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DISTRICT II

September 11, 2013

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

2013AP403-CRNM State of Wisconsin v. Kent L. Burns, Jr. (L.C. #2010CF448)

Before Brown, C.J., Reilly and Gundrum, JJ.

Kent Burns, Jr. appeals from a judgment of conviction for party to the crime of possession of cocaine with intent to deliver, possession of heroin with intent to deliver, possession of marijuana, and second-degree recklessly endangering safety, and from an order denying his postconviction motion. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),¹ and *Anders v. California*, 386 U.S. 738 (1967). Burns has filed a response to the no-merit report. See RULE 809.32(1)(e). Upon consideration of these

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

submissions and an independent review of the record, we summarily affirm the judgment and the order because there is no arguable merit to any issue that could be raised on appeal; we remand with directions that the judgment of conviction be amended.² See WIS. STAT. RULE 809.21.

Drugs were found upon execution of a search warrant on a residence after a confidential informant (CI) reported that cocaine was being sold from the residence. After being shown a photo of Burns, the CI identified Burns as the man selling cocaine from the residence. Burns's girlfriend and three-year-old child lived in the residence. Although Burns denied that he lived there, he was there when the warrant was executed and mail addressed to him at the residence was found in the house. Police observed crack cocaine and rat/mouse poison within reach of the child.

Pretrial motions to reveal the identity of the CI³ and to suppress statements Burns made to police were denied.⁴ A jury trial was conducted over three days. Burns was acquitted on a

² At sentencing, a six-month jail term was imposed on the possession of marijuana conviction, count three. The judgment of conviction reflects a nine-month jail sentence on count three. The oral pronouncement controls. *State v. Perry*, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987); *State v. Schordie*, 214 Wis. 2d 229, 231 n.1, 570 N.W.2d 881 (Ct. App. 1997). There is a mere defect in the form of the certificate of conviction, which may be corrected in accordance with the actual determination. See *State v. Prihoda*, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. The clerical error does not affect the validity of the conviction. See *State v. Huff*, 2009 WI App 92, ¶1 n.1, 319 Wis. 2d 258, 769 N.W.2d 154. We remand with directions that the judgment of conviction be amended to state the correct sentence on count three. *Id.*

³ Burns's co-defendant, his girlfriend, moved to have the name of the CI disclosed. Burns joined in the motion at the hearing. The motion was denied as to Burns. The split decision on the motion was justified and there is no arguable merit to a claim the motion should have been granted as to Burns. Additionally, Burns's case was properly severed from his co-defendant's case at that point.

⁴ When the search warrant was executed, Burns was interviewed in a bedroom of the residence after he had been read his *Miranda* rights. Burns told police all the drugs were his and his girlfriend had no knowledge of them. He further indicated he had put drugs in a cupboard in the bedroom the night before and without his girlfriend's knowledge.

charge of being a party to the crime of maintaining a drug trafficking place and found guilty on the other charges. The sentence enhancer for a second drug conviction applied to the possession convictions. Burns was sentenced to a total of ten years' initial confinement and eight years' extended supervision. A postconviction motion alleging that trial counsel was ineffective for not challenging the validity of the search warrant was denied after a *Machner*⁵ hearing.

The no-merit report addresses the potential issues of whether Burns's statement should have been suppressed, whether there was sufficient evidence to support the convictions, whether the sentence imposed was an erroneous exercise of discretion or excessive, and whether trial counsel's failure to challenge probable cause for the search warrant was ineffective assistance of counsel. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further.

The no-merit report fails to reflect that appointed appellate counsel considered other potential issues that arise in cases tried to a jury, i.e., jury selection, evidentiary objections during trial, confirmation that the defendant's election to testify is knowingly made or waiver of the right to testify is valid, use of proper jury instructions, and propriety of opening and closing arguments. It is important that the no-merit report provides a basis for a determination that the no-merit procedure has been complied with. *See State v. Allen*, 2010 WI 89, ¶¶58, 61-62, 72, 328 Wis. 2d 1, 786 N.W.2d 124 (when an issue is not raised in the no-merit report, it is presumed to have been reviewed and resolved against the defendant so long as the court of appeals follows the no-merit procedure). We address the potential issues not mentioned in the no-merit report to

⁵ A *Machner* hearing addresses a defendant's ineffective assistance of counsel claim. *See State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

demonstrate that the no-merit procedure has been followed. *See id.*, ¶82 (difficult to know the nature and extent of the court of appeals’ examination of the record when the court does not enumerate possible issues that it reviewed and rejected in its no-merit opinion).

There was no disagreement during jury selection regarding prospective jurors excused or struck for cause.⁶ We observe that one prospective juror declared, “I strongly oppose people who use and sell heroin.” However, the prospective juror then declared that he could set aside his personal feelings and decide the case on the evidence presented. The prospective juror was not subjectively biased because he could set aside his opinion. *See State v. Oswald*, 2000 WI App 3, ¶19, 232 Wis. 2d 103, 606 N.W.2d 238 (1999) (prospective juror is subjectively biased if “the juror is not a reasonable person who is sincerely willing to set aside any opinion or prior knowledge that the prospective juror might have”). There was no basis for the trial court or defense counsel to move to strike the juror for cause. Even if error occurred, the defense struck the prospective juror with its second strike. The use of a peremptory challenge to correct a trial court error in not striking a juror for cause is reversible error only when it affects the substantial rights of the defendant. *See State v. Lindell*, 2001 WI 108, ¶111, 245 Wis. 2d 689, 629 N.W.2d 223. “The substantial rights of a party are not affected or impaired when a defendant chooses to

⁶ Even though the defense made no objection to the prosecution’s strike of an African-American female from the jury panel, in an abundance of caution the prosecutor explained outside the presence of the jury why that individual was struck. The race-neutral explanation was sound and the strike does not suggest an issue of arguable merit.

exercise a single peremptory strike to correct a circuit court error.” *Id.*, ¶113. Any claim related to the prospective juror lacks arguable merit.⁷

Evidentiary objections during trial were few in number and they were properly ruled on. When Burns elected to testify at trial, the trial court conducted a proper colloquy with Burns about his right not to testify. The jury instructions accurately conveyed the applicable law and burden of proof. No improper arguments were made to the jury. The trial court handled two questions from the jury properly and without objection. Our review of the trial record discloses no issues of arguable merit from the jury trial.

Burns’s response focuses solely on challenging the search warrant. He suggests that the affidavit in support of the warrant did not demonstrate the CI’s reliability and the police did nothing to corroborate the scant details provided by the CI. He also complains that the CI was allowed to identify him from a single photo and that the CI was not presented with a photo array. His points were raised and argued via the postconviction motion. The no-merit report provides an adequate explanation of why the trial court’s denial of the postconviction motion, including the trial court’s determination that the affidavit in support of the search warrant was sufficient to establish probable cause, was correct. There is no arguable merit to Burns’s contention that the search was improper.

⁷ After opening arguments, a juror was removed from the panel after revealing she was well-acquainted with the family of Burns’s girlfriend. Although Burns noted his objection to removing the juror for cause, the trial court’s determination that the juror could be objectively biased is supported by the record. There is no arguable merit to a claim that removal of the juror was error.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Burns further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and the order denying the postconviction motion are summarily affirmed and the cause remanded with directions. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Maayan Silver is relieved from further representing Kent Burns in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals