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March 29, 2016

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

2015AP502-CRNM State of Wisconsin v. Jed E. Doolittle (L.C. # 2012CF142)
2015AP503-CRNM State of Wisconsin v. Jed E. Doolittle (L.C. # 2013CF51)

Before Lundsten, Higginbotham and Sherman, JJ.

Jed Doolittle appeals judgments convicting him of delivery of cocaine, as a party to a crime, and perjury. *See* WIS. STAT. §§ 961.41(1)(cm)1r., 939.05, 946.31(1)(a) (2013-14).[1] Attorney Ellen Krahn has filed a no-merit report seeking to withdraw as appellate counsel for Doolittle. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738, 744 (1967). Doolittle was sent a copy of the report and has filed a response alleging ineffective assistance of

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

trial counsel during the proceedings on the cocaine charge. Upon consideration of the report, the response, and an independent review of the record, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

The no-merit report asserts that there would be no arguable merit to an appeal based upon the sufficiency of the evidence in either trial. 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 it can be said as a matter of law 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 (citing ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990)).

With respect to the charge of delivery of cocaine, the State was required to prove that Doolittle delivered a substance, that the substance was cocaine, and that Doolittle knew or believed that the substance was cocaine. *See* WIS JI—CRIMINAL 6020. The State proffered testimony of a confidential informant, Jason Nundahl, who testified that Doolittle came to his apartment and that Nundahl gave him $420, consisting of $20 for gas and $400 for drugs. Nundahl also testified that Doolittle "said Mark sent him." Doolittle came back later that day with Mark Jamesson, and Nundahl testified that Doolittle handed him the drugs.

The State played a video recording for the jury in which Doolittle can be seen handing a bag to Nundahl. With respect to the substance given by Doolittle to Nundahl, Nundahl testified that he turned it over to investigator Matt Sutton. Sutton then testified that the substance was forwarded to the State Crime Lab. A witness from the State Crime Lab testified that his analysis of the substance identified the presence of cocaine.

Doolittle also testified at trial on his own behalf. He stated that Jamesson handed him something at the apartment and that Doolittle then handed the object to Nundahl. Doolittle said he believed he was handing off television parts. However, in an earlier interview with police, Doolittle did not mention any belief that he handed television parts to Nundahl. At trial, the jury viewed photos of the bag that was transferred, and the photos depict a white substance inside a clear bag. The jurors also viewed the actual bag. The jury was instructed, pursuant to the standard jury instruction for delivery of a controlled substance, that "[k]nowledge or belief must be found, if found at all, from the defendant's acts, words and statements, if any, and from all the facts and circumstances in this case bearing upon knowledge." *See* WIS JI—Criminal 6020.

We are satisfied, based on all of the above, that the evidence was sufficient for the jury to reasonably infer that Doolittle knew the bag he handed to Nundahl contained cocaine. That inference involved credibility determinations by the jury which, generally, we will not disturb on appeal. *See* ***State v. Wachsmuth***, 166 Wis. 2d 1014, 1023, 480 N.W.2d 842 (Ct. App. 1992). Thus, we agree with counsel's assessment that there would be no arguable merit to challenging the sufficiency of the evidence to support the jury's verdict as to the cocaine charge.

Doolittle argues in his no-merit response that his counsel rendered ineffective assistance during the proceedings on the cocaine charge. To establish ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that the deficiency caused him prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Doolittle asserts that his trial counsel operates his own law firm, is inexperienced, and had four trials scheduled in the same month as Doolittle's trial. Doolittle also asserts that the Office of the State Public Defender "outsourced" Doolittle's case to trial counsel. These facts, without more, are insufficient to support an arguably meritorious claim of ineffective assistance of counsel, and

nothing in the record, the no-merit report, or the response suggests that counsel's performance was deficient.

We turn next to the issues related to Doolittle's perjury trial. We are satisfied that there would be no arguable merit to challenging the sufficiency of the evidence to support the conviction. To convict Doolittle of perjury, the State was required to prove that Doolittle made an oral statement while under oath, that the statement was false, that Doolittle did not believe the statement to be true when made, that the statement was made in a proceeding before a court, and that the statement was material to the proceeding. *See* WIS JI—Criminal 1750. The statement at issue was Doolittle's trial testimony that he believed the bag he handed to Nundahl contained television parts. There was no dispute at trial that Doolittle made the statement under oath or that it was made in court. Neither was there any dispute as to what the bag contained, since Doolittle stipulated for purposes of the perjury trial that the bag contained cocaine. It also could not reasonably be argued on appeal that Doolittle's statement regarding what he believed to be in the bag was not material to the cocaine trial. The crime of delivery of cocaine requires the State to prove, as an element of the crime, that the defendant knew or believed that the substance was cocaine. *See* WIS JI—Criminal 6020.

