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DISTRICT I

March 29, 2022

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

2020AP1206-CRNM State of Wisconsin v. Otis Darnell Souter (L.C. # 2018CF2667)

Before Brash, C.J., Donald, P.J., and White, 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).

Otis Darnell Souter appeals a judgment of conviction entered after a jury found him guilty of two felonies. Souter's appellate counsel, Attorney Bradley J. Lochowitz, filed a no-merit report asserting that no arguably meritorious issues exist for an appeal. *See* WIS. STAT. RULE 809.32 (2019-20).[1] Souter did not file a response, although we granted him several

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

extensions of time to respond.[2] Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm.

Marquita Walker was killed on May 14, 2018, when a bullet struck her in the back of the head while she was driving a vehicle on North 11th Street in Milwaukee. The State alleged in a criminal complaint that either Souter or a person acting in concert with Souter fired the shot that killed Walker. The State further alleged that on May 14, 2018, Souter was a convicted felon and therefore unlawfully in possession of a firearm. The State ultimately charged Souter with first-degree reckless homicide by use of a dangerous weapon as a party to a crime, and with possession of a firearm while a felon. Souter pled not guilty and requested a jury trial. The jury found him guilty as charged. The circuit court imposed an aggregate forty-seven-year term of imprisonment bifurcated as thirty-two years of initial confinement and fifteen years of extended supervision. The circuit court granted Souter the 147 days of sentence credit that he requested, found him ineligible for the Wisconsin substance abuse program and the challenge incarceration program, and ordered him to pay $11,870.25 in restitution.

We first consider whether Souter could pursue an arguably meritorious claim that the State failed to present sufficient evidence to support the guilty verdicts. We agree with appellate counsel that he could not do so.

Before the jury could find Souter guilty of first-degree reckless homicide by use of a dangerous weapon as a party to a crime, the State was required to prove beyond a reasonable

[2] Souter's final deadline for filing a response to the no-merit report passed on September 8, 2021.

doubt that: (1) Souter caused Walker's death; (2) he caused the death by criminally reckless conduct; (3) the circumstances of his conduct showed utter disregard for human life; (4) he committed the crime while using a dangerous weapon; and (5) he either directly committed the crime or he intentionally aided and abetted its commission. *See* WIS. STAT. §§ 940.02, 939.63(1)(b), 939.05 (2)(a)-(b) (2017-18); *see also* WIS JI—CRIMINAL 1020, 990, 400. Before the jury could find Souter guilty of possession of a firearm while a felon, the State was required to prove beyond a reasonable doubt that: (1) Souter possessed a firearm; and (2) he had been convicted of a felony before May 14, 2018. *See* WIS. STAT. § 941.29(1m)(a) (2017-18); WIS JI—CRIMINAL 1343.

A.T. testified that on May 14, 2018, she was in a minivan with Walker, T.W., and D.W. They stopped at a gas station, where someone drove a black Nissan vehicle next to the minivan. A person that A.T. subsequently identified as Souter emerged from the Nissan, displayed what appeared to be a gun, and directed the group in the minivan to "tell ... Don that I'm out here, and I'm not hiding." A.T. testified that she knew a man named L.C., and that he was commonly referred to as "Don." A.T. said that she and her three companions drove to a second gas station to meet L.C. A.T. said that she then got into another car, and L.C. took her place in the minivan. Later that day, she learned that Walker had been shot and killed.

D.W. and T.W. both testified. Each man said that he was with Walker and others in a minivan on May 14, 2018, when a gunman confronted them at a gas station. D.W. and T.W. each identified Souter as the gunman. D.W. went on to testify that Walker was scared after the encounter at the gas station and that she contacted L.C. by telephone regarding the incident.

L.C. testified that he and Souter had "some [bad] blood" between them. L.C. further testified that on May 14, 2018, he received a telephone call from Walker. She described the encounter with Souter at the gas station and stated that Souter was armed. L.C. said that after the telephone call, he joined Walker at a gas station and they drove through Milwaukee until they saw Souter driving a black Nissan vehicle in the area of 12th Street and Keefe Avenue. When Walker turned onto 11th Street, L.C. saw two people shooting from an alley. L.C. recognized both gunmen, and identified one of them as Souter. As the shooting continued, L.C. realized that Walker had been shot and could no longer operate the minivan. It hit a tree and came to a stop. L.C. left the scene moments later.

A detective presented a video recording made on May 14, 2018, by a surveillance camera in the area where the shooting occurred. The video established the time of the shooting as approximately 12:40 p.m.

Souter elected not to testify. He stipulated that he had been convicted of a felony prior to May 14, 2018, and that the conviction had not been reversed or vacated as of that date. He also presented testimony from Jatamia Harris, who said that she owned a black Nissan Rogue that she lent to him on May 14, 2018. Harris testified that Souter returned the car to her that same day at some time between 12:30 p.m. and 1:00 p.m. The State in rebuttal presented a recorded interview that Harris gave to a detective in which she estimated that Souter returned the Nissan to her sometime between 1:30 p.m. and 2:00 p.m.

When this court considers the sufficiency of the evidence presented at trial, we apply a highly deferential standard. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably

to the [S]tate and the conviction, is so insufficient in probative value and force 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). In light of the evidence that the State presented to satisfy the elements of the charged offenses, any challenge to the sufficiency of that evidence would be frivolous within the meaning of ***Anders***.

Appellate counsel does not discuss whether Souter could pursue a challenge to the admissibility of testimony from L.C. describing his telephone conversation with Walker on the day she died. The witnesses established that Walker's statement to L.C. describing her encounter with Souter constituted a statement of recent perception by an unavailable declarant and therefore was admissible as an exception to the hearsay rule pursuant to WIS. STAT. § 908.045(2). Additionally, Walker's statement was not made as a substitute for trial testimony and therefore was not excluded by the Confrontation Clause of the Sixth Amendment of the United States Constitution. *See* ***State v. Reinwand***, 2019 WI 25, ¶¶19, 22-23, 385 Wis. 2d 700, 924 N.W.2d 184. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Appellate counsel also does not discuss whether Souter could pursue an arguably meritorious claim that he was denied the right to testify on his own behalf. The record shows that the circuit court conducted a colloquy with Souter and established that he understood his right to testify, had discussed that right with his trial counsel, and had knowingly and voluntarily chosen not to testify. The colloquy satisfied the requirements for a valid waiver of the right to testify. *See* ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Appellate counsel discusses whether Souter could pursue an arguably meritorious challenge to the circuit court's rulings prohibiting the State from presenting certain evidence that the prosecutor failed to timely disclose prior to trial. The rulings were favorable to Souter. Accordingly, we agree with appellate counsel's conclusion that they do not provide grounds for further proceedings. *See* WIS. STAT. RULE 809.10(4) (limiting appellate review to rulings that are adverse to the appellant).

We also agree with appellate counsel's conclusion that Souter could not mount an arguably meritorious challenge to the circuit court's mid-trial decision to designate an identified juror as one of the two alternates. Before making the decision, the circuit court found that the juror in question was visibly asleep during portions of the testimony and that the juror had likely not heard significant evidence in the case. The circuit court concluded that the juror should therefore be removed from the panel that ultimately decided the case. A circuit court has discretion to determine how to proceed in the face of juror inattentiveness, and we will uphold the circuit court's decision if the record shows that the circuit court examined the facts, complied with the law, and reasoned its way to a conclusion that a reasonable judge could reach. *See* ***State v. Hampton***, 201 Wis. 2d 662, 670, 549 N.W.2d 756 (Ct. App. 1996). In light of the standard of review, further proceedings to challenge the circuit court's decision regarding the inattentive juror would be frivolous within the meaning of ***Anders***.

We next conclude that Souter could not mount an arguably meritorious claim that the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. Upon conviction of first-degree reckless homicide by use of a dangerous weapon as a party to a crime, Souter faced sixty-five years of imprisonment. *See* WIS. STAT. §§ 940.02(1), 939.63(1)(b), 939.05, 939.50(3)(b) (2017-18). The circuit court

imposed a forty-year sentence, bifurcated as thirty years of initial confinement and ten years of extended supervision. Upon conviction of possession of a firearm while a felon, Souter faced ten years of imprisonment and a $25,000 fine. *See* WIS. STAT. §§ 941.29(1m)(a), 939.50(3)(g) (2017-18). The circuit court imposed a consecutive seven year sentence, bifurcated as two years of initial confinement and five years of extended supervision. Before pronouncing the sentences, the circuit court identified punishment and deterrence as the primary sentencing goals, and the circuit court discussed the factors that it viewed as relevant to achieving those goals. *See* ***Gallion***, 270 Wis. 2d 535, ¶¶41-43. The circuit court's discussion included consideration of the mandatory sentencing factors, namely, "the gravity of the offense, the character of the defendant, 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 sentences imposed were within the maximums allowed by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and were not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). A challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

We also conclude that Souter could not pursue an arguably meritorious challenge to the circuit court's finding that he was ineligible to participate in the challenge incarceration program and the Wisconsin substance abuse program. *See* WIS. STAT. §§ 302.045, 302.05. A circuit court normally exercises its sentencing discretion when determining a defendant's eligibility for

these programs. *See* WIS. STAT. §§ 973.01(3g)-(3m).[3] However, a person serving a sentence for a crime specified in WIS. STAT. ch. 940 is statutorily disqualified from participating in either program. *See* §§ 302.045(2)(c), 302.05(3)(a)1. Souter therefore is disqualified from program participation while serving his sentence for first-degree reckless homicide in violation of WIS. STAT. § 940.02. When he completes his thirty-year term of initial confinement for that offense, Souter—who was twenty-eight years old on the day of sentencing—will be well past forty years old and therefore statutorily disqualified from participating in the challenge incarceration program. *See* § 302.045(2)(b). Finally, the circuit court found Souter ineligible for participation in the Wisconsin substance abuse program at any time because he did not demonstrate that he had a substance abuse problem, and therefore nothing suggested that the program would benefit him. The circuit court did not make an error of law and reached a reasonable conclusion in light of the facts presented. *See* ***Hampton***, 201 Wis. 2d at 670. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

We agree with appellate counsel that Souter could not mount an arguably meritorious challenge to the restitution order. The State sought restitution on behalf of the Crime Victim's Compensation Program (CVCP), *see* WIS. STAT. §§ 973.20(5)(d), (9), and on behalf of Walker's mother, J.W., *see* § 973.20(1r), WIS. STAT. § 950.02(3), (4)(a)4.a. Restitution orders are within the circuit court's discretion, and our standard of review is highly deferential. *See* ***State v. Fernandez***, 2009 WI 29, ¶8, 316 Wis. 2d 598, 764 N.W.2d 509. We search the record for

[3] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

reasons to sustain the circuit court's exercise of discretion. *See* ***State v. Hershberger***, 2014 WI App 86, ¶43, 356 Wis. 2d 220, 853 N.W.2d 586.

The circuit court conducted the restitution hearing in conjunction with Souter's sentencing. *See* WIS. STAT. § 973.20(13)(c). J.W. was present at the hearing. At the outset of the proceeding, Souter questioned some of the requested restitution amounts, but he ultimately agreed to restitution of $2,833, payable to the CVCP for funeral expenses, and $6,237.25, payable to J.W. for various travel and burial costs. Accordingly, he cannot pursue an arguably meritorious challenge to those amounts. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126.

Souter maintained an objection to awarding J.W. $2,800 as restitution for wages that she lost following Walker's death. Souter conceded that lost wages are reimbursable as restitution, but contended that J.W.'s claim lacked confirming documentation.[4] The circuit court reviewed J.W.'s paystubs showing that J.W. had earned $10.00 per hour prior to Walker's death, and the circuit court considered J.W.'s contention that trauma induced by Walker's death had interfered with her ability to work. The circuit court relied on the documentation and representations presented at the hearing and reasonably exercised its discretion in awarding restitution. In light

[4] Approximately a year after the circuit court addressed J.W.'s restitution claim for lost wages, our supreme court decided ***State v. Muth***, 2020 WI 65, 392 Wis. 2d 578, 945 N.W.2d 645. That case involved a restitution claim for lost wages sought by the adult children of a homicide victim. Such children, like the parents of a homicide victim, are defined as victims themselves pursuant to WIS. STAT. § 950.02(3), (4)(a)4.a. The three-justice lead opinion and the three-justice concurrence in ***Muth*** set forth different bases for upholding a circuit court's award of lost wages to such victims. *See* ***id.***, 392 Wis. 2d 578, ¶¶2, 15, 49-50 (lead opinion); ***id.***, ¶¶62, 83-85 (Dallet, J., concurring). Regardless of the specific analysis used by the justices, the lead opinion and the three-justice concurrence confirm the validity of trial counsel's concession in this case that a person defined by statute as the surviving victim of a criminal homicide may seek restitution for lost wages if the loss was due to the defendant's actions.

of our deferential standard of review, further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Our independent review of the record does not disclose any other potential issues warranting discussion. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Bradley J. Lochowicz is relieved of any further representation of Otis Darnell Souter. *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