COURT OF APPEALS
DECISION
DATED AND RELEASED

DECEMBER 19, 1995

No. 94-2475-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DANIEL HOYT,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Affirmed*.

WEDEMEYER, P.J. Daniel Hoyt appeals from a judgment convicting him of disorderly conduct while armed.[1] The state public defender appointed Attorney Michael P. Jakus as Hoyt's appellate counsel. Attorney Jakus served and filed a no merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and RULE 809.32(1), STATS. Hoyt filed a response. After an

[1] This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

independent review of the record as mandated by ***Anders***, we conclude that any further appellate proceedings would lack arguable merit.

Hoyt pointed a rifle at some "skinheads" who were threatening him.[2] A jury found Hoyt guilty of disorderly conduct while armed, contrary to §§ 947.01 and 939.63, STATS. The trial court sentenced Hoyt to the House of Correction for sixty days with Huber Law privileges.

The no merit report addresses four issues, three of which Hoyt also raises. Appellate counsel addresses whether the trial court should have granted Hoyt's mistrial motion. We agree with counsel's description, analysis and conclusion that Hoyt's personal waiver of his objection renders any appellate challenge frivolous. Appellate counsel and Hoyt raise the following issues: (1) whether the trial court erroneously exercised its discretion in excluding evidence of Hoyt's knowledge of gay-bashing in Los Angeles as irrelevant; (2) whether the trial court committed reversible error in instructing the jury *sua sponte* on self-defense and retreat, or in refusing to elaborate on that instruction;[3] and (3) whether the trial court erroneously exercised its sentencing discretion. We address Hoyt's contentions, although we ultimately conclude that pursuing them would lack arguable merit.

Defense counsel sought to elicit from Hoyt that he had lived in Los Angeles where gay-bashing had occurred. Although the prosecutor objected and defense counsel sought to make an offer of proof, it was not reported. At the conclusion of the evidence, the trial court made a record that it had sustained the prosecutor's objection on the basis of relevance, because this incident did not occur in Los Angeles. We agree with appellate counsel that pursuing this issue in the context of the existing record would lack arguable merit.

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[2] Hoyt testified that four men surrounded him as one yelled, "[g]et a haircut, fag."

[3] WIS J I—CRIMINAL 810 PRIVILEGE: SELF-DEFENSE: RETREAT. Appellate counsel raises the issue of giving the instruction *sua sponte*, whereas Hoyt criticizes the trial court's failure to elaborate on that instruction.

The trial court instructed the jury on self-defense and retreat. WIS J I—CRIMINAL 810. Hoyt does not object to the instruction; he objects to the trial court's refusal to elaborate on that instruction when the jury sought further assistance. However, our review of the record does not support Hoyt's contention.

The jury asked the bailiff for the definition of using a dangerous weapon. In response to that question, the court told the bailiff to tell the jurors that they should refer to the jury instructions. Thus, there is nothing in the record to indicate that the jury inquired about the self-defense issue Hoyt raises. However, it would lack arguable merit to challenge the trial court's refusal to elaborate on a standard jury instruction when it directed the jury to refer to the instructions.

Hoyt disagrees with the sentence imposed. Although he misused a dangerous weapon, he has not had any "violent recurrence," and he implores this court to "dismiss" the sentence because justice will not be served by placing him in custody. Huber Law privileges are of no avail because he is employed out-of-state. Hoyt's postconviction conduct and out-of-state employment do not entitle him to resentencing. ***State v. Solles***, 169 Wis.2d 566, 570, 485 N.W.2d 457, 459 (Ct. App. 1992) ("courts base their sentences on the circumstances before them at the time of sentencing [not thereafter]"). To pursue these issues would lack arguable merit.

On appeal, our review of the sentence is limited to whether the trial court erroneously exercised its discretion. ***State v. Larsen,*** 141 Wis.2d 412, 426, 415 N.W.2d 535, 541 (Ct. App. 1987). The primary factors to consider are the gravity of the offense, the character of the offender, and the need for public protection. ***Id***. at 427, 415 N.W.2d at 541. The weight given to each factor is within the trial court's discretion. ***Cunningham v. State***, 76 Wis.2d 277, 282, 251 N.W.2d 65, 67-68 (1977).

The trial court considered the primary sentencing factors. It commented on the dangerousness of a rifle and emphasized that Hoyt's "response to the name calling was confrontational and actually escalated the situation .... I'm not saying people should be calling other people names, but there has to be a little bit thicker skin instead of resorting to weapons when

somebody is called a name." It considered the character of the offender. Hoyt was employed and his two prior convictions occurred in the remote past. It was concerned that Hoyt would "resort to a gun to take matters into his own hands and somehow be an enforcer in the situation that obviously had gotten out of hand . . . ." However, it balanced that against Hoyt's recognition that he had made a mistake. It recognized that the illegal use of weapons poses a danger to public safety. It concluded that some jail time was appropriate for Hoyt to realize that the illegal use of a gun will not be tolerated. To challenge Hoyt's sentence for an erroneous exercise of discretion would lack arguable merit.

We could construe some of Hoyt's complaints as raising an ineffective assistance of trial counsel claim. However, "it is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." ***State v. Machner***, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). It is inappropriate for this court to determine the competency of trial counsel on unsupported allegations. ***State v. Simmons***, 57 Wis.2d 285, 297, 203 N.W.2d 887, 894-95 (1973). Because there is no evidentiary record on this issue, we cannot review an ineffective assistance of trial counsel claim.

We have addressed each issue disclosed by Hoyt. Upon our independent review of the record as mandated by ***Anders*** and RULE 809.32(3), STATS., we conclude that there are no other meritorious issues and that any further appellate proceedings would lack arguable merit. Accordingly, we affirm the judgment of conviction and relieve Attorney Michael P. Jakus of any further appellate representation of Hoyt.

By the Court.—Judgment affirmed.