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

2011AP2903-CRNM State of Wisconsin v. Melita L. Jousha (L.C. # 2009CF118)

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

Melita Jousha appeals two related judgments convicting her, following a trial to the court, of retail theft, resisting arrest, and battery to a law enforcement officer. Attorney Daniel Necci has filed a no-merit report. *See* WIS. STAT. RULE 809.32 (2011-12);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967); and ***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 Jousha's competence to stand trial; her withdrawal of an NGI plea; her waiver of a jury trial; and the trial

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

court's exercise of its sentencing discretion. Jousha was sent a copy of the report, but has not filed a response. Attorney Andrea Cornwall has since been substituted as counsel for Jousha, and has made no motion to withdraw the no-merit report. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

Competence to Stand Trial

In Wisconsin, "[n]o person who lacks substantial mental capacity to understand the proceedings or assist in his or her own defense may be tried, convicted or sentenced for the commission of an offense so long as the incapacity endures." WIS. STAT. § 971.13(1). In order to ascertain whether this standard has been satisfied, WIS. STAT. § 971.14(2) directs a Wisconsin court to "appoint one or more examiners having the specialized knowledge determined by the court to be appropriate to examine and report upon the condition of the defendant," whenever the issue of competency is raised.

The burden of proof varies depending upon the defendant's position in regard to his or her own competence and desire to stand trial: when the defendant claims to be incompetent, the State must show the defendant's competence by the greater weight of the credible evidence in order to proceed to trial; whereas, when the defendant claims to be competent, the State must show the defendant's incompetence by clear and convincing evidence in order to have the defendant committed. WIS. STAT. § 971.14(4)(b); ***State v. Garfoot***, 207 Wis. 2d 214, 223, 558 N.W.2d 626 (1997).

Here, the circuit court twice found that Jousha was incompent to stand trial but, after periods during which psychotropic medications were involuntarily administered, subsequently determined that she had regained competency. The circuit court's ultimate determination was

based upon an expert's report, to which both Jousha and the State stipulated. The uncontested report was sufficient to satisfy the State's burden of proof to proceed.

Refusal to Pursue NGI Plea

After Jousha regained competency for the second time, counsel indicated to the court that Jousha wished to change her plea to not guilty by reason of mental disease or defect (NGI). A court appointed psychologist concluded to a reasonable degree of professional certainty that Jousha was suffering from psychotic symptoms at the time of the offenses that rendered her substantially incapable of appreciating the wrongfulness of her actions. However, against the advice of counsel, Jousha subsequently decided not to enter an NGI plea after all. She explained that she did not believe that she was mentally diseased, and also did not believe she was guilty of any crime, and would prefer to be "cleared of all charges" by trial. After conducting a colloquy, the court reluctantly allowed Jousha to withdraw the NGI plea and set the matter for trial. Because there is no fundamental right to enter an NGI plea, the circuit court is not required to obtain a waiver from the defendant before allowing the withdrawal of an NGI plea. ***State v. Francis***, 2005 WI App 161, ¶22, 285 Wis. 2d 451, 701 N.W.2d 632.

Waiver of Jury Trial

At the final status hearing, both the State and Jousha agreed to waive the right to a jury and have the matter tried to the court. The court conducted a colloquy following the script in the judicial bench book to ensure that the waiver was being knowingly and voluntarily made, and Jousha does not now claim otherwise.

Sufficiency of the Evidence

To prove the defendant guilty of retail theft, the State needed to provide evidence showing that Jousha had intentionally taken and carried away merchandise held for resale by a merchant. WIS. STAT. § 943.50(1m)(b). To prove the defendant guilty of resisting an officer, the State needed to provide evidence showing that Jousha had knowingly resisted a person she had reason to believe was a law enforcement officer while such officer was doing any act in an official capacity and with lawful authority. WIS. STAT. § 946.41(1). To prove the defendant guilty of battery to a law enforcement officer, the State needed to provide evidence showing that Jousha had intentionally caused harm to a person she had reason to believe was a law enforcement officer, who was acting in an official capacity, and who did not consent. WIS. STAT. § 940.20(2). 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 (quoted source omitted); *see also* WIS. STAT. § 805.15(1).

A convenience store clerk testified that Jousha had obtained a pack of cigarettes from him, stood by the counter for a couple minutes while he was helping a male customer, and then walked out of the store "jibberjabbering something" without paying for the cigarettes. The clerk followed Jousha out of the store to try to get her to pay, and then told the owner to call the police when she just ignored him and continued to walk away.

A city police officer testified that he was on duty and in full uniform in a squad car near the convenience store when he heard the dispatch call about the theft and observed Jousha. The

officer exited his squad car and approached Jousha because she fit the description of the suspect and was opening a pack of cigarettes. Jousha "conspicuously ignored" the officer's request to "[h]old up a minute" and walked past him, so the officer placed a hand on Jousha's shoulder and told her she was not free to leave. Jousha then swung an elbow back at the officer's head. In response, the officer took Jousha to the ground and told her she was under arrest. Jousha then began screaming, shouting "jibberish," and flailing about as the officer repeatedly directed her to stop resisting and engaged in several measures to attempt to gain control over the situation while awaiting backup. During the skirmish, Jousha kicked the officer in the face. Eventually two additional law enforcement officers arrived and assisted the first officer with handcuffing Jousha and carrying her to a squad car.

Jousha herself testified that she "panhandl[ed]" the cigarettes—by which she meant that she had asked a female customer to buy them for her, and waited until the woman had paid before she left. She said she ignored the clerk who followed her and the first officer who approached her because, as far as she was concerned, she had done nothing wrong and didn't know they were talking to her. She claimed the three law enforcement officers had assaulted her for no reason, and that if she had accidently kicked one of them, it was only in self defense.

The circuit court was not required to find Jousha's testimony credible. The testimony of the convenience store clerk and law enforcement officers was sufficient to establish the elements of all three charged offenses.

Assistance of Counsel

It could be argued that counsel provided ineffective assistance by failing to produce evidence of Jousha's mental illness at trial. In particular, the testimony that Jousha was speaking

"jibberish" or "jibberjabbering" throughout the incident, in conjunction with the NGI expert's opinion that Jousha was exhibiting signs of psychosis in the jail following the incident, might have provided grounds to believe that Jousha was suffering from delusions, rather than lying about another customer paying for her cigarettes. However, the record plainly shows that it was Jousha's own choice not to put any evidence of her mental health into evidence at trial, and another expert had reported that Jousha had regained her competency through involuntary medication by the time she made that choice. We cannot conclude that counsel performed deficiently by acceding to his client's wishes as to the overall strategy for trial.

Sentences

A challenge to the defendant's sentences 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 the defendant was afforded an opportunity to comment on the PSI and to address the court both personally and by counsel. 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 offenses, the court deemed Jousha's actions to have been "very aggressive" and "extraordinary." The court acknowledged that Jousha's mental health issues played a large part in the formation of her character, but was concerned that the extent of her defiance of authority made her unlikely to comply with conditions of supervision. The court concluded that a prison term was necessary to protect the public while Jousha could obtain treatment in a controlled setting.

The court then sentenced Jousha to two years of initial confinement and three years of extended supervision on the battery count, and imposed but withheld a thirty-day sentence on the theft count and a sixty-day sentence on the count of resisting arrest. The court also awarded 412 days of sentence credit; ordered restitution in the amount of $7.42; imposed standard costs and conditions of supervision; directed the defendant to provide a DNA sample but waived the fee; and determined that the defendant was not eligible for the challenge incarceration program or the earned release program.

The sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 940.20(2) (classifying battery to a law enforcement officer as a Class H felony); 943.50(1m)(b) & (4)(a) (classifying retail theft of less than $500 as a Class A misdemeanor); 946.41(1) (classifying resisting arrest as a Class A misdemeanor); 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); and 939.51(3)(a) (providing maximum imprisonment of nine months for a Class A misdemeanor).

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[s] 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 source 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 judgments of conviction are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that counsel is relieved of any further representation of the defendant in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals