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DISTRICT I

December 17, 2013

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

2012AP1458-CRNM State of Wisconsin v. Victor Darrel Jackson (L.C. #2005CF137)

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

Victor Darrel Jackson appeals a judgment convicting him of felony murder, with attempted armed robbery, as a party to a crime, as the predicate felony. He also appeals an order denying his postconviction motion.¹ Appellate counsel, Scott D. Obernberger, filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12),² and

¹ We reinstated Jackson's direct appeal rights on April 26, 2011, because his former appointed appellate lawyer, T.J. Perlick-Molinari, failed to pursue an appeal on his behalf.

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

Anders v. California, 386 U.S. 738, 744 (1967). Jackson filed a response. Attorney Obernberger then filed a supplemental no-merit report, to which Jackson again filed a response.³ After considering the no-merit reports and the responses, and after conducting an independent review of the record, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction and order denying postconviction relief. *See* WIS. STAT. RULE 809.21.

The no-merit reports and Jackson's responses address whether there would be arguable merit to an appellate challenge to Jackson's guilty plea. *See* WIS. STAT. § 971.08, and *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). Jackson pled guilty to one count of felony murder for his role in the death of Floyd Edwards. In his postconviction motion, Jackson alleged that he did not know the elements of the crime of attempted armed robbery, as a party to a crime, the predicate crime for felony murder. The circuit court held a hearing on the motion because Jackson made a *prima facie* case that the circuit court had accepted his plea without following the procedures established in *Bangert*; the circuit court did not inform Jackson of the elements of attempted armed robbery during the plea colloquy and the elements of attempted armed robbery were not attached to the plea questionnaire. The elements of the predicate felony are an essential component of felony murder. *See* WIS JI—CRIMINAL 1031 (2003).

At the postconviction motion hearing, Hazel Washington, Jackson's trial lawyer, testified that she remembered the case well even though Jackson had been convicted in 2005. She

³ Jackson moved for permission to file a response to the supplemental no-merit report and included the response with the motion. We grant the motion, and have considered both of Jackson's responses during our independent review of the record.

testified that, although her case file had been destroyed, she remembered explaining to Jackson the elements of felony murder, attempted armed robbery, and party-to-a-crime liability. Washington testified that she discussed the case at length with Jackson using language that was simple, rather than legalese, and providing him with concrete examples. Jackson also testified at the hearing. He said that Washington did not explain the elements of party-to-a-crime liability or attempted armed robbery to him, and he did not know what the State would have to prove to show that he committed attempted armed robbery. He also testified that he could not remember Washington reviewing the elements of felony murder with him. Jackson acknowledged, however, that he gave his co-defendant August White the gun that White used to kill Edwards and that he knew that White was going to use it to rob Edwards.

After hearing the testimony, the circuit court concluded that Washington's testimony that she explained the elements of attempted armed robbery and party-to-a-crime liability was more credible than Jackson's testimony that she did not explain the elements to him. The circuit court therefore concluded that Jackson knew the nature of the crime to which he was pleading guilty.

Jackson points out in his response that Washington testified that it was her usual practice to attach a copy of the jury instructions listing the elements of the crime to the plea questionnaire and she could not explain why the jury instructions for felony murder were attached, but the elements of attempted armed robbery were not attached. He contends that this shows she failed to explain the elements of attempted armed robbery to him. The circuit court considered this testimony when it ruled, but apparently found more convincing Washington's unequivocal testimony that she remembered reviewing the elements of attempted armed robbery with Jackson. There would be no arguable merit to an appellate argument that Jackson did not enter his plea knowingly, intelligently and voluntarily.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court misused its sentencing discretion. The circuit court sentenced Jackson to an aggregate term of thirty-three years and nine months of imprisonment, with twenty-five years of initial confinement and eight years and nine months of extended supervision. In framing its sentence, the circuit court placed significant weight on the gravity of the offense, explaining that in “[a] homicide case it’s a little late to say you’re sorry on the day of sentencing. A life was lost here. You were the one who introduced the gun into the situation. Yes, you didn’t pull the trigger, but you’re responsible.”

The circuit court also found significant the fact that Jackson continued to involve himself in criminal activity involving guns, even though he had been adjudicated delinquent as a juvenile for second-degree recklessly endangering safety and possession of a dangerous weapon, and had a pending case for carrying a concealed weapon. The circuit court explained its application of the various sentencing considerations in accordance with the framework set forth in *State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Acknowledging during the postconviction motion hearing that Jackson’s sentence was “tough,” the circuit court rejected Jackson’s argument that it was unduly harsh for the reasons it had explained at sentencing. In light of Jackson’s prior history of criminal activity involving guns, the sentence was not unduly harsh or excessive. There would be no arguable merit to a challenge to the sentence on appeal.

The no-merit report next addresses whether there would be arguable merit to a claim that Jackson was denied the effective assistance of counsel. To establish that, a defendant must show both that his lawyer’s performance was deficient and that his lawyer’s deficient performance prejudiced the defense. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A lawyer’s

conduct is presumed to fall within a wide range of reasonable professional assistance, and the defendant bears the burden of overcoming that presumption. *Id.* at 689.

In his response, Jackson argues that he was denied the effective assistance of counsel because Washington did not explain to him that he was admitting that he committed attempted armed robbery by pleading guilty to felony murder. He also contends that Washington told him he would receive only five years in prison. As explained above, Washington testified at the postconviction motion hearing that she carefully reviewed the elements of the crime with Jackson. She also testified that she never guaranteed that he would receive only a five-year sentence. The circuit court concluded that Washington's testimony was credible and Jackson's testimony was not credible on these points. Based on the circuit court's findings, which are supported by the testimony, there would be no arguable merit to a claim that Jackson was denied the effective assistance of counsel.

Jackson also argues in his response that he received ineffective assistance of counsel because Washington did not move to suppress his statement to police before he entered the plea. He contends that Washington should have argued that the police did not have probable cause to arrest him because his arrest was based on information from an anonymous, unidentified informant who did not personally witness the murder. We agree with the supplemental no-merit report's analysis of this issue and its conclusion that there would have been no basis for a suppression motion. In addition to the tip from the confidential informant that Jackson was involved in Edward's murder, the police received statements from at least two other people implicating Jackson or suggesting that he was involved. Because a suppression motion would not have been successful, Washington's failure to file a suppression motion was not ineffective assistance of counsel. There would be no arguable merit to this claim.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction and order denying postconviction relief. Therefore, we conclude that further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Scott D. Obernberger is relieved of any further representation of Jackson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals