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DISTRICT I

April 11, 2023

To:

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Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
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Steven Roy
Electronic Notice

Aaron L. Tirado
3417 West Hayes Avenue
Milwaukee, WI 53215

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

2020AP1317-CRNM State of Wisconsin v. Aaron L. Tirado (L.C. # 2018CF3916)

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).

Aaron L. Tirado appeals from a judgment of conviction, following a jury trial, of one count of substantial battery and one count of felony bail jumping. His appellate counsel, Steven Roy, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),[1] and ***Anders v. California***, 386 U.S. 738 (1967). Tirado received a copy of the report, was advised of his right to respond, and has filed a response. We have independently reviewed the record, the no-merit

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

report, and the response, as mandated by ***Anders***. We conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm.

On August 19, 2018, the State charged Tirado with one count of substantial battery. On February 28, 2019, the State filed an amended complaint adding a charge of felony bail jumping. According to the charging documents, Tirado went to the home of his ex-girlfriend, M.A.F., and beat her, causing a facial fracture. At the time of the incident, Tirado was subject to bond conditions in another case.

Prior to trial, trial counsel filed a motion to withdraw, which the trial court granted. When the trial court allowed trial counsel to withdraw, Tirado requested a speedy trial. Tirado was appointed successor counsel, however successor counsel also moved to withdraw, citing “irreconcilable differences” and “a complete breakdown in communication.” At a hearing on the motion, the trial court granted counsel’s motion and explained to Tirado,

> [T]here’s two opportunities to have a lawyer. I have an opportunity after that opportunity expires to appoint a lawyer, but that would be at your cost of $80 an hour and you have to reimburse that lawyer. Otherwise, you can proceed *pro se* which is your right and you can do that. If you wish to proceed *pro se* we can do it now.

(Italics added). Tirado stated that he wished to proceed *pro se*. The trial court conducted a colloquy with Tirado, explaining his constitutional right to counsel and the risks of proceeding *pro se*. The trial court confirmed Tirado’s desire to proceed *pro se* multiple times and ended the hearing by stating:

> And Mr. Tirado if at any time you’re thinking about this and you would like some professional help by virtue of the representation … from an attorney we’ll find a way to get that attorney appointed or, at least, make sure that the public defender

> is notified of that. In fact we will notify the public defender whether they want to appoint another attorney to you or not.

Tirado stated that while he "wouldn't mind help because I do need help," he was also "ready to go. For better or worse I'm ready to go .... I went over enough of this and been in the system long enough to know the do's and the don'ts and procedures of the situation."

At the beginning of trial, the trial court once again asked Tirado if he would like representation by counsel. Tirado responded, "I'm ready to proceed right now." The trial court asked Tirado a second time, and Tirado effectively provided the same response. When the trial court asked Tirado whether he would like standby counsel, Tirado responded, "No. I'm alright. I'm ready to go."

The State called multiple witnesses, including the victim and law enforcement. Tirado testified on his own behalf. Ultimately, the jury found Tirado guilty as charged. The trial court sentenced Tirado to one and one-half years of initial confinement and two years of extended supervision on the battery charge, and three years of initial confinement and three years of extended supervision on the bail jumping charge, to be served consecutively. The trial court also gave Tirado 259 days of sentence credit and found him eligible for the Substance Abuse Program after serving three years of initial confinement.

Tirado later filed a motion for sentence modification, requesting that the trial court modify his eligibility for the Substance Abuse Program by allowing an earlier start date on the grounds of the Covid-19 pandemic. The trial court denied the motion.

Appellate counsel's no-merit report addresses three issues: (1) whether there was substantial evidence to support Tirado's conviction; (2) whether the trial court erred in allowing

Tirado to proceed *pro se*; and (3) whether the trial court properly exercised its sentencing discretion.

When this court considers the sufficiency of evidence presented at trial, we apply a highly deferential standard. *See **State v. Kimbrough***, 2001 WI App 138, ¶12, 246 Wis. 2d 648, 630 N.W.2d 752. We "may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that ... no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *See **State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The finder of fact, not this court, considers the weight of the evidence and the credibility of the witnesses and resolves any conflicts in the testimony. *See **id.*** at 503-04.

The jury had the opportunity to evaluate the testimony of multiple witnesses, including the victim and Tirado. Upon an independent review of the record, we conclude that the evidence presented at trial supports Tirado's conviction. Any further pursuit of this issue would lack arguable merit.

Appellate counsel's no-merit report next addresses whether the trial court erred in allowing Tirado to proceed *pro se*. The validity of a defendant's waiver of counsel is not the only consideration when that defendant seeks to proceed *pro se*; the trial court must also determine whether a defendant seeking to self-represent is competent to do so. *See **State v. Klessig***, 211 Wis. 2d 194, 203, 564 N.W.2d 716 (1997). "Whether a defendant is competent to proceed *pro se* is 'uniquely a question for the trial court to determine.'" ***State v. Imani***, 2010 WI 66, ¶37, 326 Wis. 2d 179, 786 N.W.2d 40 (citation omitted; italics added).

Competency to represent oneself is a higher standard than the competency required to stand trial. *See* ***Klessig***, 211 Wis. 2d at 212. "In determining whether a defendant is competent to proceed *pro se*, the [trial] court may consider the defendant's education, literacy, language fluency, and any physical or psychological disability which may significantly affect his ability to present a defense." ***Imani***, 326 Wis. 2d 179, ¶37 (italics added); *see also* ***Klessig***, 211 Wis. 2d at 212. A determination of competency must appear in the record. *See* ***Klessig***, 211 Wis. 2d at 212.

Here, the trial court did not make an explicit finding of competence, but rather made an implicit determination by stating:

> [S]o far in my opinion you seem to have at least … the basic principles. You also have the understanding that this is a legal proceeding and that it's not what we see on TV, number one. And number two, this is a matter which is controlled by the procedures so it's not an ad hoc, sort of, conversation or otherwise. So we'll go through that—we'll go [through] it as effectively as we can.

In his response to appellate counsel's no-merit report, Tirado claims that he was not competent to represent himself and that he did not understand the potential repercussions of proceeding *pro se*. The record belies Tirado's claim. The trial court warned Tirado about the risks of proceeding *pro se*, asked Tirado multiple times whether he would like counsel, and asked Tirado whether he would like standby counsel. Tirado was adamant that he did not want to delay his trial and stated numerous times that he was "ready to go." While the form of the competency determination is not ideal, the trial court was clearly satisfied that Tirado was competent to represent himself at trial. This conclusion is not "totally unsupported by the facts apparent in the record." *See* ***Imani***, 326 Wis. 2d 179, ¶37 (citation omitted). There is no

arguably meritorious challenge to the trial court's decision and no arguable merit to a claim that Tirado was incompetent to represent himself.

As to sentencing, our review of the record confirms that the trial court appropriately considered the relevant sentencing objectives and factors. *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. The trial court focused on Tirado's inability to accept responsibility for the harm he caused the victim, his attempt to justify his actions, and his prior record. The sentence the trial 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 trial court's sentencing discretion.

Our review of the record prompts us to address one issue not discussed in appellate counsel's no-merit report, presumably because it arose after the filing of counsel's no-merit report. Well after sentencing, Tirado filed a motion for sentence modification, asking the trial court to modify his programming eligibility for the Substance Abuse Program. Tirado requested faster eligibility on the grounds of the Covid-19 pandemic, stating that "[b]y doing the program sooner, [he] can reunite with love [sic] ones and help as they struggle." The trial court denied the motion.

A motion for sentence modification based on a new factor must demonstrate the existence of a new factor by clear and convincing evidence. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is one that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it

was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Id.***, ¶40 (quoting ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)).

We have reviewed the trial court's decision denying the motion and conclude that a challenge to the decision would lack arguable merit. The trial court explained that Tirado was not the only inmate seeking modifications based on the pandemic and that to grant his request would undermine the seriousness of his conduct.

Our review of the record discloses no other potential issues for appeal.

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

IT IS FURTHER ORDERED that Attorney Steven Roy is relieved of further representation of Aaron L. Tirado in this matter. *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