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**DISTRICT I**

September 27, 2022

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Tara Terrell Smith 272008  
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You are hereby notified that the Court has entered the following opinion and order:

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2020AP263-CRNM      State of Wisconsin v. Tara Terrell Smith (L.C. # 2017CF3931)

Before Brash, C.J., Dugan and White, 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).**

Tara Terrell Smith appeals from a judgment, entered on a jury's verdict, convicting him of one count of possession of a firearm by a felon. Smith also appeals from an order denying his postconviction motion for resentencing. Appellate counsel, Jay Pucek, has filed a no-merit report, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).<sup>1</sup> Smith was advised of his right to file a response, but he has not responded. Upon

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

this court's independent review of the record, as mandated by *Anders*, and counsel's report, we conclude there are no issues of arguable merit that could be pursued on appeal. We, therefore, summarily affirm the judgment and order.

On August 26, 2017, the State charged Smith with one count of possession of a firearm by a felon. According to the criminal complaint, on August 24, 2017, two Milwaukee police officers were investigating an unrelated incident, when they observed Smith in the vicinity of their investigation. Officer Eduardo Garcia then witnessed Smith fire nine shots from a handgun. Police then followed Smith from the scene of the shooting and arrested him. The officers then spoke with a citizen witness, D.J.T., who told officers that she heard gunshots and observed Smith pass by a nearby truck and "tilt his body." Police later recovered a firearm from that truck. The complaint further states that the gun had a magazine that held a maximum of fourteen bullets but the gun contained only five bullets. Police recovered nine bullet casings in the area where they saw Smith shooting the gun and those bullet casings matched the five unfired bullets that were contained in the gun that was recovered. The complaint also alleged that Smith had previously been convicted of possession of a firearm by a felon.

The matter proceeded to trial, where both police officers, the citizen witness, a forensic investigator, and a DNA analyst all testified. Smith did not testify, but stipulated to the fact that he was a felon at the time of this incident.

The jury found Smith guilty as charged. The circuit court sentenced Smith that same day to five years of initial confinement, followed by four years of extended supervision.

Smith filed a postconviction motion for resentencing, arguing that (1) he received ineffective assistance of counsel during plea bargaining, and (2) the circuit court erroneously

exercised its discretion by failing to provide an adequate explanation for Smith's sentence and for relying on inaccurate information. Following a hearing, the postconviction court denied the motion.

The no-merit report addresses four issues: (1) whether the evidence was sufficient to convict Smith; (2) whether any meritorious appellate issues arose during pretrial proceedings or during trial; (3) whether the circuit court erroneously exercised its sentencing discretion; and (4) whether the postconviction court erroneously denied Smith's motion for resentencing. We address each issue.

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 weighing 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).

To prove that Smith was guilty of possession of a firearm by a felon, the State had to show that Smith: (1) possessed a firearm, and (2) had been convicted of a felony prior to the date of offense. *See* WIS. STAT. § 941.29(1m); WIS JI—CRIMINAL 1343. Smith stipulated to the second element. As to the first element, appellate counsel accurately summarizes the witness

testimony supporting the jury's finding that Smith possessed a firearm. We agree with appellate counsel's conclusion that there is no arguable merit to challenging the sufficiency of the evidence supporting the verdict.

Appellate counsel next addresses whether any meritorious appellate issues arose during pretrial proceedings or during trial. Specifically, counsel addresses: evidentiary issues, jury selection, trial counsel's objections during trial, closing arguments, Smith's decision not to testify, and jury instructions. We have independently reviewed the record and agree with counsel's conclusion that there is no arguable merit to challenge the pretrial proceedings or any issues that arose during trial.

Appellate counsel next addresses whether 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; *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 the relevant sentencing objectives and factors. The circuit court addressed the gravity of the offense, noting the manner in which Smith fired nine shots into an alley. The circuit court also addressed Smith's character, stating that even though Smith was in his 40s, he continued to commit crimes and needed to "grow up." The circuit court also noted the need for punishment in this case and the need to protect the community from Smith's repeated criminal activities. The maximum sentence the circuit court imposed is within the range authorized by law, see *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is 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). There would be no arguable merit to a challenge to the circuit court's sentencing discretion.

Lastly, appellate counsel's no-merit report addresses whether the postconviction court erred in denying Smith's motion for resentencing. In his postconviction motion, Smith claimed that he received ineffective assistance of counsel when his trial counsel told him that he would not be convicted at trial simply because the police did not locate a gun on his person when he was arrested. Smith claimed that this advice constituted deficient performance because the evidence against him was actually strong. Smith argued that trial counsel's advice led him to reject the State's plea offer to recommend the mandatory minimum sentence of three years of initial confinement and leave extended supervision to the circuit court's discretion.

Claims of ineffective assistance of counsel present mixed questions of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). We will not set aside the postconviction court's factual findings about what actions counsel took or the reasons for them unless those findings are clearly erroneous. See *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). Whether counsel's conduct violated the defendant's constitutional right to have effective assistance of counsel is ultimately a legal determination, which this court reviews *de novo*. See *id.*

Following an evidentiary hearing, the postconviction court rejected Smith's argument, finding that Smith's testimony was not credible and that counsel had no reason to force Smith's case to a trial. Appellate counsel accurately summarizes the postconviction court's decision and appropriately analyzes this issue. We agree that there would be no arguable merit to a challenge to the postconviction court's finding that trial counsel did not render ineffective assistance.

As to Smith's claim that the circuit court failed to adequately explain its sentencing decision, we agree with appellate counsel that the record does not support Smith's contention.

The circuit court's comments, though not lengthy, were thorough and addressed all of the relevant sentencing factors.

Smith's claim that the circuit court relied on inaccurate information is also not supported by the record. Smith's motion alleged that, at the sentencing hearing, the circuit court inaccurately stated "[y]ou have some convictions also for drug offenses. You've been on probation several times." Smith has only been convicted of one prior drug offense and has only been on probation once.

"[A] criminal defendant has a due process right to be sentenced only upon materially accurate information." *State v. Lechner*, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy in the sentencing. *See State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the [circuit court] 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" *Id.*, ¶14 (citation omitted).

Here, the postconviction court acknowledged that it "misspoke,"<sup>2</sup> but stated that its misstatement was insignificant because it pertained to "minor things, I'll call them minor [because] it wouldn't have changed the court's decision." A review of the sentencing transcript confirms the postconviction court's comments, as it is clear that the circuit court did not rely on

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<sup>2</sup> The postconviction court also presided over Smith's trial and sentencing.

the inaccuracy in rendering its decision. Accordingly, we conclude that there is no arguable merit to a claim that the circuit court sentenced Smith based on inaccurate information.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jay Pucek is relieved of further representation of Smith in this matter. *See* WIS. STAT. RULE 809.32(3).

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