The only remaining perjury element for us to examine, then, is whether Doolittle knew he was making a false statement when he testified that he believed the bag contained television parts. The jury heard testimony from Jamesson that he and Doolittle were addicted to cocaine and that they both benefitted from drug transactions by "pinching" the bags of cocaine, or taking some of the drugs for themselves, before delivering them. The jury viewed photos and a video recording showing the hand-off of the bag from Doolittle to Nundahl. Investigator Sutton also testified at the perjury trial, stating that Nundahl gave him a clear plastic bag with a knot tied in

the top that had an off-white, hard, powdery substance inside it. Doolittle did not testify at the perjury trial, and the jury was instructed that his decision not to testify must not be considered and must not influence the verdict in any way. The jury returned a guilty verdict. We are satisfied, based on all of the above, that the evidence supports the jury's verdict, such that there would be no merit to challenging the sufficiency of the evidence on appeal.

The no-merit report also asserts that there would be no arguable merit to challenging the circuit court's denial of Doolittle's motion to dismiss the perjury charge based on prosecutorial vindictiveness. We agree. To establish a claim of prosecutorial vindictiveness, a defendant must show either actual vindictiveness or that a "realistic likelihood of vindictiveness" exists, thereby raising a rebuttable presumption of prosecutorial vindictiveness. ***State v. Johnson***, 2000 WI 12, ¶17, 232 Wis. 2d 679, 605 N.W.2d 846.

The basis for Doolittle's motion to dismiss was a voice mail left by the prosecutor for defense counsel two days before the trial on the cocaine charge. In the voice mail, the prosecutor stated, in part, "Also tell your client when he perjures himself on the stand Wednesday or Thursday that I will be charging him also. Thank you." The parties fully briefed the issue of prosecutorial vindictiveness and the circuit court held a hearing on Doolittle's motion to dismiss the perjury charge. The court stated that it did not view the issue as one of vindictive prosecution, but rather an issue of whether the perjury charge was barred on constitutional double-jeopardy grounds. The parties conceded that the State was not precluded on double-jeopardy grounds from proceeding with a perjury trial, so long as it presented newly discovered evidence. *See* ***State v. Canon***, 2001 WI 11, ¶24, 241 Wis. 2d 164, 622 N.W.2d 270 (holding that newly discovered evidence may allow the State to proceed with a charge of perjury). The court denied the motion to dismiss. The circuit court's analysis and ruling is supported by this court's

decision in ***State v. Geske***, 2012 WI App 15, ¶35, 339 Wis. 2d 170, 810 N.W.2d 226 (quoting ***Lange v. State***, 54 Wis. 2d 569, 575, 196 N.W.2d 680 (1972)), for the principle that "[i]f perjury has occurred, it should be the subject of a separate charge and conviction." We are satisfied from our review of the record that there would be no merit to challenging the circuit court's ruling on the motion to dismiss.

Finally, we agree with counsel's assessment that there would be no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. On the cocaine charge, a class F felony, Doolittle faced a maximum term of seven and one-half years of initial confinement and five years of extended supervision. WIS. STAT. §§ 961.41(1)(cm)1r.; 973.01(2)(b)6m. and (d)4. On the perjury charge, a class H felony, Doolittle faced a maximum sentence of three years of initial confinement and three years of extended supervision. *See* WIS. STAT. §§ 946.31(1)(a), 973.01(2)(b)8. and (d)5. Before imposing sentence, the court considered the relevant factors, consistent with ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The court considered Doolittle's background and character, noting his lack of a criminal history and his military service. The court also considered the seriousness of the offense, stating that this was a relatively "small case." The court then withheld sentence and placed Doolittle on probation for two years in each case, to run concurrently. The court also ordered 120 days of jail time as a condition of probation, and stated that Doolittle could elect to complete six months in the justice sanctions program in La Crosse County in lieu of jail time. The sentence was well within the range permitted by law and, under the circumstances, it cannot reasonably be argued that Doolittle's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The judgments of conviction in both cases included a DNA surcharge of $250. However, corrected judgments of conviction were entered, vacating each surcharge. Therefore, there would be no arguable merit to challenging the DNA surcharges on appeal.

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

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Ellen Krahn is relieved of further representing Doolittle in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals