actuality he faced ten years. During the plea hearing, the circuit court noted that it could not read the handwriting on the plea questionnaire form as to the maximum penalties. The State then clarified for the circuit court that on the charge of second-degree recklessly endangering safety while armed, Hayes faced a fifteen-year sentence and a \$25,000 fine and on the felon in possession of a firearm charge, he faced a ten-year sentence and a \$25,000 fine.³ Therefore, there is no arguable merit to a claim by Hayes that he did not understand the range of punishments he faced.

In his response, Hayes argues that his trial counsel was ineffective for allowing him to enter into a plea agreement with the State that included a recommendation for a “moderate” amount of prison time. He claims he is entitled to plea withdrawal because the agreement lacked specificity. Hayes glosses over the fact that the plea agreement resulted in an amended charge of second-degree recklessly endangering safety with use of a dangerous weapon. As a result, the felony classification dropped from F to G and the term of imprisonment dropped from seventeen years and six months to fifteen years. *See* WIS. STAT. §§ 941.30(1)-(2), 939.63(1)(b), 939.50(3)(f)-(g). During the plea hearing, and on the plea questionnaire form itself, Hayes acknowledged the terms of the agreement. This claim seemingly amounts to one of “buyer’s remorse,” which will not support plea withdrawal. A challenge on this basis lacks arguable merit.

In addition, Hayes repeatedly suggests that the security video that the police obtained from the gas station may have been tampered with. He argues that his trial counsel was

³ The amended information also properly detailed the maximum potential imprisonment Hayes faced.

ineffective for failing to challenge the validity of the video. Based on the record before us, however, there is no support for Hayes's tampering assertion. *See generally State v. Aderhold*, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979) ("The rule is well established that reviewing courts are limited to the record, and are bound by the record."). Insofar as Hayes's assertion seemingly amounts to speculation and conjecture, it will not support an appeal.

Hayes further asserts that there were three different videos from the incident: one from the gas station; one from the ambulance (referenced as Meda Care Unit 271) that responded to the scene; and one from a pole camera. Hayes claims these videos have been withheld from him and contends that they would show that he acted in self-defense. Appellate counsel advises that he previously provided Hayes with copies of the gas station video and the pole camera video and further submits that he investigated Hayes's claim regarding the ambulance video. Appellate counsel explains his investigation and the basis for his determination that the ambulance video "never actually existed," despite a reference to it in one of the police reports. Accordingly, there is no arguable merit to further pursuit of this issue.

In his addendum, Hayes argues that the State never turned over the video from the pole camera in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Appellate counsel refutes this and advises that Hayes's trial counsel provided appellate counsel with a copy of his file and that file included both the gas station video and the pole camera video. Consequently, there is no arguable merit to this issue.

Our review of the record discloses no other potential issues for appeal. This court has reviewed and considered the various issues raised by Hayes. To the extent we did not specifically address all of them, this court has concluded that they lack sufficient merit or

importance to warrant individual attention. Accordingly, this court accepts the no-merit reports, affirms the convictions, and discharges appellate counsel of the obligation to represent Hayes further in this appeal.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Leon W. Todd is relieved of further representation of Hayes 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