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

September 19, 2023

To:

Hon. Michael J. Hanrahan
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Winn S. Collins
Electronic Notice

David Malkus
Electronic Notice

Savon D. Jones 579166
Prairie Du Chien Correctional Inst.
P.O. Box 9900
Prairie du Chien, WI 53821

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

2023AP157-CRNM	State of Wisconsin v. Savon D. Jones (L.C. # 2018CF3700)
2023AP158-CRNM	State of Wisconsin v. Savon D. Jones (L.C. # 2018CF5115)
2023AP159-CRNM	State of Wisconsin v. Savon D. Jones (L.C. # 2019CF3245)

Before White, C.J., Donald, P.J., and Geenen, J.

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).

Savon D. Jones appeals judgments of conviction entered in three matters that were joined for trial and consolidated for appeal. He also appeals an order denying postconviction relief in each case. His appellate counsel, Attorney David Malkus, filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Attorney Malkus additionally filed a supplemental no-merit report at our request. Jones did not file any

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

response. Upon consideration of the no-merit reports and an independent review of the records as mandated by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

The matter before the court involves three separate Milwaukee County Circuit Court cases involving Jones: Case No. 2018CF3700 underlies appeal no. 2023AP157-CRNM; Case No. 2018CF5115, which underlies appeal No. 2023AP158-CRNM, and Case No. 2019CF3245, which underlies Appeal No. 2023AP159-CRNM.

In case No. 2018CF3700, the State charged Jones with one felony count of possession with intent to deliver more than one gram but not more than five grams of cocaine. The State alleged in the criminal complaint that on May 22, 2018, police officers conducting an anti-prostitution investigation in a Milwaukee neighborhood saw a woman enter the passenger side of a Chevrolet Malibu in the 1500 block of West Greenfield Avenue. The Malibu travelled a short distance and then the woman got out of the vehicle and walked away with her hand cupped as if carrying an item. Officers next saw numerous people walk up to the Malibu and conduct hand-to-hand transactions with the vehicle's sole occupant, who was subsequently identified as Jones. Officers approached the vehicle and saw a baggie containing a substance. The substance tested positive for cocaine. Officers later obtained a search warrant for Jones's cell phone, and when they executed the warrant, they found numerous text messages indicating that he was involved in the distribution of cocaine.

In case No. 2018CF5115, the State charged Jones with four felonies: possession of a firearm while a felon; possession of a short-barreled (i.e., sawed-off) shotgun; bail jumping; and possession with intent to deliver more than one gram but not more than five grams of cocaine.

The criminal complaint alleged that on October 22, 2018, while Jones was out of custody on bond in case No. 2018CF3700, officers executed a search warrant for a silver Mazda registered to Jones and for a Milwaukee apartment in the 7900 block of West Bender Avenue. The complaint further alleged that, during the search of the apartment, officers found a loaded short-barreled shotgun in the closet underneath documents related to case No. 2018CF3700, other documents and identifiers for Jones, and a quantity of cocaine and marijuana. Subsequent investigation revealed that Jones had a prior felony conviction for threatening a law enforcement officer in violation of WIS. STAT. § 940.203(2).

Jones reached a plea agreement that would have resolved all of the charges against him. Pursuant to the terms of the agreement, Jones pled guilty to some charges and others were dismissed, including the entirety of a case that arose on March 18, 2018, alleging misdemeanor possession of cocaine. The circuit court accepted Jones's guilty pleas and granted the State's dismissal motions. The parties later agreed, however, that Jones had entered his guilty pleas without knowledge of the actual penalties that he faced upon conviction. The circuit court permitted Jones to withdraw his guilty pleas and reinstated the original charges. *See* ***State v. Lange***, 2003 WI App 2, ¶32, 259 Wis. 2d 774, 656 N.W.2d 480.

The State then moved to dismiss the misdemeanor charge of possession of cocaine that arose on March 18, 2018. Following the dismissal, the State issued a complaint in a new case, case No. 2019CF3245, which alleged that, on March 18, 2018, police responded to the 2000 block of West Roberts Street in Milwaukee to investigate a battery complaint. There, police found Jones grappling with a woman who had visible redness and swelling on her face. Police arrested Jones. During a search incident to the arrest, police found 3.5 grams of cocaine and

$315 dollars on his person and a digital scale in his vehicle. The State charged Jones with felonious possession with intent to deliver more than one gram but not more than five grams of cocaine.[2]

Jones requested a jury trial in each of the three cases pending against him. The State successfully moved for joinder. On the first day of trial, the prosecutor advised that in case No. 2018CF3700, the State was amending the allegation—possession with intent to deliver more than one gram but not more than five grams of cocaine—to the lesser charge of possession with intent to deliver cocaine in an amount of one gram or less. Additionally, in case No. 2018CF5115, the circuit court granted the State's motion to dismiss the charge of possession with intent to deliver cocaine.[3] The remaining five charges proceeded to trial, and the jury found Jones guilty of all five counts.

At sentencing, Jones faced maximum penalties of twelve years and six months of imprisonment and a $25,000 fine for possession with intent to deliver more than one gram but not more than five grams of cocaine; he faced maximum penalties of ten years of imprisonment and a $25,000 fine for possession with intent to deliver one gram or less of cocaine. *See* WIS.

[2] The State may file increased charges against a defendant if he or she rejects a plea agreement. "[J]ust as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded." ***United States v. Goodwin***, 457 U.S. 368, 379 (1982); *see* ***State v. Cameron***, 2012 WI App 93, ¶13, 344 Wis. 2d 101, 820 N.W.2d 433 (quoting ***Goodwin***). The State's decision to increase the charges here following the withdrawal of Jones's guilty pleas thus does not provide grounds for arguably meritorious postconviction litigation.

[3] Jones was not aggrieved by either the reduction of the charged offense in case No. 2018CF3700, or the dismissal of the narcotics count in case No. 2018CF5110. Therefore, he could not challenge those matters on appeal. *See* WIS. STAT. RULE 809.10(4) (providing that an appeal brings before the appellate court only those orders that are adverse to the appellant).

STAT. §§ 961.41(1m)(cm)1r, 961.41(1m)(cm)1g, 939.50(3)(f)-(g) (2017-18). The circuit court imposed two consecutive, evenly bifurcated two-year terms of imprisonment for those convictions. Jones faced a minimum term of three years of initial confinement and he faced maximum penalties of ten years of imprisonment and a $25,000 fine for possessing a firearm while a felon. *See* WIS. STAT. §§ 941.29(1m)(a), (4m)(a), 939.50(3)(g) (2017-18).[4] The circuit court imposed a consecutive, evenly bifurcated six-year term of imprisonment for that crime. Jones faced maximum penalties of six years of imprisonment and a $10,000 fine for both possession of a short-barreled shotgun and for bail jumping. *See* WIS. STAT. §§ 941.28(2), 946.49(1)(b), 939.50(3)(h) (2017-18). The circuit court imposed a consecutive, evenly bifurcated two-year term of imprisonment for the former offense and a concurrent, evenly bifurcated four-year term of imprisonment for the latter offense. Thus, Jones received an aggregate sentence of six years of initial confinement and six years of extended supervision. The circuit court did not impose any restitution and granted Jones the aggregate 411 days of sentence credit that he requested.

Jones pursued a postconviction motion, alleging that his trial counsel was ineffective.[5] To prove a claim of ineffective assistance of counsel, a defendant must prove both that counsel performed deficiently and that the deficiency prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Jones alleged that his trial counsel failed to tell him that

[4] Pursuant to WIS. STAT. § 941.29(4m)(b) (2017-18), the requirement to impose a mandatory minimum sentence for possessing a firearm while a felon did not apply to sentences imposed after July 1, 2020. Jones's sentencing occurred on November 25, 2019.

[5] Jones was represented before trial by a succession of attorneys. He argued in postconviction proceedings that only the last of those attorneys—the attorney who represented him at his trial and sentencing—was ineffective. We refer to that attorney as his trial counsel.

police extracted text messages when executing the search warrant for his cellphone following his arrest on May 22, 2018. Jones further alleged that, if his trial counsel had disclosed the discovery of his inculpatory text messages, he would have accepted the State's final plea offer to resolve the three cases against him.

The circuit court conducted a postconviction hearing at which trial counsel and Jones both testified. Trial counsel testified that, before trial, she and Jones reviewed the discovery, including text messages found on his cellphone. Jones testified in a way consistent with the allegations in his postconviction motion. At the conclusion of the hearing, the circuit court ruled from the bench. The circuit court considered and discussed: the hearing testimony by Jones and by trial counsel; the complaint in case No. 2018CF5115, which specifically alleged that police uncovered text messages about drug trafficking during the search of Jones's cellphone; the transcript of the preliminary examination in that case, which included testimony from a detective describing the extraction of the text messages; and Jones's trial testimony, which reflected that he was prepared with an explanation for why incriminating text messages about drug trafficking were found when police searched his cellphone. The circuit court then found that trial counsel testified credibly and that Jones's postconviction testimony was incredible. The circuit court went on to find both that trial counsel advised Jones about the existence of the cellphone evidence and that Jones knew from the pretrial proceedings and the charging documents that the State had uncovered that evidence. Because Jones did not establish either deficient performance or prejudice, the circuit court concluded that he failed to prove that his trial counsel was ineffective. The circuit court therefore denied his postconviction motion.

The no-merit report first addresses whether the evidence at trial was sufficient to support Jones's convictions. 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 [S]tate and the conviction, is so lacking in probative value and force 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).

The evidence presented included testimony from law enforcement officers who described the circumstances of Jones's arrest on March 18, 2018, the cocaine, money, and digital scale that police found when they searched Jones following that arrest, and the custodial statement that Jones gave regarding the incident. Officers also testified about the hand-to-hand transactions that they observed Jones conduct from his car on May 22, 2018, and the suspected cocaine and digital scale they discovered when police subsequently stopped his car that day. Additionally, officers testified about executing the search warrant of Jones's home on October 22, 2018, and finding and photographing a short-barreled shotgun on a shelf with documents relating to his then-pending case No. 2018CF3700. A chemist employed by the Wisconsin State Crime Laboratory testified that she examined the substances that police seized from Jones on March 18, 2018, and May 22, 2018, and that the substances contained cocaine in the amounts of 3.3 grams in and .07974 grams, respectively. A police sergeant testified that, based on his specialized knowledge and experience investigating drug crimes, Jones intended to deliver rather than personally consume the cocaine that police found on March 18, 2018, and May 22, 2018.

The State produced ample evidence to convict Jones of the five crimes at issue in these cases. We agree with appellate counsel that a challenge to the sufficiency of the evidence would be frivolous within the meaning of ***Anders***.

The no-merit report also addresses whether Jones could mount an arguably meritorious claim that the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We agree with appellate counsel's conclusion that Jones could not. The circuit court indicated that deterrence and protection of the community were the primary sentencing goals and discussed the factors that it viewed as relevant to achieving those goals. *See* ***id.***, ¶¶41-43. Its discussion also included consideration of the mandatory sentencing factors: "the gravity of the offense, the character of the defendant, 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.

For each conviction, the imposed sentence falls within the statutorily defined range. The circuit court imposed the mandatory minimum term of initial confinement required by law for possessing a firearm while a felon. A postconviction request to impose a lesser term of initial confinement for that crime would therefore be frivolous within the meaning of ***Anders***. *See* ***State v. Sittig***, 75 Wis. 2d 497, 500, 249 N.W.2d 770 (1977) (explaining that a statutory provision "for a mandatory minimum sentence leaves the courts with no alternative but to impose a sentence of not less than the minimum prescribed"). The sentences imposed were within the maximums allowed by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and were not so excessive as to shock the public's sentiment, *see* ***Ocanas v.***

State, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, a challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

The no-merit report additionally addresses procedural considerations and the postconviction motion. Appellate counsel explains why a challenge to the joinder decision would lack arguable merit and why the composition of the jury and the instructions that the jurors received do not give rise to any arguably meritorious grounds to pursue relief. Counsel also concludes that the circuit court properly exercised its discretion in addressing the parties' evidentiary objections and concludes that no procedural errors occurred that would support a request for a new trial. With respect to the postconviction proceedings, counsel explains why no arguably meritorious basis exists to pursue a further challenge to trial counsel's effectiveness in advising Jones about the potential evidence against him.

This court is satisfied that the no-merit report properly analyzes the issues it raises and correctly concludes that they lack arguable merit for appeal. Further discussion of those potential issues is not required.

Appellate counsel, in the no-merit report, does not discuss the lack of any motion to suppress the evidence that police found pursuant to warrantless searches of Jones's person and car on March 18, 2018, and May 22, 2018, or the custodial statement that Jones gave following his March 18, 2018 arrest. Our review of the records satisfies us that no arguably meritorious basis existed to pursue a suppression motion in these matters.

The trial testimony established that the warrantless searches were lawful. Police searched Jones's person incident to a lawful arrest on both March 18, 2018, and May 22, 2018. A search

incident to a lawful arrest is lawful and does not require any additional justification. *See* ***State v. Sykes***, 2005 WI 48, ¶14, 279 Wis. 2d 742, 695 N.W.2d 277. The trial testimony also established that Jones consented to the search of his car on March 18, 2018. Consent is a well-established exception to the requirement that searches be conducted pursuant to a warrant. *See* ***State v. Artic***, 2010 WI 83, ¶29, 327 Wis. 2d 392, 786 N.W.2d 430. The trial testimony further established that on May 22, 2018, police searched Jones's car only after first observing Jones engaged in suspected drug trafficking and then observing suspected cocaine in the vehicle. "Police may conduct a warrantless search of a car if they have probable cause to believe that the car contains contraband." ***State v. Jackson***, 2013 WI App 66, ¶8, 348 Wis. 2d 103, 831 N.W.2d 426.

The record also establishes that Jones's custodial statement was lawfully obtained. The trial testimony established that Jones gave that statement only after receiving the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966) (providing that before questioning a suspect in custody, police must inform the person of certain constitutional rights and the consequences of electing not to remain silent). A video recording of the custodial interview is included in the consolidated records and confirms both Jones's receipt of the required warnings and his agreement to talk to police.

The records in these cases establish that the warrantless searches were lawful and that the custodial statement was voluntarily provided within the parameters of the constitutionally required safeguards. An attorney is not ineffective for failing to file a meritless motion. ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16. Accordingly, the records do not support a claim that trial counsel was ineffective for failing to seek suppression of evidence.

Finally, appellate counsel acknowledges in a supplemental no-merit report that, at sentencing, trial counsel described the dates of Jones's pretrial custody in a way that suggests Jones was entitled to two more days of sentence credit than he received. Appellate counsel advised, however, that he investigated this issue and, after reviewing matters outside the records, concluded that a claim for additional sentence credit would lack arguable merit. Jones has not responded, and we accept counsel's representation that a claim for additional sentence credit would be frivolous.

Our independent review of the records does not disclose any other potential issues for appeal. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgments of conviction and postconviction order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of any further representation of Savon D. Jones on appeal. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals