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October 24, 2013

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

2012AP1298-CRNM State of Wisconsin v. Melvin R. Thomas, III (L.C. #2010CF735)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Melvin Thomas[1] appeals a judgment convicting him, following a jury trial, of delivery of less than three grams of heroin. Attorney Gina Bosben has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12);[2] ***Anders v. California***,

[1] Although the defendant was charged under the name Thompson, it was established at trial that his real last name is Thomas. We therefore direct that the caption be amended to name the defendant as "Melvin R. Thomas, III a/k/a Melvin R. Thompson, III."

[2] All further references to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. 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, trial counsel's performance, and the validity of the sentence. Thomas was sent a copy of the report, and has filed a response raising a number of additional issues, to which counsel has filed a supplement to her no-merit report. Upon reviewing the entire record, as well as the no-merit report, response, and supplement, we conclude that there are no arguably meritorious appellate issues.

Pretrial Issues

Thomas contends that he was forced to go to trial, despite a lack of evidence against him, due to a conspiracy among the district attorney and his own defense attorneys or perhaps due to racial discrimination. We note that the record does not contain any racial remarks or other basis to support the conclusion that Thomas was prosecuted for any reason other than that a confidential informant named him as a drug dealer. Going to trial was the natural result of the not guilty plea entered on Thomas's behalf when he stood mute at the arraignment following his bindover for trial. A review of the preliminary hearing transcript shows that the bindover was properly based on testimony about a controlled drug buy that established probable cause to support the count of conviction.[3] In any event, a valid conviction cures any defects relating to bindover unless they were preserved by an interlocutory appeal. *See* ***State v. Webb***, 160 Wis. 2d 622, 628, 467 N.W.2d 108 (1991).

[3] Thomas's comments about a lack of evidence may refer to the State's dismissal of an additional charge of attempted delivery of heroin. The State explained that it had not brought the undercover officer involved in that transaction to court because it did not want to prematurely blow her cover.

Thomas next complains about multiple delays in his case prior to trial. He did not, however, file a speedy trial demand. Moreover, nothing in the record shows that any of the delays were either improper or prejudicial. The first delay was due to a continuation of the preliminary hearing at the State's request, which resulted in the dismissal of an additional charge. The second delay was due to Thomas's own request for a new attorney after he fired his first attorney. The third delay was also at Thomas's request, to allow additional investigation of potential alibi witnesses. The fourth delay was due to the discovery of a conflict of interest between Thomas's second attorney and a State's witness.

As to the last delay, Thomas complains that the delay hurt him and, at the same time, complains that he should not have been "rushed" to trial about a month after the appointment of his third attorney. Thomas's new counsel, however, did not request a continuance, and, as we will explain further below, there is no indication that Thomas was prejudiced by counsel's performance at trial.

Additionally, we note on our own that one member of the thirteen-member jury panel was dismissed with the agreement of both parties after disclosing that he had overheard a police officer and a court employee or, perhaps, a witness, discussing the case in the elevator on his way to the courtroom. The defense did not object to any of the panel members who ultimately sat on the jury, and we see no basis in the record for challenging the impartiality of the jury.

Evidentiary Issues

The circuit court granted the State's motion in limine to allow introduction of other acts evidence relating to a speeding ticket Thomas had received. The speeding ticket was relevant because it showed that Thomas had been driving his mother's white Cadillac a few weeks before

the controlled buy, and several officers had observed the suspect exiting that same Cadillac at the scene of the controlled buy. The speeding ticket evidence was not unduly prejudicial because most of the jury panel indicated at voir dire that they also had received speeding tickets in the past.

The State also moved for permission to obtain a voice exemplar from Thomas during the trial. The circuit court ruled that a State's witness could be present in the courtroom if Thomas chose to testify, and then could provide rebuttal testimony as to whether she recognized Thomas's voice as the individual involved in the controlled buy. Regardless of whether the in-court voice identification was proper, we see no prejudice. Since the audio recording of the controlled buy was played for the jury and Thomas himself testified, the jury could decide for itself whether there was a voice match.

Sufficiency Of The Evidence

When reviewing the sufficiency of the evidence to support a conviction, the test is whether "'the evidence, viewed most favorably to the state 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. Zimmerman***, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (quoting ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

To prove Thomas guilty of delivery of a controlled substance, the State needed to provide evidence that Thomas delivered a substance to someone; that the substance was in fact a controlled substance—in this case, heroin; and that Thomas knew or believed that the substance was heroin. WIS. STAT. § 961.41(1) (2009-10). The State met its burden through the testimony of one undercover officer who had purchased a substance from Thomas in the presence of a

confidential informant; two other officers who had watched the transaction from another vehicle while listening on a wire; and a laboratory technician who had tested the substance and verified that it was, indeed, heroin. The officers had identified Thomas both from a prior photograph in their possession and by tracing the license plate of the Cadillac, and the undercover officer reaffirmed her identification of Thomas in open court. The State proved knowledge of guilt not only by fair inferences drawn from the transaction itself, but also from the fact that Thomas directed the confidential informant to buy something from the store in whose parking lot the transaction took place, to divert suspicion.

Thomas contends that the State's witnesses were lying or misleading the jury about identifying him and the substance. He also points out that there were no photographs or videos taken of him or the license plate of the Cadillac during the controlled buy. Those types of complaints merely go to the weight and credibility of the evidence, which was within the sole discretion of the jury to decide. They do not present legal issues for an appeal.

Assistance Of Counsel

Thomas alleges that counsel provided ineffective assistance in several respects. First, Thomas wanted his attorney to subpoena a forensic expert to challenge the State lab's determination that the substance recovered from him was heroin. Thomas does not believe there was enough substance recovered from the controlled buy to have been able to conduct both field and laboratory tests. Second, Thomas complains that counsel did not hire an investigator on his behalf to track down potential alibi witnesses, or issue subpoenas to them. And finally, Thomas believes counsel should have moved to dismiss the case against him due to alleged flaws in the subpoenas issued to the State's witnesses.

In order to prove a claim of ineffective assistance of counsel, Thomas would need to show both that counsel performed deficiently and that Thomas was prejudiced as a result. However, Thomas's allegations are insufficient to show that any of the actions that he alleges counsel should have taken would have affected the outcome of the trial. Thus, he has not demonstrated prejudice.

As to the amount of the substance that was recovered and tested, the State's witnesses testified that there were 100 milligrams of material recovered—30 milligrams of which were consumed in field testing, and another 22 milligrams of which were consumed in laboratory testing. When asked about the minimum volume of material required to run the laboratory tests, a crime laboratory employee testified that generally you would need milligrams (thousandths of a gram) for gas chromatography, but only needed micrograms (millionths of a gram) for mass spectrometry. The officer who performed the field test testified that there was no designated minimum amount required for the test, other than placing enough material in the pouch to be able to see it. Alleging that a generic defense expert "might have" provided testimony that the sample in this case was insufficient to provide a reliable result is merely speculative.

As to the alibi witnesses, Thomas testified at trial that he was with his mother and uncle in Chicago on the day of the controlled buy. Since Thomas already knew who his alibi witnesses were, we do not see why counsel would have had any need to hire a private investigator. Counsel informed the court during a sidebar at trial that none of the potential alibi witnesses he had planned to call were present because Thomas's mother was in the hospital and she was the one who was going to drive the uncle and another woman from Chicago. Counsel explained that he was not going to ask for a continuance, however, because neither of the potential witnesses that he spoke to remembered the specific day in question or were prepared to testify that Thomas

had been with them. Thomas has not provided any affidavits from the witnesses he claims counsel should have called and, therefore, it is merely speculative that they could have affected the trial in any way.

As to the subpoenas, trial counsel informed the court during a sidebar that it had come to his attention in other cases that the State had begun using subpoenas that purported to use compulsory power to direct witnesses to appear in the district attorney's office for deposition interviews in addition to appearing in court. In trial counsel's view, such compulsory depositions without notice to the defense would be outside of the State's authority and would render the subpoenas fatally defective, and any information obtained during such interviews would be subject to suppression under ***State v. Popenhagen***, 2008 WI 55, 309 Wis. 2d 601, 749 N.W.2d 611. However, trial counsel did not have copies of any of the subpoenas used to compel the presence of any of the State's witnesses in this case. The State agreed to submit a copy of at least one of its subpoenas for the court file by the end of the trial, but we do not see any such document among the trial exhibits. We are not certain whether the State failed to provide any subpoena, or whether trial counsel reviewed a subpoena and concluded that it did not have the alleged defect that he had noticed in other cases. In either event, since Thomas has not provided us a copy of any of the subpoenas, or even alleged to have seen one with the alleged defect, and has also not alleged that the State actually conducted any deposition interviews with any of its subpoenaed witnesses, we have no factual basis to conclude that counsel performed ineffectively by failing to move to suppress testimony or have the case dismissed on those grounds.

Sentence

A challenge to Thomas's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the record shows that Thomas was afforded an opportunity to comment on the PSI and to address the court. The court proceeded to consider the standard sentencing factors and explained their application to this case. *See generally* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Regarding the severity of the offense, the court noted that drug dealing was a very dangerous business that deteriorates society and in some cases kills people. With respect to Thomas's character, the court acknowledged that it would be difficult for Thomas to get a job with his criminal history and limited education, but noted that he came from a loving family and did have some natural abilities that would allow him to make other choices if he chose to accept responsibility for his own life. The court concluded that a significant prison term was necessary to make the cost of doing business as a drug dealer higher than the benefits of doing so.

The court then sentenced Thomas to six years of initial confinement and four years of extended supervision. It also imposed standard costs and conditions of supervision; directed Thomas to provide a DNA sample but waived the fee; and determined that Thomas was eligible for the challenge incarceration program and the earned release program, but not a risk reduction sentence. The court directed the parties to reach a stipulation on sentence credit, and indicated that it would amend the judgment of conviction to reflect that.

The components of the bifurcated sentence were within the applicable penalty ranges. *See* WIS. STAT. §§ 961.41(1)(d)1. (classifying the delivery of less than three grams of heroin as a Class F felony); 939.50(3)(f) (providing maximum imprisonment term of twelve years and six months for a Class F felony); and 973.01(2)(b)6m. and (d)4. (providing maximum terms of seven years and six months of initial confinement and five years of extended supervision for a Class F felony) (all 2009-10). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentence imposed here was 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.'" *See* ***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. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. 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 Attorney Gina Bosben is relieved of any further representation of Melvin Thomas III in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals