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DISTRICT II

November 22, 2017

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

2017AP209-CRNM State of Wisconsin v. Brian K. Adams (L.C. # 2015CF87)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Brian K. Adams appeals from a judgment convicting him of first-degree reckless homicide. Adams' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). Adams filed a response. After

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

reviewing the record, counsel's report, and Adam's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. WIS. STAT. RULE 809.21.

Adams was convicted following a jury trial of first-degree reckless homicide. The charge stemmed from allegations that he delivered heroin to a woman who subsequently overdosed and died. The circuit court sentenced Adams to twenty years of initial confinement and five years of extended supervision. This no-merit appeal follows.

The no-merit report addresses whether the evidence at trial was sufficient to support Adams' conviction. When reviewing the sufficiency of the evidence, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in force and probative value that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). Our review of the trial transcripts persuades us that the State produced ample evidence to convict Adams of his crime. That evidence included cell phone records/data and a witness who was present when the victim bought heroin. We agree with counsel that a challenge to the sufficiency of the evidence would lack arguable merit.

The no-merit report also addresses whether the circuit court properly exercised its discretion at sentencing.² The record reveals that the court's sentencing decision had a "rational

² In the no-merit report, counsel uses the phrase "abuse of discretion." We have not used the phrase "abuse of discretion" since 1992, when our supreme court replaced the phrase with "erroneous exercise of discretion." See, e.g., *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

and explainable basis.” *State v. Gallion*, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). In making its decision, the court considered the seriousness of the offense, Adams’ character, and the need to protect the public. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. Under the circumstances of the case, which were aggravated by Adams’ criminal history and lack of remorse, the sentence imposed does not “shock public sentiment and violate the judgment of reasonable people concerning what is right and proper.” *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We agree with counsel that a challenge to Adams’ sentence would lack arguable merit.

Finally, the no-merit report addresses whether Adams was afforded effective assistance of trial counsel. There is nothing in the record to suggest that Adams’ trial counsel was ineffective. Consequently, we are satisfied that the no-merit report properly analyzes this issue as without merit, and we will not discuss it further.

In addition to the foregoing issues, we considered other potential issues that arise in cases tried to a jury, *e.g.*, jury selection, objections during trial, confirmation that the defendant’s waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening statements and closing arguments. Here, the jury was selected in a lawful manner. Objections during trial were properly ruled on. When Adams elected not to testify, the circuit court conducted a proper colloquy to ensure that his waiver was valid. The jury instructions accurately conveyed the applicable law and burden of proof. No improper arguments were made by the prosecutor during opening statements or closing arguments. Accordingly, we conclude that such issues would lack arguable merit.

As noted, Adams filed a response to counsel's no-merit report. The response is difficult to decipher, as it is rambling and somewhat nonsensical. It appears to focus on the same issues raised in the no-merit report. It also appears to suggest that bindover was erroneous³ and that the circuit court judge should have recused herself from the case.⁴ In any event, we are not persuaded that the response presents an issue of arguable merit.

Our independent review of the record does not disclose any potentially meritorious issue for appeal.⁵ Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney Dennis S. Schertz of further representation in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Dennis S. Schertz is relieved of further representation of Adams in this matter.

³ Because a conviction resulting from a fair and errorless trial cures any error at a preliminary hearing, we conclude that a challenge to bindover would lack arguable merit. See *State v. Webb*, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991).

⁴ Before arraignment, the circuit court judge disclosed that she was "tangentially" familiar with the victim's mother, who had been an acquaintance of the judge's late father. The judge did not believe that was a reason for recusal; nevertheless, she gave the parties an opportunity to object. Adams indicated that he did not object to her staying on the case. Consequently, we deem the issue waived.

⁵ Prior to trial, Adams requested a competency evaluation. The circuit court appointed an examiner, who opined that Adams was competent to stand trial. Adams declined to contest the matter, as his retained examiner arrived at the same conclusion. Based upon the foregoing, the circuit court properly found Adams competent to proceed.

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

Diane M. Fremgen
Clerk of Court of Appeals