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DISTRICT II

November 9, 2022

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Circuit Court Judge
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Thomas R. Nash, Jr., #532022
Columbia Correctional Center
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You are hereby notified that the Court has entered the following opinion and order:

2021AP468-CRNM	State of Wisconsin v. Thomas R. Nash, Jr. (L.C. # 2018CF938)
2021AP469-CRNM	State of Wisconsin v. Thomas R. Nash, Jr. (L.C. #2018CF1317)

Before Gundrum, P.J., Neubauer and Lazar, 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).

Thomas R. Nash appeals a judgment of conviction entered upon a jury's verdict for armed robbery by threat of force as a party to a crime and as a repeater, contrary to WIS. STAT. § 943.32(1)(b) (2019-20).¹ He also appeals a judgment of conviction entered upon his guilty plea to fleeing or eluding a police officer, contrary to WIS. STAT. § 346.04(3).² Nash's appointed

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

² Pursuant to this court's March 23, 2021 order, these no-merit appeals were consolidated for briefing and disposition.

appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Nash made several pro se filings, including a motion seeking to proceed pro se, which he subsequently withdrew. Pursuant to this court’s order dated June 23, 2022, we will treat Nash’s various pro se filings as responses to the no-merit report. Appointed counsel has filed a supplemental no-merit report addressing the issues Nash raises. Upon consideration of the no-merit report, Nash’s responses and the supplemental no-merit report, and following an independent review of the record as mandated by *Anders* and RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgments and remand with directions.³ See WIS. STAT. RULE 809.21(1).

Nash was charged in Kenosha County Circuit Court case No. 2018CF938 with armed robbery. The trial evidence showed that two masked individuals—a taller individual brandishing a silver firearm and a shorter individual with tattoos holding a bag from a Citi Trends store—had robbed a BP gas station on August 11, 2018. Investigators learned that Nash—whose nickname is “Royal”—had, one week prior to the robbery, purchased an identical Citi Trends bag with the slogan “Loyalty is Royalty” on it. Police located a Facebook profile for “Royal Nash,” which had Nash’s date of birth and a profile photograph taken at the Citi Trends store. They compared that to a booking photograph, noting similarities between Nash’s tattoos and the tattoos of the bagman from the robbery surveillance video. Police believed the bagman seen in the robbery surveillance video was consistent with Nash’s height and weight.

³ There is a clerical error in Nash’s judgment of conviction in Appeal No. 2021AP469. That judgment indicates the fleeing/eluding conviction included the repeater penalty enhancer. As part of the plea agreement on that charge, Nash agreed to plead guilty to an amended charge with the enhancer removed. He was properly instructed at the plea hearing on the maximum penalties without the enhancer. We remand the matter to the circuit court so that the judgment can be amended to remove reference to the enhancer.

Based on their identification of Nash, police suspected Nash's brother, Aaron Primmer, might have also been involved in the robbery. Primmer's height and weight were consistent with the individual who held the firearm during the robbery. On August 14, 2018, officers stopped a vehicle being driver by Primmer. Inside they discovered a sweatshirt and two left-handed gloves they believed had been used in the robbery, as well as Nash's wallet and a silver BB gun underneath a seat.⁴ Nash was identified as a likely major contributor to the DNA found in one of the gloves, but he was excluded as a major contributor to the DNA found in the other. No comparison was attempted on the minor DNA profiles found on each of the gloves. A search of Primmer's bedroom revealed shoes and pants police believed were those worn by the suspect during the robbery.

Police obtained an arrest warrant for Nash. On September 19, 2018, Nash engaged in a high-speed chase with officers from the Kenosha Police Department, who ultimately terminated the pursuit. Nash was taken into custody in Illinois and interviewed by Kenosha officers on November 29, 2018, at which time he admitted he was the driver during the chase but denied involvement in the robbery. On December 11, 2018, he was charged in Kenosha County Circuit Court case No. 2018CF1317 with the fleeing/eluding offense.

A jury found Nash guilty of armed robbery by threat of force. At the sentencing hearing for that crime, Nash pled guilty to the fleeing/eluding offense without the repeater penalty enhancer. Following a colloquy, the circuit court accepted Nash's plea and conducted a joint

⁴ The BB gun was not used in the commission of the robbery. A receipt found in Primmer's residence suggested that it had been purchased on August 14, 2018. The gun used in the robbery was not recovered.

sentencing. The court ordered twelve years' initial confinement and seven years' extended supervision on the armed robbery conviction. It withheld sentence and ordered a consecutive one year of probation on the fleeing/eluding offense.

The no-merit report addresses the sufficiency of Nash's initial appearance; the sufficiency of Nash's preliminary hearing; the trial adjournment based on witness unavailability; the circuit court's disposition of Nash's pretrial motions; jury selection and instruction; the disposition of trial objections raised by the defense; Nash's waiver of his right to testify; the sufficiency of the evidence to convict Nash of armed robbery; the sufficiency of the plea colloquy on the fleeing/eluding charge; and the circuit court's exercise of sentencing discretion. The no-merit report concludes that any argument on these points would be frivolous. Our independent review of the appellate record satisfies us that the no-merit report properly concludes that any argument on those grounds would lack arguable merit.

The first of Nash's responses is difficult to decipher, as he combines evidentiary, procedural and constitutional concepts. His main point appears to be that the circuit court was without jurisdiction to convict him because there was no probable cause finding to support his detention in connection with case No. 2018CF938. To the contrary, the State sought an arrest warrant at the same time it filed the criminal complaint. A court commissioner signed the arrest warrant the following day, and the allegations in the criminal complaint establish probable cause to believe Nash was a party to the crime of armed robbery. After Nash was apprehended, he was placed on a probation hold. On the date of the warrant return he appeared in person at the initial appearance, in accordance with WIS. STAT. § 970.01(1). The preliminary hearing was held within ten days as required by WIS. STAT. § 970.03(2). There is no arguable merit to any

assertion that there was an inadequate probable cause finding to detain Nash in connection with case No. 2018CF938.

Nash next claims the surveillance videos from the BP gas station and the Citi Trends store were improperly received into evidence because they were copies and not the original videos. Counsel responds that the BP gas station video was properly admitted after being authenticated by a police detective who testified that the video shown at trial was the same video he viewed on the afternoon of the robbery. Counsel further responds that the Citi Trends video was neither offered nor received into evidence.⁵ The appellate record supports counsel's assertions and therefore no issue of arguable merit could be raised regarding the authentication of the surveillance videos.

Nash also argues the glove evidence was contaminated during trial when an evidence technician and the prosecutor handled trial exhibits without gloves. Counsel responds that there is no issue of arguable merit on appeal regarding contamination because DNA testing on the gloves was complete prior to trial. A significant amount of time was spent during the trial establishing that no police contamination of the evidence occurred prior to or during DNA

⁵ A police detective testified that the store clerk could not provide a hard copy of the Citi Trends surveillance video, so the detective took a video recording of the security camera footage with his camera. At trial the detective orally described what he saw when he viewed the video, and two still photos from the detective's recording were admitted into evidence.

testing. We agree with counsel’s analysis and conclude no issue of arguable merit could be raised regarding DNA contamination.⁶

Nash also appears to challenge his appellate counsel’s conclusion that any challenge based upon the sufficiency of the evidence has no arguable merit. Again, we agree with counsel’s conclusion that the evidence was sufficient to support Nash’s conviction for armed robbery.

Finally, in a third filing, Nash argues the gloves, BB gun and a second hooded sweatshirt containing marijuana—all of which were found in the vehicle Primmer was driving—were irrelevant and therefore inadmissible at trial.⁷ He apparently believes that none of this evidence was admissible because none of it was found in his possession. But relevancy is a low threshold that does not condition admissibility of the evidence on whether the defendant was able to exercise dominion and control over the item at the time of its discovery. Rather, “relevant evidence” means “evidence having any tendency to make the existence of any fact that is of

⁶ In any event, Nash’s claim that the glove evidence was contaminated by the officer’s unprotected handling of trial exhibits is meritless. The trial transcript shows the officer put on gloves prior to opening the evidence bags containing the sweatshirt and gloves found in the vehicle Primmer was driving. Any assertion that the officer transferred Nash’s DNA from the sweatshirt to the gloves by handling is mere speculation because there is no indication the sweatshirt was tested for, let alone confirmed to have, Nash’s DNA on it.

Furthermore, no issue of arguable merit could be raised regarding the prosecutor’s handling of the sweatpants at trial. Though the sweatpants were not sent for DNA testing, it is unclear from the transcript whether the prosecutor actually handled the sweatpants bare-handed before defense counsel objected and he was admonished by the circuit court to wear gloves.

⁷ The prosecutor mentioned the fact that the sweatshirt contained marijuana during his opening argument, but it appears Nash’s trial counsel was able to curtail by objection any reference to the marijuana during the trial testimony. The jury was properly instructed that the arguments of counsel are not evidence.

consequence to the determination of the fact more probable or less probable than it would be without the evidence.” WIS. STAT. § 904.01.

Counsel’s supplemental no-merit report addresses only the BB gun, which counsel contends was relevant given the State’s assertion that it was purchased by Primmer and Nash using the cash stolen from the BP gas station three days prior. We agree with counsel’s conclusion that there would be no merit to any assertion that the circuit court erroneously exercised its discretion in admitting the BB gun. We reach a similar conclusion regarding the gloves, which were plainly relevant—they appeared to be the two left-handed gloves used in the robbery, and one of them was confirmed to contain Nash’s DNA. Finally, even assuming the testimony about the second hooded sweatshirt was irrelevant, our independent review of the record confirms that any error in admitting that evidence did not affect Nash’s substantial rights. *See* WIS. STAT. § 805.18(2).

Our independent review of the appellate record reveals no other potentially meritorious issues for review.

Based upon the foregoing,

IT IS ORDERED that the judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21 and remanded with directions.

IT IS FURTHER ORDERED that Attorney Angela Conrad Kachelski is relieved of further representation of Nash in these matters.

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

Sheila T. Reiff
Clerk of Court of Appeals