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**DISTRICT I**

July 19, 2022

*To*:

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

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2019AP1442-CRNM State of Wisconsin v. Dvonta P. Ames (L.C. # 2016CF5229)

Before Brash, C.J., Donald, P.J., and Dugan, 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).**

Dvonta P. Ames appeals from a judgment, entered on a jury's verdict, convicting him of one count of possession of a firearm by a felon as a habitual offender and one count of possession with intent to deliver between five and fifteen grams of cocaine as a second or subsequent offense. Appellate counsel, Marcella De Peters, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[1] Ames

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

has filed a response and two unsigned letters. Upon this court's independent review of the record, as mandated by ***Anders***, counsel's report, and Ames's submissions, we conclude there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

## BACKGROUND

On November 16, 2016, as part of a homicide investigation, Milwaukee Police officers executed a search warrant at 1559 and 1559A South 6th Street. The building is a duplex with front and back units; police searched both spaces.[2] While searching, police found a loaded, semi-automatic handgun and three individual plastic bags on a bedroom dresser in the front unit. Two of the bags had what was determined to be crack cocaine, and the third bag contained twelve tablets of alprazolam, a Schedule IV narcotic.

During execution of the warrant, Ames was arrested while coming from the back unit. On Ames's keychain were two keys: one for the vehicle parked behind the building and one that opened all of the locks to the front unit. Ames's father, who lived in the back unit, told police that Ames lived in the front unit. Police also found an appointment notice from Ames's probation agent in a laundry basket in the front unit. Ames was charged with possession of a firearm by a felon as a habitual criminal and one count of possession with intent to deliver between five and fifteen grams of cocaine as a second or subsequent offense.

[2] There was some confusion over which unit used the "A" designation. At a pretrial motion hearing, however, the parties agreed that 1559 meant the front unit and 1559A meant the back unit.

Ames filed a pretrial motion seeking to suppress any evidence derived from execution of the search warrant. He asserted that the supporting affidavit, which contained a section titled "Nexus to Dvonta AMES home address of 1559A S. 6th St.," lacked: sufficient probable cause to believe evidence of a crime might be found at the 1559 unit; sufficient information to connect him to the 1559 unit; and a sufficient nexus between the homicide investigation and the 1559 unit. After briefing and a hearing at which Ames testified, the trial court denied the motion, concluding that Ames had not established his standing to challenge the warrant.

The case went to trial. A jury convicted Ames on both counts. The trial court imposed four years of initial confinement and four years of extended supervision on the gun charge and five years of initial confinement and four years of extended supervision on the drug charge, to be served consecutively. Ames appeals.

## DISCUSSION

The first issue appellate counsel discusses in the no-merit report is whether the trial court erroneously exercised its discretion when it denied Ames's suppression motion. As noted, the trial court denied the motion after concluding that Ames lacked standing. A defendant must establish standing to challenge a search. *See* ***State v. Curbello-Rodriguez***, 119 Wis. 2d 414, 423, 351 N.W.2d 758 (Ct. App. 1984). The question of standing involves an inquiry into whether the challenger had a legitimate expectation of privacy in the area searched. *See* ***id.*** Whether a defendant has standing is a question of law. *See* ***State v. Eskridge***, 2002 WI App 158, ¶9, 256 Wis. 2d 314, 647 N.W.2d 434.

At the motion hearing, Ames testified that he lived in the back unit with his father and stepmother. He said that the front tenant was a man named Jorge Castro. Ames testified that

Castro sometimes asked him to stay in the front unit when he was out of town. Ames also said he had only spent two nights in the front unit—once in September and once on November 13, 2016, approximately three days before the search warrant was executed. Ames testified that he had last seen Castro on November 13, 2016, before Castro left the next morning.

On cross-examination, it was revealed that Ames had told police that he had "absolutely no connection whatsoever" with the front unit and that "not a single one of [his] belongings would ever be located in the front of the duplex." He had also told police that the front unit had been vacant since the tenant, who Ames identified as "Paso," moved out earlier that summer. When asked why the appointment notice from his probation officer was found in a laundry basket in the front unit, Ames explained that his stepmother sometimes does his laundry, and she must have put his things in the front unit by mistake. Ames also claimed that Castro had specifically told him not to go in the bedroom where the guns and drugs were found.

The trial court concluded that Ames wanted "the best of both worlds" by claiming he had nothing to do with the contraband but also claiming a right to be in the apartment at the same time. In determining that Ames lacked standing, the trial court determined he had failed to establish any property interest in the unit; that, by his own admission, he did not have control over the premises; and that he did not testify about taking any precautions customarily taken by those seeking privacy. *See* ***State v. Whitrock***, 161 Wis. 2d 960, 974, 468 N.W.2d 696 (1991). With no connection to the unit, Ames can have no reasonable expectation of privacy therein; we therefore agree with the trial court's conclusion that Ames lacked standing to challenge the

search.[3] We thus further agree with appellate counsel's analysis within the no-merit report, and with her conclusion that any challenge to the denial of the suppression motion would lack arguable merit.[4]

The next issue appellate counsel discusses in the no-merit report is whether the judgment of conviction should be vacated because there is insufficient evidence to sustain the jury's verdicts. We view the evidence in the light most favorable to the verdict and, if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). The jury is the sole arbiter of witness credibility and it alone is charged with the duty of weighting the evidence. *See* ***id.*** at 506. The standard of review is the same whether the conviction relies on direct or circumstantial evidence. *See* ***id.*** at 503. "[T]he jury verdict will be overturned only if, viewing the evidence most favorably to the [S]tate and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted). Appellate counsel properly analyzes this issue in the no-merit report,

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[3] Ames may have been attempting to alternatively establish himself as an overnight guest. *See* ***State v. Trecroci***, 2001 WI App 126, ¶¶56-61, 246 Wis. 2d 261, 630 N.W.2d 555 ("[A]n overnight guest in a home may claim the protection of the Fourth Amendment, but one who is merely present with the consent of the householder may not." (citation omitted)). However, Ames was no longer an overnight guest at the time the warrant was executed, as he testified that he had last stayed in the apartment on November 13.

[4] Appellate counsel also explains that even assuming Ames had standing, there would still be no arguable merit to challenging denial of the suppression motion because the warrant application was supported by probable cause. We agree with appellate counsel's analysis and conclusion as set forth in the no-merit report.

and we agree with her conclusion that there is no arguable merit to challenging the sufficiency of the evidence supporting the verdicts.

The final issue appellate counsel discusses in the no-merit report is whether the trial court erroneously exercised its sentencing 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 record confirms that the court appropriately considered relevant sentencing objectives and factors. The consecutive sentences totaling seventeen years of imprisonment are well within the thirty-five-year range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and 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). This court is satisfied that the no-merit report properly analyzes this issue as without arguable merit.

Ames raises multiple issues in his responses; we will not revisit those that overlap with the issues identified by counsel and have already been discussed herein. As for his separate issues, Ames complains that he received "bad legal advice" because he wanted to testify but his trial attorney "said he didn't [believe] it was a good idea[.]" However, it is trial counsel's obligation to "advise his client in the strongest terms possible if he feels that it would be unwise for the client to testify."[5] *See* ***State v. Flynn***, 190 Wis. 2d 31, 63 n.4, 527 N.W.2d 343 (Ct. App. 1994) (Schudson, J., concurring/dissenting) (quoting ***Nichols v. Butler***, 953 F.2d 1550, 1553 (11th Cir. 1992) (en banc)). Nothing in Ames's responses or the record before us supports an arguably meritorious claim that trial counsel was deficient in making his recommendation, and

[5] In this particular case, trial counsel may have made that recommendation in light of Ames's testimony at the motion hearing.

the record reflects that the trial court engaged Ames in a colloquy that establishes his knowing and voluntary waiver of the right to testify. *See* ***State v. Weed***, 2003 WI 85, ¶40, 263 Wis. 2d 434, 666 N.W.2d 485. Thus, there is no arguable merit to claiming ineffective assistance of trial counsel regarding Ames's right to testify, nor to claiming an invalid waiver of that right.

Ames asserts he has newly discovered evidence in the form of an affidavit from his brother, Deonta Ames, in which Deonta says he has "personal culpability of the gun" that was seized and that Ames "didn't have any knowledge or possession of the gun." Even if the affidavit constitutes newly discovered evidence—a questionable assumption at best[6]—it does not create a reasonable probability of a different result. *See* ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98. Deonta's possession or even his ownership of the gun do not preclude Ames from also having possession of the weapon: a person need not own an item in order to possess it, and possession may be shared. *See* WIS JI—CRIMINAL 1343. "If a person exercises control over an item, that item is in his possession, even though another person may also have similar control." ***Id.*** Here, the gun and three bags of drugs were found in the front unit of the duplex. Circumstantial evidence suggested that Ames had some control over the unit, despite his denial. In addition, while Ames was excluded as a contributor of DNA found on the gun and one bag of the cocaine, he was not excluded from the second bag of cocaine, and he was a one in two trillion match for the DNA on the bag of alprazolam tablets. The grouping of the items together on the dresser was such that it could be inferred that someone had all of the items

[6] A defendant seeking a new trial based on newly discovered evidence must establish "by clear and convincing evidence, that: (1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative." ***State v. Armstrong***, 2005 WI 119, ¶161, 283 Wis. 2d 639, 700 N.W.2d 98 (citation omitted).

and set them down on the dresser together. There is no arguable merit to raising this claim of newly discovered evidence.

Finally, Ames notes that the trial court declined to make him eligible for either the challenge incarceration program or the substance abuse program. He argues that "[t]o be sentenced to nine years initial confinement with no programs to help rehabilitate myself would be a miscarriage of justice … because it goes against the mission statement of [the] Department of Corrections and the criteria of sentencing that includes giving offenders opportunities to rehabilitate through completion of programs."

The challenge incarceration and substance abuse programs are specific opportunities for inmates to earn early release, and it is within the trial court's sentencing discretion to determine whether a defendant may become eligible for the programs. *See* ***State v. Owens***, 2006 WI App 75, ¶¶6-9, 291 Wis. 2d 229, 713 N.W.2d 187. The record reflects that the trial court's primary sentencing objectives were protection of the community and punishment, not rehabilitation, of the defendant. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

The trial court's sentencing comments further reflect its opinion that Ames had plenty of prior opportunity for rehabilitation programs, all of which failed. Specifically, the trial court noted that Ames had at least six prior juvenile contacts, and his "juvenile adjustment was horrible." Services provided in those cases "were not successful." After Ames's conviction in this case but before sentencing, he was mistakenly released from jail. Rather than conduct himself "in a mature manner … as a person that really wanted to conform their conduct to the community and become a better person," Ames only returned to court when "picked up on a litany of brand new cases which are alleged to have occurred about a month after" his release.

As the trial court explained directly to Ames:

> You just don't seem to learn. You don't seem to stop. You actually seem to me to want to flaunt your complete refusal to conform your conduct in any way and behave in a lawful manner ever….
>
> ….
>
> I think you're dangerous. I think you'll reoffend. I really have no idea whether or not you have any drug or alcohol issues. So is this a prison case? It's absolutely a prison case. Probation would unduly depreciate it. Tried prison before, it didn't make you stop. I don't know, Mr. Ames, what is going to make you grow up.
>
> ….
>
> I am not finding you eligible for either of the programs. I haven't seen anything that tells me you even want to take part in those programs or that they will be successful for you at all.
>
> Mr. Ames, I am not a fan of warehousing people, but you need to be punished and you need to grow up and you need to understand that you've got to stop this behavior. I don't want to see you in prison for the remainder of your young life…. But Mr. Ames, I am very, very concerned about the community with you remaining in it. You don't stop. You don't take any of it seriously. You do what you want when you want to do it.

Accordingly, there is no arguable merit to a claim that the trial court erroneously exercised its sentencing discretion in declining to make Ames eligible for the early release programs.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved of further representation of Ames in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*