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WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

March 5, 2024

To:

Hon. David A. Feiss
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Jill Marie Skwor
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Marquise Lekeven Johnson 658922
Redgranite Correctional Inst.
P.O. Box 925
Redgranite, WI 54970-0925

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

2023AP1107-CRNM State of Wisconsin v. Marquise Lekeven Johnson
(L.C. # 2020CF214)

Before Donald, P.J., Geenen and Colón, 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).

Marquise Lekeven Johnson appeals from judgments of conviction entered after a jury found him guilty of eight crimes. His appellate counsel, Attorney Jill Marie Skwor, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2021-22).[1] At our request, Attorney Skwor filed a supplemental no-merit report addressing two potential issues. Johnson did not file a response to either submission. Upon consideration of the no-merit reports and following an independent review of the record as required by ***Anders***, we

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

conclude that no arguably meritorious basis exists for additional proceedings. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Milwaukee police officers conducted a traffic stop on January 11, 2020, in the 3500 block of North 7th Street. The vehicle's passenger, later identified as Johnson, ran from police and attempted to hide under a parked car. Police arrested Johnson, searched him, and found a loaded gun in his coat. Police also determined that Johnson was a suspect in several shootings, including a shooting on June 18, 2019, in which A.L.H. sustained a gunshot wound to the ear. Milwaukee County circuit court records reflected that on both June 18, 2019, and January 11, 2020, Johnson was out of custody on bond in connection with two 2018 misdemeanors and that the terms of his bond prohibited him from committing any additional crimes. Further, court records reflected that Johnson was subject to a domestic abuse injunction, served upon him in June 2017, preventing him from possessing a firearm until June 2021. The State ultimately filed an information charging Johnson with twenty crimes. Johnson pled not guilty and requested a jury trial.

On the day of trial, the State advised that it could not proceed with counts five through sixteen of the information and the circuit court dismissed those counts. The matter proceeded to trial on eight charges set forth in an amended information: first-degree recklessly endangering safety by use of a dangerous weapon, possessing a firearm contrary to a harassment injunction, and two counts of bail jumping, all arising on June 18, 2019; and obstructing an officer, possessing a firearm contrary to a harassment injunction, and two counts of bail jumping, all arising on January 11, 2020. The jury found Johnson guilty of each crime.

The case proceeded to sentencing. For first-degree recklessly endangering safety by use of a dangerous weapon, a Class F felony, Johnson faced a $25,000 fine and seventeen years and six months of imprisonment. *See* WIS. STAT. §§ 941.30(1), 939.63(1)(b), 939.50(3)(f) (2019-20). The circuit court imposed a thirteen-year sentence bifurcated as ten years of initial confinement and three years of extended supervision. For each of the two convictions for possessing a firearm contrary to a harassment injunction, a Class G felony, Johnson faced a $25,000 fine and a ten-year term of imprisonment. *See* WIS. STAT. §§ 813.125(4m), 941.29(1m)(g), 939.50(3)(g) (2019-20). The circuit court imposed two evenly bifurcated four-year sentences for those crimes. For obstructing an officer and for each of the four bail jumping convictions, all Class A misdemeanors, Johnson faced a $10,000 fine and nine months of imprisonment. *See* WIS. STAT. §§ 946.41(1), 946.49(1)(a), 939.51(3)(a) (2019-20). The circuit court imposed five nine-month sentences for the five misdemeanor convictions. The circuit court ordered Johnson to serve the three felony sentences consecutively and to serve the five misdemeanor sentences concurrently with each other and concurrently with his sentence for recklessly endangering safety. The aggregate sentence was thus fourteen years of initial confinement and seven years of extended supervision.

In the no-merit report, appellate counsel addresses whether the State presented sufficient evidence to support the convictions. To prevail on a claim of insufficiency of the evidence, a defendant must show that "the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Appellate counsel thoroughly discusses the elements of the charges that Johnson faced and the evidence presented to prove those offenses.

We need not repeat that discussion here. We note, however, that the State's evidence included testimony from A.L.H. describing the events culminating in the June 18, 2019 shooting; testimony from two of Johnson's acquaintances who witnessed the June 18, 2019 shooting; testimony from the police officers who took Johnson into custody on January 11, 2020; and certified copies of the court orders reflecting that on June 18, 2019, and on January 11, 2020, Johnson was both subject to a harassment injunction preventing him from possessing a firearm and was out of custody on bail in two misdemeanor matters with conditions of release that included a prohibition against committing additional crimes. Further, Johnson testified on his own behalf and admitted that he should not have run from the police on January 11, 2020, and that he had a gun with him that day. Our independent review of the record persuades us that the evidence was sufficient to satisfy the elements of the eight crimes at issue. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Our review of the record also reflects that the circuit court properly considered and addressed the parties' pretrial motions and Johnson's speedy trial demand, and that no procedural errors occurred with respect to the jury selection, the parties' evidentiary objections during trial, the colloquy concerning Johnson's decision to testify, the jury instructions, the arguments of counsel, and the handling of jury questions during deliberations. We are satisfied that appellate counsel correctly analyses these issues, and further discussion of them is not warranted.

After the jury returned its verdicts, the circuit court found that, although the probable cause section of the complaint alleged that the January 11, 2020 incident occurred in the 3500 block of North 7th Street, and although the evidence established that location as the place of the incident that day, the amended information described the address as the 3500 block of North 77th Street. The circuit court then found that the address in the amended information reflected a

scrivener's error, and the circuit court directed its clerk to correct the error. Pursuant to WIS. STAT. § 971.26, trial proceedings are not affected by imperfections in the charging documents that do not prejudice the defendant. Here, the circuit court's findings reflect that Johnson had ample notice of the address where the State alleged that his criminal conduct occurred on January 11, 2020, and thus he was not prejudiced by the scrivener's error in the amended information. We agree with appellate counsel that further pursuit of this issue would be frivolous within the meaning of ***Anders***.

Appellate counsel does not discuss Johnson's mid-trial offer to plead guilty to one of the charges arising on January 11, 2020, namely, the charge of possessing a firearm in violation of a harassment injunction. The State declined to waive a jury trial on that charge. A defendant cannot compel the State to waive a jury trial. ***State v. Warbelton***, 2009 WI 6, ¶¶59-60, 315 Wis. 2d 253, 759 N.W.2d 557. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

The no-merit report includes a substantial discussion of the circuit court's sentencing decisions, and we agree with appellate counsel that the circuit court appropriately exercised its sentencing discretion. The record shows that the sentencing court considered proper factors and did not consider any improper factors. The aggregate sentence imposed was well within the maximum aggregate sentence allowed by law and cannot be considered unduly harsh or excessive. *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. A challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

In the supplemental no-merit report, appellate counsel discusses the circuit court's determination at sentencing that Johnson was entitled to 424 days of sentence credit. The award

was intended to represent the time that Johnson spent in custody from the date that he was arrested on January 11, 2020, until the date of his sentencing on April 11, 2021. Appellate counsel first advises that the award was inadequate because Johnson was entitled to a total of 454 days of sentence credit for that period of detention. *See* WIS. STAT. § 973.155(1)(a); ***State v. Kontny***, 2020 WI App 30, ¶¶10-12, 392 Wis. 2d 311, 943 N.W.2d 923. Counsel then shows that the circuit court awarded Johnson an additional thirty days of sentence credit while this appeal was pending.[2] *See* WIS. STAT. § 808.075(4)(g)4. We agree with appellate counsel's conclusion that further proceedings to address sentence credit would lack arguable merit.[3]

[2] In support of the supplemental no-merit report, appellate counsel filed an affidavit along with copies of the motion for additional sentence credit, the circuit court's order granting the motion, and the amended judgment of conviction reflecting the amended award of sentence credit. *See* WIS. STAT. RULE 809.32(1)(f). Further, electronic docket entries confirm that the circuit court granted Johnson an additional thirty days of sentence credit during the pendency of this appeal. Accordingly, we take judicial notice that the circuit court has entered an amended judgment of conviction reflecting a total of 454 days of sentence credit. *See* WIS. STAT. § 902.01(2)(b), (4); ***Kirk v. Credit Accept. Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522. We also take judicial notice that the period from January 11, 2020, until April 11, 2021, was 454 days. *See* ***State ex rel. Shimkus v. Sondalle***, 2000 WI App 262, ¶13, 240 Wis. 2d 310, 622 N.W.2d 763 (reflecting that we may take judicial notice of the calendar); *see also* http://www.timeanddate.com/date/duration.html.

[3] The record and supplemental submissions show that the circuit court properly awarded Johnson 454 days of sentence credit against his sentence for first-degree recklessly endangering safety by use of a dangerous weapon, the first of the three consecutive felony sentences that the circuit court imposed. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988) (explaining that where a court imposes consecutive sentences, "total time in custody should be credited on a day-for-day basis against the total days imposed" and "applied to the sentence that is first imposed"). The circuit court did not award Johnson any sentence credit against the five nine-month sentences imposed for his five misdemeanor convictions. Because the five nine-month misdemeanor sentences were all imposed to run concurrently with each other and with the sentence for first-degree recklessly endangering safety, Johnson was entitled to 454 days of credit against each of those five misdemeanor sentences. ***State v. Carter***, 2007 WI App 255, ¶30, 306 Wis. 2d 450, 743 N.W.2d 700. There is, however, no arguable merit to pursuit of an order for sentence credit against those sentences. Johnson has completed the five nine-month concurrent sentences, which he began serving on April 11, 2021, and any sentence credit claim regarding those sentences is therefore moot. ***State v. Zahurones***, 2019 WI App 57, ¶10 n.2, 389 Wis. 2d 69, 934 N.W.2d 905.

Finally, the supplemental no-merit report addresses whether Johnson could pursue an arguably meritorious claim that trial counsel was ineffective for failing to object when the circuit court presented the jury with verdict forms identifying the eight charges against him as counts 1, 2, 3, 4, 17, 18, 19, and 20. To prevail on a claim of ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's performance "fell below an objective standard of reasonableness." ***Id.*** at 688. To demonstrate prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

We agree with appellate counsel's conclusion that Johnson could not mount an arguably meritorious claim that trial counsel's failure to challenge the non-sequential numbering of the eight counts was prejudicially deficient. As to deficiency, appellate counsel advises that her research has not uncovered any binding authority reflecting that presenting a jury with non-sequentially-numbered counts constitutes grounds for relief. This court similarly has not identified any precedential Wisconsin case resolving this issue. "Failure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services outside the wide range of professionally competent assistance[.]" ***State v. Hanson***, 2019 WI 63, ¶28, 387 Wis. 2d 233, 928 N.W.2d 607 (citation omitted). Further, we agree with appellate counsel that, on this record, Johnson could not show prejudice. While Johnson might argue that the non-sequential numbering prejudiced him by suggesting undisclosed charges, any such argument would be purely speculative here. *See* ***Smith v. Mirandy***, No. 2:14-CV-18928, 2016 WL 1274592, at *19 (S.D.W. Va. Mar. 31, 2016). Moreover, the circuit court instructed the jury

that it could consider "only the evidence" along with the jury instructions when deciding Johnson's guilt; and the circuit court provided a definition of evidence that clearly excluded the numbering of the counts. We presume that the jury follows the circuit court's instructions. ***State v. Dorsey***, 2018 WI 10, ¶55, 379 Wis. 2d 386, 906 N.W.2d 158.

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 judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Jill Marie Skwor is relieved of any further representation of Marquise Lekeven Johnson in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals