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DISTRICT I

February 14, 2023

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

2020AP1635-CRNM State of Wisconsin v. Leshaun Benjamin (L.C. # 2017CF5105)
2020AP1636-CRNM State of Wisconsin v. Leshaun Benjamin (L.C. # 2018CF1086)

Before Brash, C.J., Donald, P.J., and White, 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).

Leshaun Benjamin appeals from judgments of conviction, entered upon his guilty pleas. Appellate counsel has filed a no-merit report.[1] *See* ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2019-20).[2] Benjamin has provided a response to the report. Upon

[1] The no-merit report was filed by Attorney Leon W. Todd, III, who has been replaced by Attorney Christopher P. August as Benjamin's appellate counsel. Attorney August advised the court that he had reviewed Benjamin's response and did not intend to file a supplemental report.

[2] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

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

On November 4, 2017, Benjamin was charged in Milwaukee County Circuit Court case No. 2017CF5105 with second-degree recklessly endangering safety, misdemeanor battery, two counts of felony bail jumping, and misdemeanor bail jumping, all as domestic abuse incidents. The criminal complaint alleged that on November 1, 2017, Benjamin and L.T.H., who lived together, were in a vehicle having an argument. Benjamin, who was in the driver's seat, told L.T.H., who was in the front passenger seat, to get out of the car; she asked him to take her back to a friend's house. Benjamin punched L.T.H., causing pain and giving her a bloody lip. Benjamin next reached across L.T.H., opened her door, and pushed her out of the vehicle, causing her to fall to the ground. Benjamin then drove away, allegedly running over L.T.H.'s foot and breaking it. At the time, Benjamin was released on bail in cases from Milwaukee and Washington Counties; conditions of the bail in both counties required Benjamin to commit no new crimes while released. Cash bail was set in the new case, and Benjamin posted the amount. A condition of the new bail was that Benjamin have no contact with L.T.H.

At a hearing in February 2018, Benjamin's attorney requested a competency evaluation for him; the circuit court so ordered. On March 18, 2018, the State filed a complaint in Milwaukee County Circuit Court case No. 2018CF1086, charging Benjamin with one count of felony bail jumping. The criminal complaint alleged that shortly before 3 a.m. on March 3, 2018, police officers on patrol spotted a vehicle on the street with three people—Benjamin, L.T.H., and a third individual—arguing nearby. L.T.H. told police that she and Benjamin had

argued over who was going to pay for a pizza, which led to Benjamin striking L.T.H., breaking her phone, and breaking her car window.

Shortly after the new case was filed, the competency report was submitted in the first case. The examining psychiatrist had concluded that Benjamin was competent to stand trial. Neither party challenged the report. Subsequently, these two cases were joined for trial.

On the day the trial was to begin, the circuit court called an initial panel of jurors and gave preliminary instructions for voir dire before breaking for lunch. After the break, the parties informed the circuit court that Benjamin was prepared to resolve these cases through a plea agreement. The State would amend the second-degree reckless endangerment charge, a Class G felony, to negligent operation of a motor vehicle, a Class A misdemeanor. In exchange for Benjamin's guilty pleas to the amended charge and the other two misdemeanors in the first case, plus the felony bail jumping charge in the second case, the State would dismiss and read in the two remaining felony bail jumping charges. The State also agreed to recommend a sentence of "consecutive incarceration to the [c]ourt's discretion between both cases."

The circuit court accepted Benjamin's pleas. In the first case, the circuit court imposed three months' imprisonment for the negligent operation, nine months for the battery, and three months for the bail jumping, consecutive to each other and to any other sentences. In the second case, the circuit court imposed two years of initial confinement and two years of extended supervision, stayed for a consecutive four years of probation. Benjamin appeals.[3]

[3] Benjamin was initially granted 200 days of sentence credit in case No. 2017CF5105. He filed a postconviction motion seeking an additional two days of sentence credit in that case, plus twenty days of credit in case No. 2018CF1086. The circuit court granted the motion and awarded the credit.

The No-Merit Report

The first potential issue discussed in the no-merit report is whether Benjamin should be allowed to withdraw his pleas as not knowing, intelligent, and voluntary. Our review of the records—including the plea questionnaire and waiver of rights forms and addenda, attached jury instructions for each offense, and plea hearing transcript—confirms that the circuit court complied with its obligations for taking guilty pleas, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

The no-merit report notes two potential deficiencies with respect to the negligent operation charge. Negligent operation of a motor vehicle is committed by someone who "endangers another's safety by a high degree of negligence in the operation of a vehicle, *not upon a highway*[.]" WIS. STAT. § 941.01(1). The no-merit report first observes that the circuit court provided an "overbroad and technically incorrect" explanation of the "not upon a highway element." The report also observes that a factual basis for the "not upon a highway" element was not specifically established and that the criminal complaint is unclear about the offense location.

"'Highway' means all public ways and thoroughfares and bridges on the same … but does not include private roads or driveways[.]" WIS. STAT. § 340.01(22). Thus, the circuit court's explanation that "not upon a highway … could be a crosswalk or parking lot or road" is largely inaccurate, as non-private roads are highways and crosswalks can be part of a highway. *See* § 340.01(10)(a). We also agree with the no-merit report's observation that the complaint is unclear regarding where the offense occurred.

In order to bring a postconviction motion on these grounds, however, Benjamin would have to allege that he did not understand the information that should have been provided to him at the plea hearing. *See* ***State v. Bangert***, 131 Wis. 2d 346, 274, 389 N.W.2d 12 (1986). The no-merit report advises that "[f]or reasons outside the record … counsel is not able to make such an allegation." In addition, testimony at the preliminary hearing established that Benjamin and L.T.H. were in a vehicle parked in a private residential driveway when he pushed her out of the vehicle to the ground before driving away, and a private driveway is specifically excluded from the definition of a highway. Based on the foregoing, there is no arguable merit to a claim that the circuit court failed to properly conduct a plea colloquy or that Benjamin's pleas were anything other than knowing, intelligent, and voluntary.

The other issue discussed in the no-merit report is whether this court should remand the matters for resentencing because 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. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider several primary factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider other factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

In his response, Benjamin argues that the circuit court "did not consider the proper factors" and imposed sentences that "were unduly harsh and excessive." However, our review of

the record confirms that the court appropriately considered relevant sentencing objectives and factors. Benjamin faced a possible maximum eight years and three months of imprisonment; fifteen months of confinement and four years of probation are well within that maximum, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and the total sentence 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 is no arguable merit to challenging to the circuit court's sentencing discretion.

The No-Merit Response

1. Speedy Trial

In his response, Benjamin raises several concerns, one of which is his assertion that his speedy trial rights were denied.[4] There are two types of speedy trial rights: statutory and constitutional. The statutory right derives from WIS. STAT. § 971.10(2)(a), which requires the trial of a felony defendant to "commence within 90 days from the date trial is demanded by any party in writing or on the record." The constitutional speedy trial right is guaranteed by the Sixth Amendment to the United States Constitution ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]") and Article I, section 7 of the Wisconsin Constitution ("In all criminal prosecutions the accused shall enjoy the right … to a speedy public trial[.]").

[4] To the extent that the no-merit response makes other arguments that are not discussed with specificity in this opinion, these arguments are deemed to lack sufficient merit to warrant individual attention. *See* ***Libertarian Party of Wis. v. State***, 199 Wis. 2d 790, 801, 546 N.W.2d 424 (1996); ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

The complaint in the first case was filed on November 4, 2017, and Benjamin entered a speedy trial demand on November 6, 2017. However, a statutory demand cannot be entered before the filing of the information or the indictment, *see* WIS. STAT. § 971.10(2)(a), so the clock began running on November 17, 2017, when the information was filed. The first statutory deadline, then, was February 15, 2018. The complaint in the second case was filed on March 8, 2018. A speedy trial demand was entered for the second case on May 9, 2018, with Benjamin also reasserting his right in the first case. The statutory deadline following this demand was August 7, 2018. The demand in both cases was renewed on August 15, 2018. On August 29, 2018, Benjamin filed a "motion for discharge from custody or to effectuate the defendant's release on a personal recognizance bond," which the circuit court granted on September 5, 2018. The first day of trial was March 8, 2019.

The exclusive remedy for a statutory speedy trial violation is the defendant's pretrial release on bond, not dismissal of the charges, *see* WIS. STAT. § 971.10(4), and Benjamin was released on bond in both cases when trial was not timely held under the statute. Further, while Benjamin was returned to custody in October 2018, that was because he had entered a plea in a different case and was remanded pending sentencing on a possession of a firearm charge that carried a mandatory minimum of three years' imprisonment. There is no arguable merit to a statutory speedy trial violation in either case.

When a defendant claims he was denied his constitutional right to a speedy trial, we employ a four-part balancing test, in which we consider: "(1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *See* ***State v. Borhegyi***, 222 Wis. 2d 506, 509, 588 N.W.2d 89 (Ct. App. 1998). The first factor, delay, functions as a "triggering mechanism." ***Id.*** at 509-10. Until there is a

presumptively prejudicial delay, the other factors need not be examined. ***Id.*** As a delay approaches, and certainly when it exceeds, one year, it becomes presumptively prejudicial. ***Id.*** Whether there was a speedy trial violation is a question of law, though we accept any factual findings from the circuit court so long as they are not clearly erroneous. *See* ***State v. Urdahl***, 2005 WI App 191, ¶10, 286 Wis. 2d 476, 704 N.W.2d 324

Speedy trial rights generally attach at the time of arrest. *See* ***Borhegyi***, 222 Wis. 2d at 511. The record does not reveal the precise dates of Benjamin's arrests in the two cases, but for purposes of this opinion, it suffices to use the incident dates. Thus, the delay in the first case, from November 1, 2017, to trial date March 8, 2019, was approximately sixteen months. The delay in the second case, from March 2, 2018, to March 8, 2019, just barely exceeds twelve months. Because both time frames exceed one year, we consider the remaining ***Borhegyi*** factors and the totality of the circumstances. *See* ***id.*** at 510. There can be little dispute that Benjamin repeatedly asserted his right to a speedy trial. However, the record reflects that Benjamin shares responsibility for the delay with the State and that suffered minimal prejudice from the delay.

Many "delays" were simply due to party schedules and to ordinary calendaring concerns, which do not weigh heavily against either party. The State was responsible for thirty-six days of delay, asking to have the January 16, 2018 trial date moved because the State had not yet received all of the victim's medical files as requested; the trial was moved to February 21, 2018. The State was also responsible for sixty days between January 7, 2019, to March 8, 2019, when a clerical error meant that Benjamin was not produced for the January 7 trial date. The State is not responsible for a thirty-day delay from February 21, 2018 to March 23, 2018, which was the period for Benjamin's competency evaluation; one hundred days between April 16, 2018 to

July 25, 2018, occasioned by the withdrawal and replacement of Benjamin's attorney; and seventy-seven days between October 22, 2018 to January 7, 2017, when defense counsel was ill.

The circuit court specifically determined that Benjamin was responsible, by his own actions, for an eighty-nine-day delay between July 25, 2018, and October 22, 2018. The State had requested an adjournment on July 25 because it had just learned of calls Benjamin supposedly made from jail to L.T.H.; the State told the court it intended to file charges and consolidate them with these matters. The State did, in fact, file new charges, but they were dismissed at the preliminary hearing; Benjamin later protested that the new charges were not filed in good faith, though the circuit court rejected this argument. However, even if we attribute those eighty-nine days to the State, the State bears responsibility for approximately 185 days, while 207 days stem from the defense.

When it comes to a prejudice analysis, we consider three interests that the speedy trial right protects: "prevention of oppressive pretrial incarceration, prevention of anxiety and concern by the accused, and prevention of impairment of defense." ***Urdahl***, 286 Wis. 2d 476, ¶34. Here, pretrial incarceration was no longer an important interest by October 2018—eleven months from the initial arrest/charge under consideration here—when Benjamin entered a plea in a third case and was remanded pending sentencing. Defendants no doubt experience anxiety from having open charges, implicating the second interest, but "without more than the bare fact of unresolved charges—which exists in every criminal case—we view the prejudice to the second interest as minimal." ***Id.***, ¶35. Nothing in the record reflects any unusual cause for anxiety beyond the original charges, and Benjamin in his response claims none. Finally, there is no indication that Benjamin's defense was impaired in any way. In fact, it appears to have been

bolstered by at least one delay—the victim's medical records evidently reflected that her foot had not actually been broken after Benjamin pushed her out of the car.

Because both the State and Benjamin share responsibility for delay in bringing these matters to trial, and because the record reflects very little prejudice to Benjamin, there is no arguable merit to any constitutional speedy trial violation claim.

2. Witness Recantation

In his response, Benjamin also complains that he sent the circuit court an "affidavit" from L.T.H., "proclaiming that [Benjamin] was indeed innocent" and that this document "was not taken into consideration[.]" First, we note that the document from L.T.H. is not an affidavit. An affidavit must be sworn. While L.T.H.'s letter is notarized, the jurat reflects only that the document was signed before the notary, not that it was sworn or otherwise given under oath. Second, "recanting affidavits, standing alone, are of no legal significance." ***Nicholas v. State***, 49 Wis. 2d 683, 694, 183 N.W.2d 11 (1971). Corroboration is required, *see* ***id.***, and there is none in this record. While Benjamin requested an evidentiary hearing based on L.T.H.'s recantation in order to challenge her credibility, he forfeited the opportunity to have a fact finder review and determine L.T.H.'s credibility when he opted to resolve his case with a plea. Accordingly, there is no arguable merit to any claim arising from L.T.H.'s supposed recantation.

***Pro Se* Motions**

Benjamin complains that motions he filed himself were not considered by the circuit court. The circuit court declined to consider the motions because Benjamin was represented by counsel, and told counsel that if counsel thought the motions should be submitted, counsel

should submit them. The circuit court did not err; Benjamin could either represent himself or be represented by counsel—there is no allowance for hybrid representation. *See* ***State v. Redmond***, 203 Wis. 2d 13, 16-17, 552 N.W.2d 115 (Ct. App. 1996). There is no arguable merit to challenging the circuit court's refusal to consider Benjamin's *pro se* motions.

4. Ineffective Assistance of Counsel

Finally, Benjamin complains that "every lawyer [he] had" was ineffective for failing to file a motion to dismiss. To the extent that any motion to dismiss would have been predicated on L.T.H.'s "recantation," we have explained above why the recantation is insufficient to garner relief. A motion to dismiss based on the uncorroborated recantation would not have been granted. Attorneys are not ineffective for failing to pursue meritless motions. *See* ***State v. Sanders***, 2018 WI 51, ¶18, 381 Wis. 2d 522, 912 N.W.2d 16.

Our independent review of the record 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 Christopher P. August is relieved of further representation of Benjamin 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