COURT OF APPEALS
DECISION
DATED AND RELEASED

August 5, 1997

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1669-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMAL D. JONES,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Jamal D. Jones, acting *pro se,* appeals from a judgment of conviction after a jury found him guilty of armed robbery, as a party to a crime. He also appeals from two orders denying his motions for postconviction relief. His primary allegation on appeal is that he was held in custody in excess of 48 hours without a probable cause hearing, contrary to the

holding of ***County of Riverside v. McLaughlin,*** 500 U.S. 44 (1991). As a result, he argues that his case should be dismissed. He further asserts that a statement introduced at trial should have been suppressed because it was procured after he had been held in excess of the 48-hour rule expressed in ***Riverside***. He also contends that proceeding with only eleven jurors was unlawful and, finally, he states the trial court erroneously exercised its discretion when it relied on an improper sentencing factor. Because a violation of the ***Riverside*** rule requires dismissal only when the defendant has been prejudiced by the delay and there has no such showing here, and because the record reflects a proper waiver of the right to a twelve-person jury, we affirm. Because Jones failed to raise any objection to the introduction of his statement based on ***Riverside*** and failed to raise any issues concerning sentencing with the trial court, those issues are deemed waived.

I.

Jones was charged with armed robbery, as party to a crime, as a result of an incident that occurred on February 25, 1994. The victims testified that Jones and another man, armed with handguns, forced themselves into a home. Once inside, Jones and his accomplice demanded that the victims give them money and the victims complied. Jones was arrested on February 26, 1994, but did not make his initial appearance in court until March 3, 1994. At the initial appearance, his attorney moved to dismiss his case based on ***Riverside***. The motion was denied and bail was set at $1,000 because Jones was also in custody on a probation hold. A preliminary hearing was conducted on March 14, 1994, and Jones was bound over for trial. After his preliminary hearing, Jones requested a speedy trial pursuant to § 971.10, STATS. At the preliminary hearing, Jones again renewed his motion to dismiss based on ***Riverside*** and he later renewed his motion at the scheduling conference, a subsequent bail motion, and at each of his

two trial dates. His jury trial finally commenced on June 8, 1994. The next day, the trial court informed the parties that one of the jurors was ill and was unable to come to court. This generated a great deal of discussion on the record and ultimately led to Jones waiving his right to a twelve-person jury. The jury trial proceeded with eleven jurors who eventually returned a guilty verdict. The trial court sentenced Jones to fifteen years imprisonment. Jones brought three separate postconviction motions which the trial court denied in two successive orders.

II.

Jones first argues that his constitutional rights were violated because he was held in custody from February 26, 1994, to March 3, 1994, without receiving a probable cause determination. He argues that this delay violated the 48-hour rule set forth in ***Riverside***. Further, he seeks alternative forms of relief: (1) a reversal of a conviction and a new trial; or (2) suppression of an inculpatory statement he gave to police while in custody. We reject his arguments.

In ***Riverside***, the United States Supreme Court held that, following a warrantless arrest, there must be a probable cause determination within 48 hours. ***Riverside***, 500 U.S. at 56-58; *see* ***State v. Koch***, 175 Wis.2d 684, 696, 499 N.W.2d 152, 159 (holding ***Riverside*** rule applicable in Wisconsin), *cert. denied*, 510 U.S. 880 (1993).

Jones first seeks a new trial for the alleged ***Riverside*** violation in this case. This court, however, has previously stated that reversal for a new trial is not the appropriate remedy for a ***Riverside*** violation, absent a showing of both deliberateness and prejudice. *See* ***State v. Golden***, 185 Wis.2d 763, 769, 519 N.W.2d 659, 661 (Ct. App. 1994). Thus, there must be a showing that "the delay resulted from a deliberate ***Riverside*** violation producing prejudice to the

defendant's ability to prepare a defense." ***Id***. Our review of the record shows no deliberateness on the part of the State in violating the 48-hour rule, nor has Jones pointed to any prejudice in his ability to prepare a defense resulting from the delay. Accordingly, reversal for a new trial is not the appropriate remedy for any alleged violation of ***Riverside***.

Alternatively, Jones seeks a suppression of inculpatory statements that he gave to police during his time in custody. The State argues that he never objected to the admission of, or moved to suppress the statement on this ground and, thus, he has waived his right to raise this issue on appeal. We agree. *See* § 971.31(2), STATS. Jones moved to suppress the statement on the grounds that its probative value was substantially outweighed by the danger of unfair prejudice and because the admission interfered with his right to testify. Neither of the bases raised below preserves the ***Riverside*** claim.

Finally, Jones argues that the trial court violated his rights by shifting the burden set forth in ***Riverside***. The procedure followed by the trial court and this court in reviewing ***Riverside*** claims is set forth in our prior cases and the statutes, *see* ***Golden***, 185 Wis.2d at 768-69, 519 N.W.2d at 660-61; ***State v. Evans***, 187 Wis.2d 66, 92-93 n.7, 522 N.W.2d 554, 564 n.7 (Ct. App. 1994); *see also* § 970.01(1), STATS., and we are bound by that procedure.[1] *See* ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997).

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[1] Section 970.01(1), STATS, provides:

> **Initial appearance before a judge. (1)** Any person who is arrested shall be taken within a reasonable time before a judge in the county in which the offense was alleged to have been committed. The initial appearance may be conducted on the record by telephone or live audiovisual means under s. 967.08. If the initial appearance is conducted by telephone or live

(continued)

Next, Jones asserts that proceeding with only eleven jurors at trial was improper. He makes two contradictory arguments regarding the fact that only eleven people sat on his jury. First, he argues that the trial court and the prosecutor decided to proceed with eleven jurors after learning of the illness of the twelfth juror—over Jones's stated objection. Next, he argues, possibly in recognition of the fact that his waiver appears in the record, that he was "psychologically coerced" by the trial court into giving up his right to twelve jurors.

With regard to his first argument, the record does contain a statement which, if taken out of context, would support Jones's position because the trial court stated: "It seems to me that that would be the easiest solution, is to just go with the 11 jurors. It has to be unanimous anyhow. We'll proceed that way." This statement, however, was made during an informal discussion between defense counsel, the prosecutor and the trial court while a solution was sought to the problem of the missing juror. The problem was further complicated by the fact there was no longer another jury panel available; Jones's speedy trial request was close to the 90-day limit; and there were significant scheduling conflicts preventing an accelerated trial date.

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audiovisual means, the person may waive physical appearance. Waiver of physical appearance shall be placed on the record of the initial appearance and does not waive other grounds for challenging the court's personal jurisdiction. If the person does not waive physical appearance, conducting the initial appearance by telephone or live audiovisual means under s. 967.08 does not waive any grounds that the person has for challenging the court's personal jurisdiction.

It is evident, however, from the trial court's later colloquy with Jones, that the trial court was well aware of the fact that the trial could proceed only if Jones agreed to waive his rights:

> Mr. Jones, you and your attorney had an opportunity to discuss whether you wanted to proceed with 11 jurors or not, and [trial counsel] has advised us that you've decided that you want to proceed with 11 jurors. Is that correct? … Because you're the defendant. In other words, you have to waive or give up your right to a 12 person jury and proceed with an 11 person jury. It still has to be a unanimous verdict. They all have to agree. It's just that there will be 11 jurors instead of 12.

Jones argues that the dictates of ***State v. Moore***, 97 Wis.2d 669, 671, 294 N.W.2d 551, 553 (Ct. App. 1980), requiring "the defendant to personally, not through his attorney, make a knowing and voluntary waiver of his right to a jury trial," were not met in this case. We are not so persuaded. Jones, although clearly unhappy about the situation, stated on the record: "I'll go with 11 jurors." Inasmuch as § 972.02(2), STATS., provides for the parties to agree to a jury of less than twelve, this was a legally valid jury. Jones personally waived his right to a twelve-person jury. The record belies Jones's contention that the trial court proceeded against his wishes.

Next Jones argues, in contradiction to his first argument, that the trial court "psychologically coerced" him into giving up his right to a twelve-person jury. He alleges that the trial court refused to release him on a personal recognizance bond under the dictates of the speedy trial statute. *See* § 971.10(4), STATS. Also, he claims that the trial court intentionally released an available jury panel in order to force him to waive his rights. Thus, he contends that he faced the choice of either remaining in custody until the next trial date or permitting the trial to proceed with eleven jurors. He claims it was only because he was given this

choice that he waived his right to a twelve-person jury. He argues that this constituted coercion. In support of his argument that he was "psychologically coerced" by the court, he cites to cases discussing the propriety of police interrogation methods.

We reject his arguments because they are not supported by the record. Contrary to Jones's contention, there was no discussion of the release provisions of § 971.10(4), STATS.[2] in the record at the time he decided to give up his right to a twelve-person jury. While defense counsel did suggest that Jones be released on a personal recognizance bond and Jones did ask if he could go home, neither demanded his release pursuant to the speedy trial statute. The trial court appropriately refused Jones's request, stating: "Because you're charged with a serious crime and there's bail that's been set. You're charged with armed robbery. That's a pretty serious offense." Jones cannot now argue that he was entitled to be released pursuant to his speedy trial demand when no such argument was made to the trial court. Nor would the dictates of § 971.10(4) have been applicable on the day the exchange took place because the 90 days had yet to expire.

With regard to the released panel of jurors, it appears that the trial court did dismiss a jury panel earlier in the day. Apparently, this was done because the trial court mistakenly thought a solution to the missing juror problem had been reached. Jones has failed to show that the trial court had an ulterior

[2] Section 971.10(4), STATS., provides:

> **(4)** Every defendant not tried in accordance with this section shall be discharged from custody but the obligations of the bond or other conditions of release of a defendant shall continue until modified or until the bond is released or the conditions removed.

motive for this action. Further, the failure to have an alternate jury panel available is not tantamount to "psychological coercion."

Finally, we reject Jones's contention that there is a corollary between police interrogation methods and the trial court's questioning of a defendant in open court on the record as to whether he wishes to give up a constitutional right. As the State argued, "No one forced the appellant to do anything here." We agree. The fact that Jones, with the benefit of hindsight, wishes he had made a different decision is not a legally sufficient reason for a new trial.

Finally, Jones urges us to remand his case for resentencing, alleging that the trial court utilized an improper factor in sentencing. Jones claims the trial court erroneously exercised its discretion at sentencing when it stated: "Under those circumstances [determination of guilt by a jury] you don't get the consideration that people that plead guilty often receive." Jones interprets this to mean that he received a longer sentence because he exercised his constitutional right to a jury trial. Moreover, he alleges that the trial court improperly set conditions of restitution including the requirement that he repay the money stolen from the victims and obligating him to pay the costs of his prosecution. We need not address these issues, however, because Jones failed to raise them first in the trial court. Jones filed three postconviction motions. In none of them did he seek sentence modification. A defendant must move to modify his sentence in the trial court before he is entitled to appellate review of the sentence. *See* ***State v. Chambers***, 173 Wis.2d 237, 261, 496 N.W.2d 191, 200 (Ct. App. 1992). The only other avenue for a review of a sentence is one in which an appellant demonstrates compelling circumstances. No such showing has been made in this case. Thus, the issues are considered waived.

For the reasons stated, the judgment and orders of the trial court are affirmed.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.