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DISTRICT III

June 29, 2022

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Brown County Courthouse
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Leon N. Eppis
Brown County Jail
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You are hereby notified that the Court has entered the following opinion and order:

2020AP12-CRNM State of Wisconsin v. Leon N. Eppis
2020AP13-CRNM (L. C. Nos. 2017CF1456, 2018CF263)

Before Stark, P.J., Hruz and Gill, 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).

Leon Eppis appeals from judgments, entered after court trials, convicting him of five counts of felony bail jumping, one count of resisting an officer, one count of resisting an officer causing soft tissue injury, and one count of disorderly conduct. Appellate counsel, Vicki Zick, has filed no-merit reports, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and

WIS. STAT. RULE 809.32 (2019-20).[1] Eppis was advised of his right to file a response, but he has not responded. Upon this court's independent review of the records—as mandated by ***Anders***—and counsel's reports, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgments.

Shortly after 11:00 p.m. on September 28, 2017, Green Bay Police Officer Kevin Stevens was dispatched to a city-owned parking ramp to look for a male subject, later identified as Eppis, sleeping in the stairwell. Eppis, who was homeless, had prior arrests for trespassing and was subject to a no-trespass order for all city parking ramps.

Stevens and two other officers approached Eppis. Stevens attempted to speak with Eppis, who was "acting strange" and did not answer Stevens' questions. When Stevens explained to Eppis that he was not welcome on the property and was going to be arrested for trespassing, Eppis responded, "I'm not going to jail." The officers instructed Eppis to put his hands behind his back, but Eppis did not do so. When the officers attempted to place Eppis' hands behind his back, a struggle ensued. Stevens and another officer were able to handcuff Eppis, but he declined to cooperate with being moved to the squad car. As a result, the officers had to further secure Eppis' feet with a hobble. At the time of his arrest, Eppis was released on a signature bond for prior charges of disorderly conduct and felony bail jumping. Based on his conduct in the September 28, 2017 incident, Eppis was charged in Brown County Circuit Court case No. 2017CF1456 with one count of resisting an officer and one count of felony bail jumping.

[1] Counsel did not seek to consolidate these matters and filed a separate no-merit report for each case. By amended order dated June 21, 2022, we consolidated these matters for disposition on our own motion. *See* WIS. STAT. RULE 809.10(3) (2019-20).

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

Eppis was originally held on a cash bond in case No. 2017CF1456. The bond was amended to a signature bond on December 11, 2017. A bench warrant for Eppis' arrest was issued on January 12, 2018, after he failed to appear at a pretrial conference.

On February 10, 2018, shortly before midnight, Green Bay police were dispatched to a homeless shelter. Eppis had been caught smoking in the bathroom, a violation of shelter rules, and was refusing the staff's request that he leave. One of the officers ran a computer check and noticed several warrants for Eppis' arrest, including the bench warrant in case No. 2017CF1456. Eppis was again uncooperative with, and physically resistant to, law enforcement. Police attempted to use a Taser, deploying it four times, but the tool was unsuccessful in subduing Eppis. Officer Keith Rager delivered two or three "focused knee strikes" to Eppis' thigh. On the final strike, there was "bone-on-bone contact" which caused Rager "immediate sharp pain shooting from [his] anterior knee towards [his] quadriceps muscle." Eppis was taken into custody in the early morning hours of February 11, 2018. Rager went to the emergency room for treatment and was diagnosed with a quadriceps contusion. Eppis was subsequently charged in Brown County Circuit Court case No. 2018CF263 with one count of resisting an officer causing soft tissue injury, one count of disorderly conduct, and four counts of bail jumping.

In addition to the two cases captioned for this matter, Eppis was also facing charges in Brown County Circuit Court case Nos. 2016CF1831, 2017CF1261, and 2017CF1311. After Eppis' February 2018 arrest, the five cases began tracking together. The State dismissed case No. 2016CF1831 without prejudice on March 8, 2018. Eppis waived a jury trial in the four remaining cases on July 9, 2018, and court trials in those cases began on September 25, 2018.

The cases were tried individually, starting with the most recent one. Eppis was first convicted of the six charges in case No. 2018CF263, then of the two charges in case No. 2017CF1456. After the second conviction, the State moved to dismiss the remaining two cases, acknowledging that their dismissal would be with prejudice, and explaining that "it's not that his behavior with the police here was acceptable … but … there's a point of diminishing returns and I think we've reached that point. Frankly, I just don't think Mr. Eppis needs to be convicted of more crimes for his course of behavior here. I think it's enough." The circuit court dismissed the final two cases.

A presentence investigation report was ordered, but Eppis refused to cooperate with the writer. His odd behavior while expressing his refusal to cooperate caused the writer concerns about Eppis' competency, which led the State to ask the circuit court for a competency evaluation. The court ordered the evaluation. The doctor's report stated that Eppis had "a history of intellectual deficits," but that he was nevertheless competent. Eppis did not protest the findings, and the matters were scheduled for sentencing.

In case No. 2018CF263, the circuit court imposed eighteen months' initial confinement and thirty months' extended supervision for the resisting causing injury charge, ninety days for the disorderly conduct charge, and one year of initial confinement and two years' extended supervision for each of the four bail jumping charges. The sentences were ordered to run concurrently, and the court awarded 314 days of sentence credit. In case No. 2017CF1456, the court imposed nine months in jail for each of the two convictions, concurrent with each other and with the sentences in case No. 2018CF263. Eppis appeals.

The first issue appellate counsel discusses in the no-merit reports is whether Eppis "knowingly, voluntarily, and intelligently waived his right to a preliminary examination and his right to a jury trial in both cases." In each case, Eppis signed a completed "Waiver of Right to Preliminary Hearing" form. His trial attorney also signed each form, certifying that he had read the questionnaire to Eppis, that he had discussed and explained its contents to Eppis, and that Eppis understood the form. The court commissioner conducted a waiver colloquy with Eppis in each case to ensure a valid waiver. Moreover, any claims of error at a preliminary hearing must be made before trial, or the claims will be waived. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991). No interlocutory challenges were pursued. Thus, our review of the records satisfies us that there is no arguable merit to a challenge to the waiver of the preliminary hearings.

WISCONSIN STAT. § 972.02(1) requires criminal cases to be tried by a jury "unless the defendant waives a jury in writing or by statement in open court … on the record, with the approval of the court and the consent of the state." The defendant, not counsel, must waive the right to a jury trial by an affirmative act. *See* ***State v. Anderson***, 2002 WI 7, ¶11, 249 Wis. 2d 586, 638 N.W.2d 301. When Eppis' attorney advised the circuit court that Eppis was interested in a court trial over a jury trial, the court conducted an appropriate colloquy with Eppis to ensure that Eppis was making a deliberate choice. *See* ***id.***, ¶¶23-24. The State also consented to the jury trial waiver. Our review of the records satisfies us that there is no arguably meritorious challenge to Eppis' waiver of a jury trial.

The second issue counsel discusses is whether Eppis voluntarily gave up his right to testify. "A criminal defendant has a personal, fundamental right to testify and 'present his own version of events in his own words.'" ***State v. Nelson***, 2014 WI 70, ¶19, 355 Wis. 2d 722, 849

N.W.2d 317 (citations omitted). This right cannot be forfeited; it must be expressly and personally waived. *See* ***id.***, ¶20. Thus, the circuit court is required to conduct a colloquy with the defendant to ensure the waiver of the right to testify is knowing, intelligent, and voluntary. *See* ***State v. Weed***, 2003 WI 85, ¶43, 263 Wis. 2d 434, 666 N.W.2d 485. "The colloquy should consist of a basic inquiry to ensure that (1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel." ***Id.*** The records reflect that the court conducted an appropriate ***Weed***-style colloquy with Eppis for each of the two cases that were tried. There is no arguably meritorious challenge to Eppis' waivers of the right to testify.

The third issue counsel addresses is whether there was sufficient evidence to convict Eppis of the crimes charged. When reviewing the sufficiency of the evidence to support a conviction, this court will not reverse the 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." *See* ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). This rule applies not only to jury trials but to court trials as well. *See* ***State v. Schulpius***, 2006 WI App 263, ¶11, 298 Wis. 2d 155, 726 N.W.2d 706.

The no-merit reports set forth the applicable standard of review and the evidence satisfying the elements of each crime. This court is satisfied that the no-merit reports properly analyze the sufficiency-of-the-evidence issue as being without merit, and we will not discuss that issue further.

Finally, appellate counsel discusses whether "any errors occurred at sentencing." Sentencing is committed to the circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17,

270 Wis. 2d 535, 678 N.W.2d 197; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Our review of the records confirms that the court appropriately considered relevant sentencing objectives and factors. The concurrent sentences totaling four years' imprisonment are well within the maximum possible thirty-seven-year range authorized by law. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). Further, the concurrent sentences are not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975) (stating that an erroneous exercise of discretion "will be found only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment"). Thus, this court is satisfied that the no-merit reports properly analyze the sentence length as lacking arguable merit.

We do, however, note one potential issue overlooked by trial and appellate counsel. In case No. 2018CF263, Eppis was awarded 314 days of sentence credit for the time from his arrest on February 11, 2018, to his sentencing on December 21, 2018. It is unclear from the sentencing transcript whether the circuit court intended to also award the same credit in the other case but, in any event, the judgment of conviction in case No. 2017CF1456 does not award Eppis any sentence credit. While it appears that Eppis was not entitled to the same 314 days of credit in his 2017 case, he was nevertheless entitled to an amount between 75 and 105 days.

On December 11, 2017, the circuit court converted Eppis' $500 cash bond to a signature bond, and Eppis was released from custody. At that time, the State noted that Eppis had "been in jail on [2017CF]1456 for 75 days now." Thus, it is readily apparent that Eppis was entitled to at least seventy-five days of sentence credit in that case.

Eppis was returned to custody on February 11, 2018, not just for the new charges, but also on the bench warrant issued in the 2017 case. Electronic circuit court docket entries indicate that the warrant was not canceled until March 8, 2018, when the circuit court ordered that "[p]resent bond in those remaining files continues." Thus, Eppis' signature bond was reinstated and he was released on his 2017 case at that time, even though cash bond in the 2018 case kept him in custody. Still, Eppis was in custody in connection with both cases for thirty-five days and, because the sentences were concurrent, he was entitled to credit for that time in both cases. *See* ***State v. Ward***, 153 Wis. 2d 743, 744-45745, 452 N.W.2d 158 (Ct. App. 1989) (defendant is entitled to sentence credit against multiple offenses where custody for each offense was "in connection with" all of the concurrent sentences); *see also* WIS. STAT. § 973.155(1)(a).

However, Eppis was fully discharged from the sentences in 2017CF1456 on September 21, 2019. Accordingly, there is no arguable merit to a claim for additional sentence credit because any such claim is moot. *See* ***State v. Barfell***, 2010 WI App 61, ¶9, 324 Wis. 2d 374, 782 N.W.2d 437.

Our independent review of the records reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved of further representation of Leon Eppis in these matters. *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