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DISTRICT I

July 26, 2022

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

2020AP929-CRNM State of Wisconsin v. Pierre Donshay Taylor (L.C. # 2017CF4345)

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).

Pierre Donshay Taylor appeals a judgment, entered upon a jury's verdict, convicting him of two felonies: first-degree reckless homicide by use of a dangerous weapon as a party to a crime, and possession of a firearm while a felon. Appellate counsel, Attorney Marcella De Peters, filed a no-merit report. *See* WIS. STAT. RULE 809.32 (2019-20).[1] Taylor filed a lengthy response and, at our request, Attorney De Peters filed a supplemental no-merit report in

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

regard to the issues that Taylor raised. This court has considered the no-merit report, the supplemental no-merit report, and Taylor's response, and we have independently reviewed the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), and RULE 809.32. We conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The State filed a criminal complaint in 2017, alleging that on or about July 22, 2014, Taylor was riding in a car with two other men when the driver stopped the car at a red light near the Fryerz Restaurant in the 2600 block of West Fond du Lac Avenue, in Milwaukee. After Taylor exchanged words with a man who was standing outside the restaurant, the driver parked the car, and the driver and Taylor, each armed with a handgun, ran towards the restaurant. The two gunmen then returned to the car and told their companion, M.K., that they had "hit the guy." Police who responded to the Fryerz Restaurant that night found Jimmy Nash in the lobby bleeding from a gunshot wound. Police also found .38 caliber fired bullets and .40 caliber bullet casings at the scene; a firearm and toolmark examiner determined that the bullets and casings had been fired from two different handguns. The State further alleged that Nash did not survive the shooting and that an autopsy determined that he died from a gunshot wound. Next, the State alleged that on November 13, 2014, Taylor fled from police as they attempted to conduct a traffic stop, and when officers subsequently arrested him, they discovered a .38 caliber revolver in the car he had been driving.[2] The firearm and toolmark examiner subsequently determined that this revolver had fired the .38 caliber bullets recovered from the Fryerz homicide scene.

[2] The criminal complaint states that Taylor pled guilty to the November 13, 2014 fleeing charge in Milwaukee County Circuit Court case No. 2014CF5050. The judgment of conviction in that matter is not before us.

Finally, the State alleged that as of July 22, 2014, Taylor was a convicted felon and his felony convictions remained of record and had not been reversed.

The State charged Taylor with first-degree reckless homicide by use of a dangerous weapon as a party to crime, and with possessing a firearm while a felon. He pled not guilty, and the matters proceeded to a jury trial. The jury found Taylor guilty as charged.

Taylor faced a sixty-five year term of imprisonment upon his conviction for first-degree reckless homicide by use of a dangerous weapon as a party to a crime. *See* WIS. STAT. §§ 940.02(1), 939.50(3)(b), 939.05(1), 939.63(1)(b) (2013-14). The circuit court imposed a thirty-three year term of imprisonment bifurcated as twenty-three years of initial confinement and ten years of extended supervision. Taylor also faced a ten-year term of imprisonment and a $25,000 fine upon his conviction for possessing a firearm while a felon. *See* WIS. STAT. §§ 941.29(2)(a), 939.50(3)(g) (2013-14). The circuit court imposed a consecutive five-year term of imprisonment bifurcated as two years of initial confinement and three years of extended supervision. The circuit court did not order Taylor to pay any restitution, and the circuit court awarded him the 239 days of credit that he requested for his time in custody prior to sentencing.[3]

[3] Taylor requested and received credit against his sentence for 239 days that he spent in custody from the date of his initial appearance in this matter on October 5, 2017, until he was sentenced on June 1, 2018. The record reflects, however, that on October 5, 2017, Taylor was serving a prison sentence for another crime and that he did not complete his term of confinement for that crime until approximately November 20, 2017. Accordingly, the basis for awarding him a total of 239 days of sentence credit for the instant matter is not clear. *See* ***State v. Beets***, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985). Because the record does not suggest any basis on which Taylor is aggrieved by the sentence credit awarded, however, we do not discuss this matter further. *See* WIS. STAT. RULE 809.10(4) (stating that an appeal from a final judgment brings before this court nonfinal orders and rulings adverse to the appellant).

In the no-merit report, Attorney De Peters examines whether the State presented sufficient credible evidence to support the guilty verdicts. The report sets forth the applicable standard of review and the evidence satisfying the elements of each crime. The no-merit report also examines whether the circuit court erroneously exercised its sentencing discretion and whether the sentences imposed were unduly harsh or excessive. We are satisfied that the no-merit report properly analyzes these issues and we agree that they do not present issues of arguable merit. Further discussion of these issues is not warranted.[4]

The no-merit report does not include a discussion of the circuit court's pretrial ruling that the State could introduce evidence of Taylor's flight from police on November 13, 2014, when officers attempted to conduct a traffic stop.[5] We conclude that Taylor could not pursue an

[4] Attorney De Peters's analysis of the sentencing decisions does not address the circuit court's finding that Taylor is ineligible to participate in the Wisconsin substance abuse program (formerly called the earned release program, *see* 2011 Wis. Act 38, § 19) and the challenge incarceration program. A circuit court normally exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's conclusions if they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; ***State v. Steele***, 2001 WI App 160, ¶¶7-8, 246 Wis. 2d 744, 632 N.W.2d 112. A person serving a sentence for a crime specified in WIS. STAT. ch. 940, however, is statutorily disqualified from participating in either program. *See* WIS. STAT. §§ 302.045(2)(c); 302.05(3)(a)1. Accordingly, Taylor is disqualified from participating in the programs while serving his twenty-three-year term of initial confinement for first-degree reckless homicide, a crime specified in WIS. STAT. § 940.02(1) (2013-14). Moreover, a defendant is statutorily disqualified from participating in the challenge incarceration program if the defendant has attained the age of forty years old before his or her participation would begin. *See* § 302.045(2)(b). The record is uncontroverted that Taylor was twenty-nine years old at the time of his sentencing, and therefore he will be well past forty years old when he completes his term of initial confinement for the homicide and begins his term of initial confinement for possessing a firearm while a felon. He will thus be statutorily disqualified from participating in the challenge incarceration program while serving that term. Finally, § 302.05(1)(am) provides that the Wisconsin substance abuse program is "for the treatment of substance abuse of inmates." Nothing in the record suggests that Taylor is in need of substance abuse treatment. In sum, no arguably meritorious basis exists to challenge the circuit court's finding that Taylor is ineligible for the two prison programs.

[5] Taylor did not dispute the admissibility of evidence that a search of his car following his flight uncovered the .38 caliber revolver connected to the homicide scene. We see no arguably meritorious basis to pursue a postconviction challenge to the admission of that evidence.

arguably meritorious challenge to that ruling. The admissibility of evidence lies within the circuit court's discretion. ***State v. Dukes***, 2007 WI App 175, ¶26, 303 Wis. 2d 208, 736 N.W.2d 515. We will uphold a discretionary evidentiary ruling if the circuit court considered relevant facts, applied a proper legal standard, and, using a rational process, reached a conclusion that a reasonable judge could reach. *See* ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. Here, the circuit court concluded that Taylor's flight was admissible as "part of the panorama of evidence" that was "inextricably intertwined with the crime[s]." *See* ***Dukes***, 303 Wis. 2d 208, ¶28. The circuit court's conclusion constituted a reasonable exercise of discretion. "[E]vidence of criminal acts of an accused which are intended to obstruct justice or avoid punishment are admissible to prove a consciousness of guilt of the principal criminal charge." *See* ***State v. Neuser***, 191 Wis. 2d 131, 144, 528 N.W.2d 49 (Ct. App. 1995) (citation omitted). Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Taylor raised numerous claims in response to the no-merit report, including claims that: (1) he was prevented from testifying, from presenting an alibi defense, and from calling an alibi witness; (2) he was denied successor trial counsel; (3) his trial counsel was ineffective in various ways, including by failing to challenge the jury composition, raise claims that the jury saw Taylor in restraints, or emphasize that a .40-caliber bullet, not a .38-caliber bullet, killed the victim; and (4) he suffered violations of his right to be free from double jeopardy. We are satisfied that the supplemental no-merit report that Attorney De Peters filed in reply to Taylor's submission accurately analyzes the issues she discusses. We agree with her conclusion that those issues do not provide arguably meritorious grounds for postconviction or appellate proceedings. Further discussion of those issues is not required.

We observe that Attorney De Peters did not address one of the reasons that Taylor believes he was subjected to double jeopardy, namely, Taylor's allegation that the circuit court erroneously imposed DNA surcharges, victim-witness surcharges, and court costs in addition to imposing prison sentences. Taylor states that "a person is to be fined or sent to prison. Not both." There is no merit to this claim. While the double jeopardy clauses of the Federal and Wisconsin Constitutions prohibit multiple punishments for the same offense, *see* ***State v. Ziegler***, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238, not every sanction is a punishment, and historically, "a surcharge has not been viewed as punishment," *see* ***State v. Schmidt***, 2021 WI 65, ¶35, 397 Wis. 2d 758, 960 N.W.2d 888 (citation omitted). The surcharges and costs imposed here do not present exceptions to the rule.[6]

Taylor's response to the no-merit report included several pages of discussion about federal law. The discussion is difficult to follow, and Attorney De Peters did not address it. As best we can determine, Taylor believes that the federal sentencing guidelines require a reduction in his sentences. There is no merit to this claim. The circuit court sentenced Taylor for state crimes in conformity with Wisconsin law.

[6] Moreover, were we to view as punishment any component of the surcharges and costs imposed here, we would nonetheless conclude that Taylor's double jeopardy claim lacks arguable merit. The legislature has authorized the surcharges and costs at issue. *See, e.g.*, WIS. STAT. § 973.046(1r) (requiring a DNA surcharge in every case in which the circuit court imposes a sentence); WIS. STAT. § 973.045(1) (requiring a crime victim and witness assistance surcharge in every case where the circuit court imposes a sentence); WIS. STAT. § 165.755 (requiring, with exceptions not relevant here, a crime laboratories and drug law enforcement surcharge in every case in which the circuit court imposes a sentence); WIS. STAT. § 814.60(1) (requiring the clerk of circuit court to collect a fee whenever judgement is entered against the defendant); *see also* ***State v. Carter***, 229 Wis. 2d 200, 213, 598 N.W.2d 619 (Ct. App. 1999) (holding that a separate clerk's fee is permitted for each count on which a defendant is convicted). "[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *See* ***State v. Davison***, 2003 WI 89, ¶28, 263 Wis. 2d 145, 666 N.W.2d 1 (quoting ***Missouri v. Hunter***, 459 U.S. 359, 366 (1983)).

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 Marcella De Peters is relieved of any further representation of Pierre Donshay Taylor. *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