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DISTRICT I/II

January 23, 2013

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

2012AP1018-CRNM State of Wisconsin v. Kendrick L. Johnson (L.C. # 2010CF2278)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Kendrick L. Johnson appeals from a judgment of conviction for: (1) possession of a firearm by a person adjudicated delinquent for a felony; (2) possession of a firearm in a school zone; (3) possession with intent to deliver cocaine while possessing a dangerous weapon; and (4) possession with intent to deliver marijuana while possessing a dangerous weapon. After a jury found Johnson guilty of the above four counts, the trial court imposed bifurcated prison

sentences of seven years on two of the counts and three years on the other two counts, all to run concurrently.[1] Johnson's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2009-10)[2] and ***Anders v. California***, 386 U.S. 738 (1967). Johnson received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon 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* WIS. STAT. RULE 809.21.

At Johnson's jury trial, police officers testified that while pursuing and attempting to stop Johnson, they observed him throw something toward a fence. The officers heard a sound they believed to be a firearm hitting a brick wall. After Johnson was stopped and arrested, the officers searched the area where Johnson made the throwing motion and discovered a handgun on the ground beside a house. Police located an apparently fresh divot on the house as well as transferred paint on the gun. Five to ten feet away from the handgun was a plastic bag containing fifteen cornercuts of cocaine and fourteen cornercuts of marijuana.

At trial, Johnson stipulated both orally and in writing to several elements of the charged offenses. Though the court conducted a personally colloquy with Johnson regarding the stipulations, it did not specifically ask Johnson if he waived his right to a jury trial on each

[1] On counts one and three, the court ordered two years of initial confinement and five years of extended supervision. On counts two and four, the court ordered one year of initial confinement and two years of extended supervision.

[2] All references to the Wisconsin Statutes are to the 2009-10 version.

stipulated element. The court instructed the jury on all elements of each charge, including the stipulated elements.

After sentencing, Johnson filed a postconviction motion challenging the court-imposed condition that he obtain an associate's or bachelor's degree during his sentence. The trial court granted the motion and entered an order consistent with the language suggested in the defendant's postconviction motion. The trial court did not impose the discretionary WIS. STAT. § 973.046(1g) DNA surcharge.

The no-merit report first considers the issue of whether Johnson's stipulation to several offense elements deprived him of his right to a jury trial. A defendant's waiver of the right to a jury trial must be personally and intelligently made. *See* ***State v. Livingston***, 159 Wis. 2d 561, 569-70, 464 N.W.2d 839 (1991). The right to a jury trial includes the right to a jury determination on each element. ***State v. Hauk***, 2002 WI App 226, ¶32, 257 Wis. 2d 579, 652 N.W.2d 393. In the present case, when accepting Johnson's stipulation, the trial court did not specifically ascertain from Johnson that he understood he was waiving his right to a jury trial on the stipulated elements. However, because the jury was instructed on the stipulated elements, the jury ultimately determined the existence of each element. *See* ***State v. Benoit***, 229 Wis. 2d 630, 638-40, 600 N.W.2d 193 (Ct. App. 1999) (where the jury is instructed on each and every element of the offense, the defendant has not waived his right to a jury trial on the stipulated elements). No arguable issue exists with regard to Johnson's stipulation.

Johnson did not testify at trial. We have independently reviewed whether the trial court properly advised Johnson of his right to testify. *See* ***State v. Weed***, 2003 WI 85, ¶¶39-40, 43, 263 Wis. 2d 434, 666 N.W.2d 485 (where a criminal defendant waives his fundamental right to

testify on his own behalf at trial, the trial court should conduct an on-the-record colloquy "to ensure that (1) the defendant is aware of his or her right to testify and (2) the defendant has discussed this right with his or her counsel.") The record demonstrates that the trial court ascertained Johnson's understanding that he had the absolute right to testify and chose not to do so. No arguable issue exists with regard to Johnson's decision not to testify.

The no-merit report also addresses whether the trial evidence was sufficient to support the guilty verdicts on each count. On appeal we view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). A jury verdict will be overturned only if the conviction is so lacking in probative value and force that as a matter of law "no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***Id***. at 507.

The contraband in this case was not discovered in Johnson's actual possession. Counsel's no-merit report acknowledges that the State relied in part on circumstantial evidence to prove that Johnson possessed the firearm, marijuana, and cocaine. A conviction may be supported solely by circumstantial evidence, and on appeal, the standard of review is the same whether the conviction relies upon direct or circumstantial evidence. ***Id.*** at 501-03. Based on our review of the record and counsel's no-merit report, we conclude that there are sufficient facts to support each and every element of the four offenses. There is no issue regarding the sufficiency of the evidence.

Finally, counsel's no-merit report addresses whether the trial court properly exercised its discretion at sentencing. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d

197 (appellate review of a sentence is limited to whether the sentencing court properly exercised its discretion). In fashioning the sentence, the court considered the seriousness of the offense, the defendant's character and history, and the need to protect the public. *See* ***State v. Ziegler,*** 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court considered mitigating factors, such as Johnson's supportive family and his desire to further his education. The court considered but rejected probation, concluding that probation would unduly depreciate the severity of the offense. *See* ***Gallion***, 270 Wis. 2d 535, ¶44 (court should consider probation as the first alternative). The court concluded that a lengthy sentence was unnecessary but that Johnson needed to learn that there are consequences for his actions. The seven-year bifurcated sentence was well within the thirty-eight and one-half year sentence[3] 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 court's sentencing discretion.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Johnson further in this appeal.

Upon the foregoing reasons,

[3] Though the no-merit report cites the maximum as thirty-nine and one-half years, because the conviction for possession with intent to deliver marijuana was a Class I felony, the dangerous weapons enhancer could only add four years of imprisonment. *See* WIS. STAT. § 939.63(1)(c). Given that the court's sentence was well below the maximum and that the enhancer was never invoked, this one-year misstatement is immaterial.

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

IT IS FURTHER ORDERED that Attorney Kaitlin A. Lamb is relieved from further representing Kendrick L. Johnson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals