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September 12, 2014

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

2013AP1865-CRNM State of Wisconsin v. Tommy Leonardo Jones
(L.C. #2012CF4388)

Before Brennan, J.[1]

Tommy Leonardo Jones pleaded guilty to the misdemeanor charge that he possessed THC, contrary to WIS. STAT. § 961.41(3g)(e) (2011-12).[2] He now appeals from the judgment of conviction. Jones's postconviction/appellate counsel, Jeremy C. Perri and Leon W. Todd, filed a

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12).

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

no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32.[3] Jones has not filed a response. We have independently reviewed the record and the no-merit report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Jones was originally charged with the aforementioned crime and one felony count of possessing narcotics (Oxycodone). The felony count was dismissed on the State's motion after Jones produced a valid prescription for the Oxycodone.

Jones challenged the search of his vehicle that occurred during a traffic stop and which led to the discovery of a fourteen-gram bag of marijuana in the center console of his vehicle. Jones also objected to the earlier search of his person, although that search revealed no contraband. At the suppression hearing, Jones did not dispute that the officers were entitled to conduct a traffic stop after Jones parked his vehicle in the driving lane and exited his vehicle to attempt to close a broken passenger side door that had swung open. One officer testified that Jones gave him permission to search Jones's person, while a second officer testified that Jones consented to a search of his vehicle. Jones testified that he did not give the officers permission to search his person or the vehicle.

In an oral decision, the trial court denied Jones's motion to suppress. The trial court explicitly found that the officers' testimony was credible, and it said that Jones's testimony "did not make sense." The trial court further found that even if Jones had not consented to the search

[3] Attorneys Perri and Todd succeeded postconviction/appellate counsel Attorney Lillian V. Lewis, who withdrew after filing a no-merit report because she began a new job as a special prosecutor (continued)

of his vehicle, the officer could have conducted a search based on "the odor of marijuana" that emanated from the vehicle and the other circumstances of the stop.

After the trial court denied Jones's suppression motion, he entered a plea agreement with the State pursuant to which he agreed to plead guilty to misdemeanor possession of THC. In exchange, the State agreed to recommend a time-served disposition and moved to withdraw an amended information—on which Jones had not yet been arraigned—that added two counts of bail jumping. The trial court conducted a thorough plea colloquy, accepted Jones's guilty plea to the single count of possession of THC, and found him guilty. Consistent with the parties' joint recommendation, the trial court sentenced Jones to five days in the House of Correction and awarded Jones five days of credit against that sentence, resulting in "a time-served disposition." The trial court also waived "all the costs, fees and assessments in this case."

The no-merit report concludes there would be no arguable merit to argue that: (1) the trial court erroneously denied Jones's suppression motion; (2) Jones's plea was not knowingly, voluntarily, or intelligently entered, or was not supported by a factual basis; and (3) the trial court erroneously exercised its sentencing discretion. This court agrees with postconviction/appellate counsel's thorough description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In addition to agreeing with postconviction/appellate counsel's description and analysis, we will briefly discuss the identified issues.

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while the appeal was pending. Attorneys Perri and Todd filed a substitute no-merit report, which is the only report this court has considered in deciding this appeal.

We begin with the suppression hearing, where the issue presented was whether Jones consented to the search of his person and his vehicle. "[A] warrantless search conducted pursuant to consent [that] is 'freely and voluntarily given' does not violate the Fourth Amendment." ***State v. Phillips***, 218 Wis. 2d 180, 196, 577 N.W.2d 794 (1998) (citation omitted). Thus, if Jones consented to the search of the vehicle, there would be no basis to suppress the marijuana evidence found in the vehicle's center console. When we review an order denying a motion to suppress evidence, we uphold the trial court's findings of fact "unless they are against the great weight and clear preponderance of the evidence." ***State v. Dubose***, 2005 WI 126, ¶16, 285 Wis. 2d 143, 699 N.W.2d 582. Moreover, when considering the trial court's factual findings, we defer to the trial court's credibility determinations. *See* ***State v. Owens***, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989).

We have carefully reviewed the transcript of the suppression hearing. The trial court's findings of fact are supported by the testimony of two police officers, which the trial court explicitly found to be credible. Further, Jones's testimony—which the trial court found was not credible—was the only evidence presented suggesting that he did not give consent. We agree with the no-merit report that there would be no merit to assert that "the trial court's finding was against the great weight and clear preponderance of the evidence."

Next, we turn to the guilty plea. There is no arguable basis to allege that Jones's guilty plea was not knowingly, intelligently, and voluntarily entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986); WIS. STAT. § 971.08. He completed a plea questionnaire and waiver of rights form, which the trial court referenced during the plea hearing. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The trial court conducted a thorough plea colloquy addressing Jones's understanding of the plea agreement and the charge to which he was pleading guilty, the penalties he faced, and the constitutional rights

he was waiving by entering his plea. *See* § 971.08; ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14; ***Bangert***, 131 Wis. 2d at 266-72.

The trial court confirmed with trial counsel that he had discussed the crime's elements and penalties with Jones, and it referenced the jury instruction that was attached to the guilty plea questionnaire. The trial court told Jones that it was not bound by the parties' recommendations, and it reiterated the maximum sentence and fine that could be imposed. The trial court also restated the crime's three elements. Trial counsel stipulated that there was "an adequate factual basis" for the plea, and the trial court discussed with Jones the facts that were stated in the criminal complaint. Jones told the trial court that he had put the marijuana in the console of his vehicle.

Based on our review of the record, we conclude that the plea questionnaire, waiver of rights form, Jones's conversations with his trial counsel, and the trial court's colloquy appropriately advised Jones of the elements of the crime and the potential penalties he faced, and otherwise complied with the requirements of ***Bangert*** and ***Hampton*** for ensuring that the plea was knowing, intelligent, and voluntary. There would be no basis to challenge Jones's guilty plea.

Next, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant,

and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and it must determine which objective or objectives are of greatest importance, ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the trial court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and it may consider several subfactors. ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court recognized that this was "not the most egregious offense," but cautioned Jones that a future possession offense could be charged as a felony. The trial court discussed Jones's prior criminal history, which included a 1999 felony conviction for armed robbery in Mississippi and a 1998 misdemeanor conviction for possession of marijuana in Texas.[4] The trial court considered society's interest in being protected from those "who violate the law." It concluded that the parties' joint recommendation for a time-served disposition was "fair and reasonable."

Our review of the sentencing transcript leads us to conclude that there would be no merit to challenge the trial court's compliance with ***Gallion***. Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. The trial court imposed a time-served sentence of five days in jail, which was a fraction of the six months in jail that could have been imposed. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449

[4] The State told the trial court that based on the Texas conviction, it could have charged Jones with a felony, but it had elected not to do so.

("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.").

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorneys Jeremy C. Perri and Leon W. Todd are relieved of further representation of Jones in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals