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January 21, 2015

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

2014AP389-CRNM State of Wisconsin v. Avery A. Hannah (L. C. #2012CF507)

Before Hoover, P.J., Hruz and Brennan, JJ.

Counsel for Avery A. Hannah has filed a no-merit report concluding there is no arguable basis for Hannah to withdraw his guilty plea or challenge the sentence imposed for delivery of cocaine, second and subsequent offense, and as a repeater, or for challenging an order denying Hannah's postconviction motion to withdraw his guilty plea. Hannah filed a response arguing:

- (1) His trial counsel violated the attorney-client privilege;
- (2) The trial court failed to follow the

requirements of WIS. STAT. § 971.08 (2011-12)¹ in accepting his plea; (3) Trial counsel was ineffective for not having audio recordings of the drug transactions forensically examined to identify Hannah's voice on the recordings; (4) A search warrant of Hannah's residence was defective because the application for the warrant did not establish the credibility of a confidential informant; (5) Hannah's arrest lacked probable cause; and (6) Trial counsel advised Hannah that the impaneled jury would be mostly Caucasian and that would skew any verdict. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

The complaint charged Hannah with selling cocaine to a confidential informant on June 6, 2012 and June 20, 2012, and possessing with intent to deliver cocaine to the same informant on July 10, 2012. The first two transactions were nearly identical. Officers searched the confidential informant for contraband with negative results, fitted him/her with a body-wire transmitting device and provided prerecorded cash to buy cocaine from Hannah. The informant met with Hannah while under surveillance. In each instance, the transaction took place at a vehicle that belonged to and was driven by Hannah's girlfriend. Hannah was a passenger. The informant stood outside the vehicle during the transaction. After the informant finished the transaction, he/she made contact with officers, who recovered rocks that tested positive for cocaine. The third transaction was like the first two except that officers arrested Hannah and his girlfriend at the scene and found approximately 7.3 grams of cocaine under Hannah's leg.²

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

² Hannah was sitting on the crack cocaine when the police intervened.

Pursuant to a plea agreement, Hannah pled guilty to one count of selling cocaine, second and subsequent offense, as a repeater, based on the June 6 transaction. The other charges were dismissed and read in for sentencing purposes. The court imposed a sentence of seven and one-half years' initial confinement and five years' extended supervision, concurrent with a six-year sentence Hannah was serving as a result of an unrelated conviction in another county. The court also required Hannah to pay \$1,000 restitution, returning the buy money.

Hannah filed a postconviction motion to withdraw his guilty plea, arguing his trial counsel was ineffective in five respects: (1) Counsel failed to inform him that the court could consider the read-in offenses to impose a lengthier sentence and restitution; (2) Counsel failed to provide Hannah with complete discovery, including a videotape of the transactions; (3) Counsel failed to obtain the videotape and was therefore unaware of any possible exculpatory information it might reveal; (4) Counsel incorrectly informed Hannah that the jury would hear details regarding his previous drug convictions; and (5) Counsel advised Hannah he would lose at a jury trial based on his race. Hannah's trial counsel testified at the postconviction hearing, refuting each of Hannah's allegations. She testified she explained to Hannah the potential consequences of the read-in offenses. She went to the jail to review the audio and video recordings with Hannah, but after he listened to a portion of an audio recording, Hannah said he "didn't want to do any more." She believed it was Hannah's voice on the recordings. Counsel also reviewed the video recording and said she saw nothing that would constitute exculpatory evidence. Counsel denied telling Hannah that the jury would hear details of his prior drug convictions and denied telling him he would lose because of his race if he went to trial. Counsel could not recall whether she discussed the possibility of requesting a bench trial, but said she would have recommended against a bench trial in any event because "the burden is greater for the State to

convince 12 people versus one judge.”³ Counsel recommended that Hannah accept the plea agreement because, in effect, the State agreed to recommend a sentence that would amount to only eighteen months more than the sentences he was already serving.

The court denied Hannah’s motion to withdraw his guilty plea, concluding Hannah failed to establish a manifest injustice because he failed to establish ineffective assistance of counsel. The court noted the transcript of the plea hearing in which Hannah admitted he understood the elements of the offense and understood that dismissed and read-in counts could be used by the court to determine an appropriate sentence. Hannah told the court he admitted to being guilty because he was guilty. The court also noted that the presentence investigation report (PSI) indicated that Hannah denied his guilt to the PSI author and at a revocation proceeding. However, at the sentencing hearing, Hannah admitted he was out of control and glad he was caught. Counsel, after a discussion with Hannah, informed the court that Hannah admitted to delivering cocaine but denied “certain aspects of the transaction.” Regarding all of the disputes between Hannah and his trial counsel, the court found, with the exception of Hannah’s testimony that he did not know what his defense would be, “I, quite frankly, don’t believe a word that Mr. Hannah said today. His testimony is incredible. He is incredible.”

The record discloses no arguable manifest injustice upon which Hannah could withdraw his guilty plea. See *State v. Duychak*, 133 Wis. 2d 307, 312, 395 N.W.2d 795 (Ct. App. 1986). The court’s exemplary plea colloquy, supplemented by a Plea Questionnaire and Waiver of Rights form, informed Hannah of the elements of the offense, the potential penalties, and the

³ We perceive counsel to have been addressing the difficulty of proving guilt beyond a reasonable doubt to twelve individuals as opposed to one, not that the burden of proof was different as
(continued)

constitutional rights Hannah waived by pleading guilty. The court informed Hannah of the use it could make of the read-in offenses. As required by *State v. Hampton*, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, the court informed Hannah it was not bound by the parties' sentence recommendations. Hannah assured the court he understood this information and his plea was not the product of any promises or threats. Hannah agreed that he was pleading guilty because he was guilty. The record shows the plea was knowingly, voluntarily and intelligently entered. See *State v. Bangert*, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

In his response to the no-merit report, Hannah concedes he was guilty of the offense that led to his arrest, the July 10, 2012 transaction. That count was dismissed and read in for sentencing purposes. The issues raised in the response to the no-merit report relate to the June 6, 2012, crime to which Hannah pled guilty. Those issues lack arguable merit.

Hannah contends his trial counsel violated the attorney-client privilege at the sentencing hearing by telling the court that Hannah admitted his guilt despite denials he made to the PSI author and at a revocation hearing. Counsel made that statement after consulting with Hannah. Attorney-client privilege does not prohibit counsel from explaining a potential discrepancy that might undermine a very generous plea agreement. Counsel's statements confirmed Hannah's own admissions at the plea hearing and at the sentencing hearing that he pled guilty because he was guilty, and: "I know I was out of control. I'm glad I got caught." The record suggests Hannah's statements to his attorney were meant to be shared with the court.

between the two methods of trial.

Hannah's argument that the court failed to follow the requirements of WIS. STAT. § 971.08 is belied by the transcript of the plea hearing. Hannah contends that, in addition to the elements of the offense to which he pled guilty, he should have been informed of the elements of the charges that were dismissed as a part of the plea agreement. The law does not require the court's colloquy to include the elements of dismissed charges. In addition, the dismissed charges were a second count of the same offense and one count of possession with intent to deliver cocaine, the charge Hannah's response to the no-merit report admits he committed. Therefore, he was informed of the elements of one of the offenses and was not prejudiced by any lack of knowledge as to the elements of the other dismissed offense.

Hannah next argues his counsel was ineffective for not having the audiotapes examined to determine whether it was his voice on the tape. Hannah does not allege that he told his trial counsel it was not his voice. The reasonableness of counsel's actions may be determined by Hannah's own statements or actions. *See Strickland v. Washington*, 466 U.S. 668, 691 (1984). The trial court found counsel's postconviction testimony credible that the voice on the tape appeared to match Hannah's voice. Counsel was not ineffective for pursuing a generous plea agreement rather than seeking forensic tests on the tapes in the absence of any reason to believe the tests would result in favorable evidence.

Hannah's arguments regarding the validity of a search warrant present no arguable basis for appeal for several reasons. First, none of the three offenses charged in the complaint relied on the results of the search. The drugs and paraphernalia found in Hannah's residence did not result in any charges. Second, the record discloses no arguable basis for challenging the application for the search warrant. In addition to the crimes described in the complaint, the application for the warrant described an earlier incident in which the informant, wearing a body

wire and having been previously searched for contraband, bought drugs from Hannah. That transaction, along with the subsequent controlled transactions, adequately established the informant's credibility. Constant surveillance of the informant and immediate recovery of the marked currency was not necessary because the court's examination of the evidence in support of the warrant is pragmatic, dealing with the totality of the information. *See Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The record discloses no arguable basis for challenging probable cause to arrest Hannah. Hannah contends the police were required to see drugs or a package leave the vehicle and could not rely on the confidential informant. The charge that arose from the transaction that led to Hannah's arrest was possession with intent to deliver cocaine. Completion of the transaction was not necessary. The cocaine was found under Hannah's leg at the time of the arrest. The totality of the circumstances justified the arrest.

Hannah's additional issues, particularly those regarding the racial composition of Eau Claire County juries, depend on his own credibility. The trial court is the arbiter of the witnesses' credibility, and this court can overturn findings of fact based on witness credibility only if those findings are against the laws of nature or conceded facts. *See Chapman v. State*, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975). Neither basis applies here.

Finally, the record discloses no arguable basis for challenging the sentencing court's discretion. Because the charge included two penalty enhancers, the court could have imposed a sentence of twenty-two and one-half years, consecutive to any other sentence. The court appropriately considered the seriousness of the offense, the read-in offenses, Hannah's character including a substantial prior record, and the need to protect the public. *See State v. Harris*, 119

Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The sentence of seven and one-half years' initial confinement and five years' extended supervision, concurrent with a six-year prison sentence imposed in another county, is not arguably so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Dennis Schertz is relieved of his obligation to further represent Hannah in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals