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DISTRICT I

December 20, 2013

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

2013AP46-CRNM State of Wisconsin v. Lawrence Edward Jones
(L.C. #2009CF2111)

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

Lawrence Edward Jones appeals a judgment convicting him of being a felon in possession of a firearm, as a repeater. He also appeals an order denying his postconviction motion. Appellate counsel, Donald L. Conner, II, filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Jones was informed of his right to respond, but he has not done so. After

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

considering the no-merit report and 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 report addresses whether there is sufficient evidence to support the conviction. When reviewing the sufficiency of the evidence, we look at 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)). We will not overturn the verdict if "'any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt.'" ***Id.*** (citation omitted).

At trial, Police Officer Jose Viera testified that he went with several other officers to investigate a citizen tip that there were three to four black men in the upper unit of 3256 North 15th Street in Milwaukee with cocaine and guns. When he arrived, he spoke to Henry Cleveland, who owned the building. Cleveland told him that no renters lived in the upper unit, but he let his grandson and nephews stay there. Cleveland gave the police permission to enter the upstairs unit to investigate. Police Officer William Esqueda testified that he entered the upper unit and identified himself as a police officer. A man, later identified as Jones, stood up abruptly from his chair and, as he stood up, a gun fell from his lap and hit the ground with a heavy thump. Officer Esqueda testified that he shouted to the other police officers to alert them that there were guns present. He saw two guns on a table in the room in addition to the gun on the floor. He kept his gun pointed at Jones and put his foot on the gun that had dropped to the

floor to secure it until Jones was handcuffed. He testified that he noticed a clear plastic sandwich bag on the ground near the gun with a white substance that looked like crack-cocaine. He and the other officers then arrested Jones and the other men.

Jones testified on his own behalf at trial. He testified that his sister had just dropped him off at the apartment to pick up Morgan Nokes because he and Nokes were going out to get something to eat together. He testified that because Nokes was not ready to leave, he turned to walk outside to wait for her when the police arrived. He testified that the police began yelling "police, police," so he backed away with his hands in the air. They then came in the room, slammed him to the ground, and arrested him. Jones further testified that he did not have a gun, that he did not see the gun that dropped onto the floor, and he did not notice the two guns on the table until after the police had entered. The parties stipulated that Jones had a prior felony conviction.

"The jury is the ultimate arbiter of a witness's credibility." *See* ***State v. Norman***, 2003 WI 72, ¶68, 262 Wis. 2d 506, 664 N.W.2d 97. The jury heard two different versions of what happened, one from Officer Esqueda, who said a gun fell from Jones's lap as he stood, and one from Jones, who said that he was not sitting down when the police arrived and did not have a gun. The jury decided that Officer Esqueda was more credible than Jones. Officer Esqueda's testimony supports the jury's verdict that Jones was in possession of a firearm, and it was stipulated that Jones was a felon. Therefore, there would be no arguable merit to a claim that there was insufficient evidence to support the jury's verdict.

The no-merit report next addresses whether there is arguable merit to a claim that Jones's trial lawyer ineffectively represented him. To establish a claim of ineffective assistance of

counsel, 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 claim of ineffective assistance of counsel is a mixed question of fact and law." ***State v. Carter***, 2010 WI 40, ¶19, 324 Wis. 2d 640, 782 N.W.2d 695. "We will uphold the circuit court's findings of fact unless they are clearly erroneous." ***Id.*** "Findings of fact include the circumstances of the case and the counsel's conduct and strategy." ***Id.*** (quotation marks and citation omitted). "However, the ultimate determination of whether counsel's assistance was ineffective is a question of law, which we review de novo." ***Id.*** (citation omitted).

In his postconviction motion, Jones contended that his counsel was ineffective for failing to investigate before trial and failing to call witnesses at trial to corroborate Jones's version of events. At the hearing on the motion, Jones's lawyer, Robert D'Arruda, testified that he did not interview the three other men in the room when the police arrived, Tony Oliver, Deangelo Garcia and Jacquis Leichman, because he did not think that they would testify that the guns belonged to them, not Jones. D'Arruda also testified that he did not interview Morgan Nokes, the woman Jones said he had come to pick up, because she was in a back room of the apartment when the police arrived and did not see what had happened. Finally, D'Arruda testified that he did not call Jones's sister to testify that she had just dropped Jones off at the apartment because he did not think her testimony would undermine Officer Esqueda's testimony that he had seen the gun fall from Jones's lap.

The circuit court concluded that D'Arruda's performance was deficient because he failed to investigate before trial; he did not interview Nokes, the three men in the room with Jones when the police arrived, or Jones's sister, although he spoke to Jones's sister on the phone. The circuit court also concluded that Jones was not prejudiced because, even if D'Arruda had

interviewed the three men and attempted to call them at trial, they would not have testified favorably for Jones. All three men gave statements, both written and recorded, to the police indicating that the three guns in the room did not belong to them. When Jones attempted to call Deangelo Garcia at the postconviction motion hearing, Garcia invoked his Fifth Amendment right not to testify on the grounds that it might incriminate him. Tony Oliver appeared at one of the several postconviction motion hearings but, after being informed that he had a right to consult with a lawyer about his Fifth Amendment rights, he did not appear again despite being repeatedly subpoenaed. Jones's postconviction lawyer was not able to locate Jacquis Leichman, but Leichman had already told the police that none of the guns in the room were his.

At the postconviction motion hearing, the parties stipulated that Jones's sister would have testified that she dropped Jones off shortly before the police arrived, that she did not see him with a gun and that she was not present when the police entered the apartment. While this testimony would have corroborated Jones's testimony that he just arrived to pick up Nokes, Jones's sister was not in the apartment when the police arrived, and we cannot say that if she had testified the result of the proceeding would have been different; her testimony did not undermine Officer Esqueda's testimony that he saw the gun fall from Jones's lap. A defendant "must show that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *See* ***Carter***, 324 Wis. 2d 640, ¶37 (quoting ***Strickland***, 466 U.S. at 694). Therefore, the circuit court properly concluded that Jones did not show that he was prejudiced by his lawyer's deficient performance. There would be no arguable merit to an appellate challenge premised on a claim of ineffective assistance of counsel.

The no-merit report next addresses whether there would be arguable merit to a claim that Jones's arrest was illegal because the police officers had no authority to be in the apartment

where he was arrested. To assert a claim for protection under the Fourth Amendment, a person must have standing. ***State v. Bruski***, 2007 WI 25, ¶22, 299 Wis. 2d 177, 727 N.W.2d 503. A person has standing when he or she "has a reasonable expectation of privacy" in the place that was searched. ***Id.*** Whether an expectation of privacy is one that society is willing to recognize as reasonable depends on many factors, including: (1) whether the person had a property interest in the place; (2) whether the person "had complete dominion and control and the right to exclude others," and (3) whether the person "took precautions customarily taken by those seeking privacy." ***Id.***, ¶24 (citation omitted). This list is not exclusive; the "courts consider the totality of the circumstances." ***Id.***

According to Jones's testimony, he was a visitor who had stopped by to pick up his friend to go to dinner. He had no ownership interest or control over the residence and was intending to stay for only a short period of time. Under these circumstances, he did not have an expectation of privacy in the residence that society is willing to recognize as reasonable. Because he did not have standing to challenge the search of the residence, there would be no arguable merit to Jones's claim that the officers did not have authority to search the residence.

The no-merit report next addresses whether there would be arguable merit to a claim that the sentence imposed on Jones was excessive. The circuit court sentenced Jones to ten years of imprisonment, with six years of initial confinement and two years of extended supervision. In framing its sentence, the circuit court considered positive factors about Jones, like the fact that his employment record showed that he had employment skills, he had been working on his GED, he had strong letters of support from his family, he did not fire the gun and he did not resist the officers. The circuit court also considered negative factors, like the fact that Jones was on extended supervision when he committed this crime, and he had a criminal record, including a

conviction for being a felon in possession of a firearm. 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. There would be no arguable merit to a challenge to the sentence on appeal.

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 Donald L. Conner, II, is relieved of any further representation of Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals