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November 1, 2016

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

2014AP945-CRNM State of Wisconsin v. Scott Allen Youngmark
2014AP946-CRNM (L. C. Nos. 2011CF397, 2012CF462)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Scott Youngmark filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] concluding no grounds exist to challenge Youngmark's convictions for second-degree reckless endangerment and second-degree intentional homicide. Youngmark has filed responses raising several challenges to his second-degree intentional homicide conviction. Upon our independent review of the records as mandated by ***Anders v. California***, 386 U.S. 738

[1] All references to the Wisconsin Statutes are to the 2013-2014 version unless otherwise noted.

(1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.

In Polk County Circuit Court case No. 2011CF397, the State charged Youngmark with first-degree reckless endangerment; injury by negligent use of a dangerous weapon; misdemeanor battery; and disorderly conduct, all counts as a repeater. The charges arose from allegations that Youngmark held a large kitchen knife to A. K.'s neck and then cut A. K. on the chest. Youngmark also purportedly kneed another person in the jaw. In exchange for his no-contest plea to an amended charge of second-degree reckless endangerment without the repeater enhancement, the State agreed to dismiss and read in the remaining counts in this and another case.[2] The State also agreed to cap its sentence recommendation "at probation" and no more than one year in the county jail, noting that it remained free to recommend an imposed and stayed prison sentence under the agreement.

Before Youngmark was sentenced in case No. 2011CF397, he was charged with first-degree intentional homicide in Polk County Circuit Court case No. 2012CF462. In that case, the complaint alleged that Polk County dispatch received an anonymous 911 call indicating a subject was badly hurt at an apartment in Milltown. Police arrived at the apartment to find Kari Roberts deceased. Police observed "an exceptional amount of blood strewn from the living room through the kitchen to the back bedroom where [Roberts' body] was located." In addition, police found what appeared to be skin, hair, and skull fragments in the bedroom.

[2] The other case charged Youngmark with three counts of felony intimidation of a witness as a repeater.

Police then responded to the location where the 911 call originated—an address identified as the residence of Youngmark's mother, Shirley Youngmark. There, officers found Youngmark, who agreed to speak with the police after being advised of his ***Miranda***[3] rights. Shirley also told police that her son made statements to the effect of "I did something bad" and "I think I killed her." Police found blood on Youngmark's hands and feet that was later determined to match Roberts' DNA. After obtaining a search warrant for Shirley's residence, officers found bloody clothing containing Roberts' DNA.

Youngmark filed pretrial motions to suppress statements and evidence, and also sought a venue change. Before the motions were decided, Youngmark opted to enter into a plea agreement. Under that agreement, Youngmark pleaded guilty to an amended charge of second-degree intentional homicide, and the parties remained free to argue at sentencing. Youngmark faced a maximum possible ten-year sentence on the reckless endangerment conviction from case No. 2011CF397 and a maximum possible sixty-year sentence on the homicide conviction in case No. 2012CF462. The circuit court imposed maximum consecutive sentences, consisting of forty-five years' initial confinement and twenty-five years' extended supervision.

The record discloses no arguable basis for withdrawing Youngmark's no-contest plea to second-degree reckless endangerment or his guilty plea to second-degree intentional homicide. The court's plea colloquies, as supplemented by plea questionnaire and waiver of rights forms that Youngmark completed, informed Youngmark of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering his pleas. The court

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

confirmed Youngmark's understanding that it was not bound by the terms of the respective plea agreements, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also advised Youngmark of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c).

The court ascertained that medications Youngmark was taking for bipolar disorder did not interfere with his ability to understand the proceedings. Additionally, the court found that a sufficient factual basis existed in the criminal complaints to support the conclusion that Youngmark committed the crimes charged. Further, the record shows Youngmark was aware that by entering his guilty plea before his pretrial motions were decided in the homicide case, he was waiving the right to pursue those motions. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983) (by entering a plea other than not guilty, the defendant waives the right to challenge non-jurisdictional defects and defenses). The records show the pleas were knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

In his response to the no-merit report, Youngmark challenges his plea to second-degree intentional homicide, claiming the circuit court failed to ensure Youngmark understood the element of intent. The circuit court, however, is not required to "thoroughly ... explain or define every element of the offense to the defendant." ***State v. Trochinski***, 2002 WI 56, ¶20, 253 Wis. 2d 38, 644 N.W.2d 891. "[A] valid plea requires only knowledge of the elements of the offense, not a knowledge of the nuances and descriptions of the elements." ***Id.***, ¶29 (defendant knew and understood elements of offense even though meaning of "harmful to children" was not explained to him at plea hearing). "The inquiry on review should not focus on 'ritualistic litany' of formal elements, but should address whether the defendant received real notice of the nature

of the charge." ***Bangert***, 131 Wis. 2d at 282-83. Here, the circuit court informed Youngmark of the elements of the offense, stating:

> As amended, that charge is second-degree intentional homicide, and if the matter was to go to trial there are elements, it's what the [State] would have to prove at trial. It would have to be shown that you caused the death of Kari Roberts, that you acted with the intent to kill Kari Roberts. [Those] would be the two elements that would have to be shown at trial and it would be the State's burden of proof beyond a reasonable doubt as to those two elements.

Because Youngmark received real notice of the nature of the charge, any challenge to the plea on this ground would lack arguable merit.

Youngmark also claims the plea was unknowing because the court failed to "alert the accused to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to a layman such as the accused." ***Id.*** at 262. This directive is primarily for the benefit of accuseds not already represented by counsel. The record reveals that Youngmark appeared by counsel throughout the criminal prosecution, thus demonstrating Youngmark's knowledge that a lawyer might assist him in defending against the charge. Because Youngmark was represented by counsel, we conclude there would be no arguable merit to challenge the plea on this ground.

There is no arguable merit to a claim that Youngmark was denied the effective assistance of trial counsel. To establish ineffective assistance of counsel, Youngmark must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Youngmark must demonstrate that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty

and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). In his response to the no-merit report, Youngmark claims trial counsel was ineffective by filing a suppression motion based on the warrantless search of Youngmark's mother's home. Youngmark claims his trial counsel should have known that the motion filed was frivolous, as exigent circumstances—i.e., the 911 call from the residence—"would rule out any Fourth Amendment argument."

According to Youngmark, counsel should have based the suppression motion on the alleged violation of Youngmark's ***Miranda*** rights. With his response to the no-merit report, Youngmark submitted a Polk County Sheriff's Department Statement of Constitutional Rights form that describes the ***Miranda*** rights and includes a "Waiver of Rights" section indicating: "I have read this statement of my rights and they have been read to me. I understand what my rights are. At this time I am willing to answer questions without a lawyer present." In the line provided for the defendant's signature, it appears Youngmark did not sign the document but, rather, wrote "Need Attorney."

As noted above, Youngmark's valid guilty plea waived the right to pursue all nonjurisdictional defects and defenses. *See* ***Riekkoff***, 112 Wis. 2d at 122-23. Youngmark nevertheless asserts that if counsel had moved to suppress statements based on the alleged ***Miranda*** violation, he would not have pleaded guilty and would have insisted on going to trial. In appointed counsel's supplemental no-merit report, she clarifies, however, that law enforcement attempted to interview Youngmark twice on the night of Roberts' murder. The record shows that after police arrived at Youngmark's mother's home, Youngmark was placed in handcuffs at "approximately 0207 hours." The arresting officer read Youngmark his constitutional rights, and Youngmark made a statement. Youngmark was then transported to the

jail where a second interview was attempted at "0418 hours on December 1, 2012." This is the same time and date reflected on the form on which Youngmark wrote "Need Attorney." Further, the form indicates the attempted interview took place at a Polk County building. According to the complaint narrative, the officer attempting the second interview indicated that Youngmark invoked his right to counsel and the interview ended without Youngmark making any statements. Youngmark's invocation of his right to counsel at 4:18 a.m. would not apply to statements he made during the first interview at his mother's house. Counsel cannot be deficient for failing to pursue a meritless claim. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441.

Youngmark alternatively contends that had counsel pursued a voluntary intoxication defense, he would not have pleaded guilty and would have insisted on going to trial.[4] Voluntary intoxication may be a defense only if it negates a state of mind essential to a crime. WIS. STAT. § 939.42(2) (2011-12).[5] When specific intent is an element of a crime, there is a defense if the defendant was too intoxicated to form the requisite intent. ***State v. Strege***, 116 Wis. 2d 477, 482, 343 N.W.2d 100 (1984). The defendant, however, has the burden to produce enough evidence to make intoxication an issue in the case. ***Id.*** at 485–86. Our supreme court has clarified:

[4] Youngmark filed and then withdrew a pro se motion for DNA testing. To the extent Youngmark's submission could be construed as an additional no-merit response claiming additional DNA evidence may exonerate him, his valid guilty plea waived any non-jurisdictional defects and defenses. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 122-23, 332 N.W.2d 744 (1983). If Youngmark is intimating his trial counsel was ineffective by failing to seek additional DNA testing, nothing in the record before this court suggests there is any arguable merit to challenge the effectiveness of trial counsel on this ground.

[5] Pursuant to 2013 Wisconsin Act 307, effective April 18, 2014, voluntary intoxication was eliminated as a defense to criminal liability.

> To be relieved from responsibility for criminal acts it is not enough for a defendant to establish that he was under the influence of intoxicating beverages. He must establish that degree of intoxication that means he was utterly incapable of forming the intent requisite to the commission of the crime charged.

State v. Guiden, 46 Wis. 2d 328, 331, 174 N.W.2d 488 (1970). "[T]he degree of a defendant's intoxication may be determined from his conduct, his own testimony regarding his condition, and the testimony of witnesses." ***Larson v. State***, 86 Wis. 2d 187, 195, 271 N.W.2d 647 (1978). A "defendant's actions speak at least as loud as his words." ***Guiden***, 46 Wis. 2d at 332. If a defendant has vivid and detailed memories of the crime, this weighs against a voluntary intoxication defense. *See* ***State v. Nash***, 123 Wis. 2d 154, 166, 366 N.W.2d 146 (Ct. App. 1985).

After the attack, Youngmark had the wherewithal to go to his mother's residence to seek her assistance. There, Youngmark stated: "I did something bad. I think I killed her. I can't believe I did this, I hope she's not dead." Although Youngmark could not convince his mother to return to the crime scene with him, his mother's neighbor, Darryl Lee, agreed to accompany Youngmark back to the crime scene to check on Roberts. At the scene, Lee attempted to find a pulse on Roberts' body, and discovered she was "ice cold." According to Lee, Youngmark asked him to help move the body and Lee declined, telling Youngmark he had to call the police. Because Youngmark's actions and statements surrounding the crime would not support a voluntary intoxication defense, counsel was not deficient for failing to pursue this defense in lieu of a plea agreement. Our review of the records and the no-merit report discloses no basis for

challenging trial counsel's performance and no grounds for counsel to request a ***Machner*** hearing.[6]

Finally, there is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Before imposing the maximum sentence authorized by law, the court considered the seriousness of the offenses; Youngmark's character, including his criminal history; the need to protect the public; and the mitigating circumstances Youngmark raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The sentencing court placed particular emphasis on the severity of the crimes. With respect to the second-degree reckless endangerment charge, the sentencing court noted that a knife with an eight-inch blade was used and there was a "threat with regard to killing or that the individual would die." When considering the seriousness of the second-degree intentional homicide charge, the sentencing court recounted that the pictures of Roberts at the crime scene were "so graphic" the court had to order them sealed. The court stated:

> Mr. Youngmark brutally murdered Kari Roberts in her own home where she was supposed to feel safe. He tortured her by cutting off pieces of her scalp. He beat her with a curtain rod, … broke her jaw, stabbed her several times and cut her belly ring out of her stomach and inflicted superficial cuts and bruises all over her body. The significant bruises all over her body, the drag marks … from the living room to the bedroom … and the significant amount of blood found in the apartment shows clear indication that this was a prolonged death for the victim.

Under the "totality of the circumstances," the circuit court determined that maximum sentences were "necessary to protect the public." It cannot reasonably be argued that Youngmark's

[6] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

sentences are so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

We note that the court referenced the COMPAS risk assessment at sentencing. In ***State v. Loomis***, 2016 WI 68, ¶¶98-99, 371 Wis. 2d 235, 881 N.W.2d 749, our supreme court held:

> [A] sentencing court may consider a COMPAS risk assessment at sentencing subject to the following limitations. As recognized by the Department of Corrections, the PSI instructs that risk scores may not be used: (1) to determine whether an offender is incarcerated; or (2) to determine the severity of the sentence. Additionally, risk scores may not be used as the determinative factor in deciding whether an offender can be supervised safely and effectively in the community.
>
> Importantly, a circuit court must explain the factors in addition to a COMPAS risk assessment that independently support the sentence imposed. A COMPAS risk assessment is only one of many factors that may be considered and weighed at sentencing.

While the circuit court referenced COMPAS at sentencing, the record shows it was not "determinative" of the sentence imposed. It merely reinforced the circuit court's assessment of other, independent factors. Accordingly, we conclude that any challenge to the sentence based on the circuit court's reference to COMPAS would lack arguable merit.

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

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Ellen J. Krahn is relieved of further representing Youngmark in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals