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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 IV

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To:

Hon. William E. Hanrahan
Circuit Court Judge, Br. 7
Dane County Courthouse
215 South Hamilton, Rm. 4103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 South Hamilton, Rm. 1000
Madison, WI 53703

William E. Schmaal
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Corey C. Stephan
Asst. District Attorney
Rm. 3000
215 South Hamilton
Madison, WI 53703

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

Frank J. Gentry 469065
John C Burke Corr. Inst.
P.O. Box 900
Waupun, WI 53963-0900

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

2014AP1404-CRNM State of Wisconsin v. Frank J. Gentry (L.C. # 2012CF2128)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

Frank Gentry appeals a judgment convicting him, after a jury trial, of one count of robbery with use of force and one count of felony bail jumping, both as a habitual offender. *See* WIS. STAT. §§ 943.32(1)(a), 946.49(1)(b), 939.62(1)(c) (2013-14).[1] Attorney William Schmaal has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v.***

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Wisconsin Court of Appeals, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the sufficiency of the evidence and the validity of the sentence. Gentry was sent a copy of the report and has filed multiple responses. Upon order of this court, Schmaal filed a supplemental no-merit report and Gentry filed an additional response. After reviewing the entire record, as well as the no-merit reports and responses, we conclude that there are no arguably meritorious appellate issues.

First, we address Gentry's argument that the evidence was insufficient to support the jury's verdicts. Gentry was charged with the forcible robbery of a man who was in his seventies, thereby also violating the conditions of his bail release in an unrelated pending felony prosecution. The crime of robbery with use of force requires proof of the following elements: (1) the victim was the owner of property, (2) the defendant took and carried away property from the victim's person, (3) the defendant had the intent to steal, and (4) the defendant acted forcibly. WIS JI—CRIMINAL 1479. On the felony bail jumping charge, the State needed to prove that: (1) the defendant was charged with a felony crime, (2) the defendant was released from custody on bond with conditions, and (3) the defendant intentionally failed to comply with the conditions of his bond. WIS JI—CRIMINAL 1795.

When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). In this case, the victim, T.B., testified at trial that he had been at Dejope casino, also known as Ho Chunk Gaming, on the date in question, and that he went to the restroom at approximately 12:15 p.m. He stated that he had approximately $140 in winnings in his wallet at the time and that there was no one else in the restroom when he entered it. T.B. testified that he was grabbed by an assailant, who threw him to the floor facedown and took his

billfold. The assailant then left the restroom and T.B. left a moment later, yelling for help. A police officer responded to the scene. T.B. told the officer that the assailant had been a black male wearing a jacket that possibly had red and white coloring on it.

During his testimony, T.B. viewed a surveillance video from the casino. In the video, T.B. recognized the ramp leading to the men's restroom and identified himself entering the restroom, followed by another man. He viewed the other man walking out of the restroom and identified the man as the person who assaulted him. T.B. then identified himself walking out of the restroom, "hollering for the guards."

At trial, the State also presented the testimony of Gentry's cousin, George Thomas, who testified that, on the date in question, he and Gentry had been at the casino. Thomas testified that Gentry had been wearing a jacket that had a large American flag on the back and said "USA" on the sleeves. Thomas viewed the same surveillance video that T.B. had viewed, and Thomas identified the man who entered the restroom after T.B. as Gentry.

Outside the presence of the jury, Gentry stipulated that, as of the date of the incident, he had been charged with a felony offense. Certified copies of the bail bond, the criminal complaint and information, and a notice of court hearing in that case were introduced into the record. In light of all of the above, we agree with counsel's assessment that there would be no arguable merit to challenging the sufficiency of the evidence on appeal.

In his responses to the no-merit report, Gentry makes a number of arguments related to ineffective assistance of trial counsel. To establish ineffective assistance of counsel, Gentry must show that his counsel's performance was deficient and that the deficiency caused him prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

First, Gentry argues that his trial counsel was ineffective for failing to challenge police officers' warrantless entry into his home. He does not argue that the police lacked probable cause to arrest him. Rather, he argues that probable cause is not sufficient to justify a warrantless in-home entry absent exigent circumstances, citing ***Payton v. New York***, 445 U.S. 573 (1980). In ***Payton***, 445 U.S. at 576, the Supreme Court held that a routine felony arrest made during a warrantless and *nonconsensual* entry into a suspect's home violated the Fourth Amendment. However, police can make a valid warrantless arrest in a person's home if they have consent to enter the home. ***State v. Rodgers***, 119 Wis. 2d 102, 107, 349 N.W.2d 453 (1984).

The record in this case reflects that the police officers entered into Gentry's apartment with his consent. Gentry does not allege otherwise in his no-merit responses. Detective Gregg Luedtke testified at Gentry's trial that he and his partner first made contact with Gentry in the parking lot of his apartment building. Gentry was standing outside of a maroon van with the hood up. Luedtke identified himself as a police officer and told Gentry he wanted to talk to him about an incident that had occurred at the casino. Gentry initially denied having been at the casino on the date in question. Luedtke told Gentry that he had spoken with Thomas and that Thomas had confirmed Gentry was at the casino on that date. According to Luedtke, Gentry then asked if he could speak with the officers inside his apartment. We are satisfied, based on these facts, that there would be no arguable merit to pursuing an ineffective assistance claim based on trial counsel's failure to challenge the warrantless entry by police.

Gentry also argues that his trial counsel was ineffective for failing to challenge his arrest on the basis that he was not given a contemporaneous ***Miranda***[2] warning at the time of arrest. Luedtke testified that, once he was inside the apartment, he and his partner asked Gentry about the whereabouts of his jacket with the American flag on it. Gentry replied that he believed it was at his brother's house. Nothing in Gentry's no-merit responses indicates that he felt coerced to speak with the officers or that he did not feel free to leave or ask them to leave the apartment. Luedtke told Gentry he was investigating a complaint of an individual who had property taken from him in the casino bathroom and that he believed Gentry was involved. Gentry then admitted to having been at the casino, but was uncertain whether it had been on the date in question.

Attached as "Exhibit 8" to Gentry's first no-merit response is a document that appears to be a police report prepared by Luedtke. The report states that, after he admitted to having been at the casino, Gentry said he wanted to speak further at the police station and asked for his lawyer to be present. The report states that Luedtke's partner then placed Gentry under arrest and Gentry was brought to the police station. Nothing in the record or in Gentry's responses indicates that Gentry was interrogated after he asked for his lawyer. In addition, nothing in the report, record, or Gentry's responses indicates that Gentry was questioned after that point. The record also does not contain evidence of any confession to the crime or any custodial statements by Gentry. Based on all of the above, we agree with counsel's assessment that there would be no arguable merit to a claim that trial counsel was ineffective for failing to challenge Gentry's arrest on the basis that the police officers failed to give a contemporaneous ***Miranda*** warning at the

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966)

time of arrest. *See* ***State v. Grady***, 2009 WI 47, ¶18, 317 Wis. 2d 344, 766 N.W.2d 729. (***Miranda*** requires only that the warning be given at some time prior to any custodial questioning).

Next, Gentry argues that trial counsel was ineffective for failing to challenge the impoundment of his vehicle, which was later searched pursuant to a warrant. Luedtke testified that, after exiting Gentry's apartment building on the date of Gentry's arrest, he impounded the maroon van that he had seen Gentry standing next to earlier. Luedtke had the van towed to a secure police storage facility until he later obtained a search warrant for the van. Inside the van, Luedtke located a purple backpack on one of the rear seats, and inside the backpack was a jacket with a flag on the back of it. Luedtke also found a wallet in the van with Gentry's I.D. inside the wallet. The backpack and jacket were received into evidence and viewed by the jury at trial.

There is no doubt that the van was "seized" when Luedtke had it towed and held in storage while he applied for a search warrant. However, a seizure of a vehicle is permitted on probable cause. ***State v. Friday***, 147 Wis. 2d 359, 375, 434 N.W.2d 85 (1989). Prior to the date of Gentry's arrest and the seizure of the vehicle, police had viewed surveillance videos from the casino that showed a black male in an American flag jacket with "USA" on the sleeves entering the restroom after T.B. and then exiting hurriedly. From one camera angle, T.B. could be seen lying on the floor. After conversing with casino security, Luedtke was informed that casino employees had identified a man who was seen leaving the casino with the robbery suspect. That man was Gentry's cousin, Thomas. Luedtke then made contact with Thomas, who confirmed that he had been at the casino and identified the robbery suspect as Gentry from a still photograph. Thomas stated that he had asked Gentry for a ride home from the casino on the date in question, but that Gentry mentioned he was down on cash and wanted to continue gambling.

In addition, Gentry admitted to the police, after asking if he could speak with them inside his apartment, that he knew the whereabouts of his jacket with the American flag on it. In light of these circumstances, we agree with counsel that there would be no arguable merit to pursuing a claim that police lacked probable cause to seize the vehicle.

Gentry also argues that his trial counsel was ineffective for failing to challenge the admission of the surveillance recordings from the casino. Gentry argues that his trial counsel had a duty to challenge the authenticity of the evidence. However, the record reflects that the surveillance recordings were properly authenticated at trial with testimony from the casino's investigator, testimony from the police officer who responded to the robbery at the casino, and testimony from Luedtke. In addition, T.B. and Thomas both testified as to the identity of the robber on the video. We agree with counsel's assessment that a challenge to trial counsel's effectiveness based on failure to challenge admission of the surveillance recordings would be without arguable merit.

Gentry's responses and the supplemental no-merit report also address the issues of whether his trial counsel was ineffective for failing to object to the judge's pretrial inquiry of the parties about any plea negotiations, for failing to object to questions posed by the prosecutor on direct examination of T.B., and for failing to object during the prosecutor's closing argument. This court is satisfied that the supplemental no-merit report properly analyzes these issues as being without merit, and we will not discuss them further.

Finally, the record discloses no arguable basis for challenging the sentences imposed. The court considered the seriousness of the offenses, the need to protect the public, Gentry's background and character, and his remorsefulness for the crime. The court imposed five years of

initial confinement and five years of extended supervision on the robbery count and a concurrent term of three years of initial confinement and three years of extended supervision on the felony bail jumping count. The components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 943.32(1) (classifying robbery with use of force as a Class E felony); 946.49(1)(b) (classifying felony bail jumping as a Class H felony); 973.01(2)(b)5. and (d)4. (providing maximum terms of ten years of initial confinement and five years of extended supervision for a Class E felony); 973.01(2)(b)8. and (d)5. (providing maximum terms of three years of initial confinement and three years of extended supervision for a Class H felony); 939.62(1)(b) (increasing maximum term of imprisonment for offense otherwise punishable by one to ten years by four additional years for habitual criminality). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that William Schmaal is relieved of any further representation of Frank Gentry in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals