



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 I

August 13, 2019

To:

Hon. Frederick C. Rosa
Circuit Court Judge
Br. 35
901 N. 9th St., Rm. 632
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Basil M. Loeb
Schmidlkofer, Toth, Loeb & Drosen, LLC
949 Glenview Avenue
Wauwatosa, WI 53213

Karen A. Loebel
Deputy District Attorney
821 W. State St.
Milwaukee, WI 53233

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Myrtle Mae Moss 293280
Taycheedah Correctional Inst.
P.O. Box 3100
Fond du Lac, WI 54936-3100

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

2018AP1389-CRNM State of Wisconsin v. Myrtle Mae Moss (L.C. # 2015CF4859)

Before Brash, P.J., Kessler and Dugan, 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).

Myrtle Mae Moss appeals from a judgment of conviction for two counts of first-degree recklessly endangering safety with the use of a dangerous weapon. *See* WIS. STAT. §§ 941.30(1), 939.63(1)(b) (2015-16).¹ Moss's appellate counsel, Attorney Basil M. Loeb, has filed a no-merit

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Moss received a copy of the report and filed multiple documents that we construe as responses. Upon consideration of the submissions 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.

The charges against Moss arose out of a shooting in a bar. According to the complaint, the owner of the bar refused to serve Moss a drink because she appeared to be highly intoxicated. As he attempted to escort her out, Moss shot him. One of the bullets that Moss fired grazed another individual during the incident. Both victims lived. When police arrived at the scene, Moss was being held down by a group of individuals. The complaint alleged that video from the bar showed Moss firing several shots. The State charged Moss with attempted first-degree intentional homicide with the use of a dangerous weapon, first-degree recklessly endangering safety with the use of a dangerous weapon, and carrying a concealed weapon.

Moss entered a special plea of not guilty by reason of mental disease or defect. However, after the evaluating psychiatrist's report did not support the special plea, Moss withdrew it. A subsequent competency evaluation deemed Moss competent to proceed, and trial counsel advised the trial court that Moss agreed with that conclusion.

Moss subsequently pled no-contest to two counts of first-degree recklessly endangering safety, one of which was with the use of a dangerous weapon. Prior to sentencing, with the assistance of newly appointed counsel,² Moss moved to withdraw her pleas. The trial court

² During the trial court proceedings, Moss was represented by three different attorneys.

granted her motion and the case proceeded to a court trial where Moss was convicted of two counts of first-degree recklessly endangering safety with the use of a dangerous weapon. On count one, the trial court sentenced Moss to six years of initial confinement and three years of extended supervision. On count two, the trial court ordered Moss to serve a concurrent sentence of three years of initial confinement and three years of extended supervision.

The no-merit report addresses the following issues: the sufficiency of the evidence to support the convictions; whether Moss received the effective assistance of counsel; and the trial court's exercise of its sentencing discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit.³ The report sets forth the applicable standards of review and details the evidence satisfying the elements of the crimes for which Moss was convicted. This court will not discuss these issues further.

In her responses, Moss argues that her blood alcohol level has been withheld from her, that there has been a cover-up in this case to protect the victim, and that the prosecutor tampered with the video evidence in order to convict her. As to her blood alcohol level, based on the

³ We note in passing that the trial court made Moss eligible for both the Challenge Incarceration Program (CIP) and the Substance Abuse Program. Based on her age, however, she was statutorily ineligible for CIP. *See* WIS. STAT. § 302.045(2)(b) (providing that one of the criteria for CIP eligibility is that “[t]he inmate has not attained the age of 40 as of the date the inmate will begin participating in the program”). At the time of sentencing, Moss was fifty-five years old.

The trial court's mistaken CIP eligibility determination consists of one sentence in the sentencing transcript. Thus, there is no indication from the sentencing record that Moss's eligibility for CIP was highly relevant to the exercise of its sentencing discretion such that it would present an arguably meritorious issue for appeal.

record before us, it does not appear that any such evidence exists.⁴ *See generally State v. Aderhold*, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (Ct. App. 1979) (“The rule is well established that reviewing courts are limited to the record, and are bound by the record.”).

In any event, we fail to see how the issue of Moss’s blood alcohol level has arguable merit. Moss acknowledged during her testimony that she drank heavily on the night of the shooting, stating: “I drank so much my mind got twisted and then—I don’t know nothing else that happened then.” Moss further testified that she was taking medication at the time and was aware that she was not supposed to drink alcohol. We have considered whether Moss’s attorney could have pursued a voluntary intoxication defense on her behalf. In 2014, the legislature eliminated the voluntary intoxication defense. *See* 2013 Wis. Act 307, §§ 1-4. The crimes at issue here occurred in November 2015. Consequently, trial counsel properly concluded that voluntary intoxication was not available as a defense for Moss.

As to Moss’s cover-up theory and her claim of evidence tampering, there is no support for either assertion in the record before us. Instead, these assertions seemingly amount to speculation and conjecture, which will not support an appeal. During her trial testimony, Moss acknowledged that she had watched the video and that it showed her in the bar with a gun. She testified that she had owned the gun for eight years. As stated in some of its findings, the trial court described seeing Moss fire shots on the video and noted that the video matched the trial testimony.

⁴ Moss additionally asked that we scrutinize the discovery in this case. She seems to suggest that some of the discovery is not corroborated, but it is unclear what she is referring to and how it is at odds with the evidence presented at her court trial.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the convictions, and discharges appellate counsel of the obligation to represent Moss 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 Basil M. Loeb is relieved from further representing Myrtle Mae Moss in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals