



OFFICE OF THE CLERK
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 III/II

January 3, 2013

To:

Hon. Donald R. Zuidmulder
Circuit Court Judge
Brown County Courthouse
100 S. Jefferson St., P.O. Box 23600
Green Bay, WI 54305-3600

Jason B. Beck
Clerk of Circuit Court
Brown County Courthouse
100 S. Jefferson St., P.O. Box 23600
Green Bay, WI 54301-3600

David L. Lasee
District Attorney
P.O. Box 23600
Green Bay, WI 54305-3600

Timothy T. O'Connell
O'Connell Law Office
403 S. Jefferson St.
Green Bay, WI 54301

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Rodney G. Reed, Sr. 222050
Waupun Corr. Inst.
P.O. Box 351
Waupun, WI 53963-0351

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

2012AP994-CRNM State of Wisconsin v. Rodney G. Reed, Sr. (L.C. #2010CF986)

Before Brown, C.J., Neubauer, P.J., Gundrum, J.

Rodney Reed, Sr. appeals from a judgment of conviction for being a party to the crimes of attempted first-degree intentional homicide, kidnapping, and armed robbery, all as a repeat offender. Reed's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2009-10),¹ and *Anders v. California*, 386 U.S. 738 (1967). Reed received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

consideration of the report and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* RULE 809.21.

Reed, two of his friends, and his niece were having a drink with a man who indicated he could obtain drugs for the group. When the man was unable to obtain the drugs, he was beaten, tossed into the trunk of the niece's car and transported to a new location, beaten and stabbed en route to the new location, and then left on the side of the road. The man was able to crawl to a nearby truck and survived. The man was missing his wallet when he was discovered by the truck's owner and given medical assistance.

A trial to the court was conducted over three days. The witness accounts of who accompanied the man to get the drugs, who first beat the man, and the participation of Reed and his three co-actors in the beating and stabbing varied. Reed testified that he did not actively participate and went along in the car only because he was afraid of the group's ringleader. Upon conviction, Reed was sentenced to concurrent terms of fourteen years' initial confinement, ten years' extended supervision and ten years' initial confinement, ten years' extended supervision on the attempted homicide and kidnapping convictions. A sentence of ten years' initial confinement and ten years' extended supervision was imposed and stayed in favor of ten years' probation, to be served consecutively, on the armed robbery conviction.

The no-merit report addresses the potential issues of whether Reed is entitled to a new trial because his trial counsel failed to object to the amendment to the information on the eve of trial to charge the kidnapping as a party to the crime, whether there was sufficient evidence to

find Reed guilty, and whether the sentence was a proper exercise of discretion. We agree with counsel's determination that these potential issues lack merit.

As to the amendment of the information, Reed's trial counsel acknowledged that he could not claim prejudice by the amendment. Reed's theory of defense was that Reed did not directly transport the victim from one locale to another and that he was only along because he felt threatened. Amendment of the kidnapping charge did not impact Reed's theory of defense. Moreover, in light of the evidence presented, the amendment was proper under WIS. STAT. § 971.29(2), which permits the amendment of the information to conform to the proof at trial when not prejudicial to the defendant.

Although the no-merit report provides a complete summary of the evidence at trial, it does not examine the evidence in relationship to the elements of each offense. We have done that analysis. *See* WIS JI—CRIMINAL 400, 1070, 1280, 1480. There was sufficient credible evidence to conclude that Reed participated in the beating, robbery, and transportation of the victim, and that there was intent in the acts committed to cause the victim's death.

A sentence is a proper exercise of discretion when the court provides a rational and explainable basis for the sentence and specifies the objectives of the sentence on the record, which include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence of others. *State v. Gallion*, 2004 WI 42, ¶¶39-41, 270 Wis. 2d 535, 678 N.W.2d 197. Here the sentencing court explained why probation was not an option as it would unduly depreciate the seriousness of the offenses. The court identified punishment and protection of the public as the objectives of the sentence. The court acknowledged that the sentence imposed on the attempted homicide conviction was

between the sentence received by Reed's niece and that of the group's ringleader. It expressly stated that the sentence was a proper allocation of the culpability among all participants to the crime. The sentence was a demonstrably proper exercise of discretion. Further, the sentence is well within the maximum and cannot be considered excessive. *See State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) ("A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.").

In addition to the issues discussed by the no-merit report, we have considered whether Reed has any arguable claim arising from his initial desire to be tried jointly with one of his co-actors but then ultimately being tried alone.² The trials were severed on the prosecution's motion because the statement of Reed and his co-actor would be offered as evidence against the other. This, absent special circumstances that do not apply here, was a proper basis for severance. *See Bruton v. United States*, 391 U.S. 123, 136-37 (1968); WIS. STAT. § 971.12(3). No issue of arguable merit exists.

We note that Reed was not present at a short pretrial conference. The court and Reed's trial counsel acknowledged that logistical problems with the county jail prevented Reed from attending the conference and that there was no prejudice to Reed. Nothing of substance was discussed at the conference and a subsequent final pretrial conference was held approximately a

² From the start, the trial court consolidated Reed's case with one of the co-actors (not the ringleader) in the interests of judicial economy. At several pretrial proceedings Reed's trial counsel expressed a desire for the cases to be tried together.

month later. No arguable merit exists to a potential claim that Reed was prevented from being present at the critical stages of the prosecution. *See State v. Carter*, 2010 WI App 37, ¶19, 324 Wis. 2d 208, 781 N.W.2d 527 (a defendant has the constitutional right to be present at any critical stage of the criminal proceeding).

Our review of the record discloses no other potential issues for appeal. The colloquies conducted with Reed about waiver of his right to a jury trial and his right not to testify were adequate. The rulings made on the numerous evidentiary objections raised at trial, both in favor of the prosecution and defense, were a proper exercise of discretion and no impermissible evidence was admitted. Also, the trial court properly handled Reed's presentencing complaint that his trial attorney should be discharged, and Reed ultimately withdrew his request to be appointed new counsel. Having concluded that no issues of arguable merit exist for appeal, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Reed further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Rodney Reed, Sr. in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals