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April 22, 2021

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

2020AP79-CRNM State of Wisconsin v. Lonell A. Powers (L.C. # 2018CF522)

Before Fitzpatrick, P.J., Blanchard, 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).

Lonell Powers appeals a judgment convicting him of three felonies, following a jury trial. Attorney Mark Schoenfeldt has filed a no-merit report seeking to withdraw as appellate counsel. See WIS. STAT. RULE 809.32 (2019-20);¹ *Anders v. California*, 386 U.S. 738, 744 (1967). The

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

no-merit report discusses the sufficiency of the evidence to support the convictions, the circuit court's exercise of sentencing discretion, and the effectiveness of trial's counsel representation of Powers. Powers was sent a copy of the no-merit report and has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Powers was charged with one count of felony bail jumping, possession of drug paraphernalia, possession of THC, maintaining a drug trafficking place, attempted delivery of methamphetamine, and possession of methamphetamine with intent to deliver, all as repeaters. A trial was held and the jury found Powers guilty of attempted delivery of methamphetamine, possession with intent to deliver methamphetamine, and bail jumping. The jury returned verdicts of not guilty on the remaining charges.

The no-merit report discusses whether the evidence was sufficient to support the jury's verdicts. In order for the jury to find Powers guilty of possession of methamphetamine with intent to deliver under WIS. STAT. § 961.41(1m)(e)1., the State needed to prove that Powers possessed a substance, that the substance was methamphetamine, that Powers knew or believed the substance was methamphetamine, and that he intended to deliver methamphetamine. *See* WIS JI—CRIMINAL 6035. In order to find Powers guilty of attempted delivery of methamphetamine under WIS. STAT. §§ 961.41(1)(e)1. and 939.32, the State needed to prove that Powers intended to commit the crime of delivery of methamphetamine, and that Powers did acts toward the commission of the crime that demonstrated unequivocally, under all of the circumstances, that he would have committed the crime except for the intervention of another person or some other extraneous factor. *See* WIS JI—CRIMINAL 580 and 6020.

Without attempting to recite the evidence in detail here, Powers's convictions on the two drug charges are supported by the trial testimony. A police officer testified that he was dispatched to an address where Powers had been observed, and that there was a warrant out for Powers's arrest. The officer testified that he observed Powers standing out in front of the residence at the address and, over a period of time, saw Powers meet with a succession of individuals, each of whom interacted with Powers for about a minute and then left. After each meeting, Powers went back into the house. The officer further testified that he saw Powers walk up to an SUV in the alley behind the house. The officer made contact with the occupants of the SUV, while another officer made contact with Powers behind the house. Powers was arrested on the warrant and, at the time of arrest, had a small bag in his hand containing a crystallized substance that was determined from testing to be methamphetamine. A search of the room inside the house where Powers had been staying produced scales, a pipe, a small baggie containing a crystal-like substance, cash, and a metal grinder.

It is true that no witness testified to having seen the actual transfer of an item that could be drugs between Powers and any of the individuals he met with on the day of his arrest. However, a conviction may be supported solely by circumstantial evidence and, in some cases, circumstantial evidence may be stronger and more satisfactory than direct evidence. *State v. Poellinger*, 153 Wis. 2d 493, 501-02, 451 N.W.2d 752 (1990). In reviewing the sufficiency of the evidence to support a conviction in circumstantial evidence cases, we may not substitute our judgment for that of the trier of fact unless the evidence, viewed most favorably to the verdict, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found the requisite guilt. *Id.* at 507. Therefore, if more than one reasonable inference can be drawn from the evidence, we must adopt the inference that supports the verdict. *Id.* at 506-07. Here, it

was reasonable for the jury to infer that the presence of the baggie in Powers's hand, combined with the testimony regarding the officer's observations of Powers summarized above, satisfied the elements of possession of methamphetamine with intent to deliver under WIS. STAT. § 961.41(1m)(e)1. It was also reasonable for the jury to infer that Powers's attempt to reach the SUV in the alleyway was an attempted delivery of methamphetamine under WIS. STAT. §§ 961.41(1)(e)1. and 939.32. We agree with counsel's assertion that there would be no arguable merit to challenging the sufficiency of the evidence to support the drug convictions.

In order to find Powers guilty of felony bail jumping under WIS. STAT. § 946.49(1)(b), the State needed to prove that Powers was charged with a felony, that he was released from custody on bond, and that he intentionally failed to comply with the terms of the bond. *See* WIS JI—CRIMINAL 1795. Powers stipulated to the first two elements of felony bail jumping. The only remaining element, then, was whether Powers intentionally failed to comply with the terms of his bond. In this case, Powers was charged with violating a condition of bond that required that he not commit any crime. Thus, the State was required to prove by evidence that satisfied the jury beyond a reasonable doubt that Powers committed a crime. The guilty verdicts on the two drug counts demonstrate that the jury was satisfied beyond a reasonable doubt that Powers committed a crime, thus violating the terms of his bond. The evidence was sufficient to support the felony bail-jumping conviction.

A challenge to Powers's sentence also would be without arguable merit. On each of the three counts, the court imposed three years of initial confinement and three years of extended supervision, to run concurrently. The sentences are well within the legal maximums. The standards for the circuit court and this court on discretionary 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. The court found that Powers was eligible for the substance abuse program, and awarded 194 days of sentence credit. Our independent review of the record reveals no issue of arguable merit with regard to sentencing.

Finally, the record discloses no arguable basis for challenging the effectiveness of Powers's trial counsel. To establish ineffective assistance of counsel, Powers must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's ineffective performance, the outcome of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In reviewing trial counsel's performance, "every effort is made to avoid determinations of ineffectiveness based on hindsight.... and the burden is placed on the defendant to overcome a strong presumption that counsel acted reasonably within professional norms." *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). Therefore, this court judges "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of the counsel's conduct." *Strickland*, 466 U.S. at 690. This court's review of the record and the no-merit report discloses no basis for challenging trial counsel's performance.

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

Accordingly,

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

IT IS FURTHER ORDERED that attorney Mark Schoenfeld is relieved of any further representation of Lonell Powers in this matter pursuant to 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