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August 23, 2017

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

2016AP1820-CRNM State of Wisconsin v. Melvin Jones (L.C. #2014CF351)

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Melvin Jones appeals from a judgment of conviction for felony murder and from an order denying his postconviction motion. His appellate counsel has filed a no-merit report pursuant to

WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Upon consideration of the report, Jones's response, and an independent review of the record, we conclude that the judgment and order may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

On November 18, 2013, Jones, then age sixteen, along with Jonathan Sellers, broke into the residence of Christopher Gray looking for money and items to steal. Gray returned home while the two robbers were in the residence. When Gray entered the residence, one of the two robbers hit Gray in the head with a hammer found in the residence. Gray ran from the residence but Sellers and Jones followed. Gray was thrown to ground and hit multiple times in the head with the hammer as the robbers attempted to rifle through his pockets.[2] Gray died as a result of injuries inflicted by the beating. Jones was charged with first-degree reckless homicide contrary to WIS. STAT. § 940.02(1), as a party to the crime and by use of a dangerous weapon, and burglary as a party to the crime.

Jones was charged in adult criminal court in accordance with WIS. STAT. § 938.183(1)(am) and (ar). A preliminary examination was held and the court concluded that there was probable cause to believe Jones had committed the specific offense which conferred adult criminal court jurisdiction. *See* WIS. STAT. § 970.032(1). After a contested competency determination, a reverse waiver hearing was held under § 970.032(2). The court ruled to retain adult criminal court jurisdiction. Jones entered a guilty plea to the amended charge of felony

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Jones initially admitted that he wielded the hammer and acted on instructions from Sellers. Later Jones indicated that he did not strike the victim but was only present during the robbery and ensuing chase.

murder while a party to the crime of attempted armed robbery. The plea agreement required Jones to waive his right to a hearing under § 938.183(1m)(c), which requires the court to consider whether a juvenile delinquency disposition is appropriate when a juvenile is convicted of a lesser offense than the offense on which adult criminal court jurisdiction is based. In the alternative, Jones agreed to waive the right to present any evidence at the § 938.183(1m)(c) hearing. The State agreed to recommend a sentence of twenty-five years' initial confinement. At sentencing, the court determined that Jones had not proven by clear and convincing evidence that it was in the best interest of Jones and the public to adjudge him to be delinquent and impose a delinquency disposition. *See* § 938.183(1m)(c)3.

The State made the agreed-upon recommendation at sentencing. Jones was sentenced to twenty-five years' initial confinement and ten years' extended supervision.[3] Jones filed a postconviction motion for sentence modification on the ground that his right to due process was violated by the sentencing court's reliance on the COMPAS[4] assessment included in the presentence investigation report.[5] The postconviction court denied the motion concluding that the COMPAS "report merely corroborated what the court already understood about the defendant's risk, and it was one of many sentencing factors the court considered in this case."

[3] On an order from the trial court, an amended judgment of conviction was entered reducing the number of days of sentence credit from 592 days to 528 days. The record confirms that error was made in the original calculation of the number of days of credit. No issue of arguable merit exists from the correction.

[4] "'COMPAS' stands for 'Correctional Offender Management Profiling for Alternative Sanctions.'" ***State v. Loomis***, 2016 WI 68, ¶4 n.10, 371 Wis. 2d 235, 881 N.W.2d 749.

[5] The postconviction motion was held in abeyance pending the ***Loomis*** decision, and this court extended the deadline for deciding the postconviction motion until forty-five days after the ***Loomis*** decision.

The no-merit report addresses the potential issues of whether the trial court's bindover decision complied with WIS. STAT. § 970.032;[6] whether the trial court erroneously exercised its discretion in denying reverse waiver; whether Jones's plea was freely, voluntarily and knowingly entered and supported by a factual basis; whether the sentence was the result of an erroneous exercise of discretion or unduly harsh; whether the postconviction motion was properly denied; and whether Jones was denied the effective assistance of trial counsel. The no-merit report demonstrates that counsel has considered these potential issues under applicable law and by examination of the record. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit, and this court will not discuss them further. We have also considered whether the finding that Jones was competent to proceed was clearly erroneous and whether the denial of reverse waiver upon Jones's conviction of the lesser offense was a proper exercise of discretion. We conclude that there is no arguable merit to challenge those determinations. We further note that imposition of the $250 mandatory DNA surcharge was not an ex post facto violation because Jones was required to give a DNA sample. *See* ***State v. Scruggs***, 2017 WI 15, ¶¶21, 38, 373 Wis. 2d 312, 891 N.W.2d 786.

In his response to the no-merit report, Jones indicates a desire to withdraw his plea. To that end he claims that his plea was not knowingly and voluntarily entered because the trial court did not ascertain his level of education or general comprehension, his thoughts and mental ability was compromised by the medication Risperdal®, and the trial court did not explain the elements

[6] The no-merit report discusses whether the trial court erroneously exercised its discretion by ordering Jones bound over for trial. The more precise inquiry is whether, as a matter of law, the requisite finding required by WIS. STAT. § 970.032 was made and was supported by the evidence. *See* ***State v. Toliver***, 2014 WI 85, ¶24, 356 Wis. 2d 642, 851 N.W.2d 251.

of the offense of armed robbery. Although the trial court did not specifically ask Jones about his level of education, the trial court utilized the plea questionnaire signed by Jones and the questionnaire informed the court that Jones had completed eleven years of schooling and did not have a high school diploma. A plea questionnaire may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time the plea is taken. ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. Jones was asked and he confirmed that he understood what was going on in court.[7] Nothing more was required when there was no indication during the plea colloquy that Jones was having difficulties understanding the proceeding. Additionally, the court questioned Jones about his use of Risperdal® and both Jones and his attorney acknowledged that the medication improved Jones's ability to understand the proceeding.

The trial court addressed the elements of the offense during the plea colloquy. The court asked Jones if he had gone over WIS JI—CRIMINAL 1032, defining the elements of felony murder while committing a crime as a party to the crime, and the jury instruction on attempted armed robbery.[8] Jones confirmed that he had gone over those with his attorney and understood what the State would have to prove to establish his guilt. The court obtained Jones's affirmation that he understood what a party to the crime means. The court also put the elements of the offense in the context of the case asking Jones whether he understood that the State would have to prove

[7] Jones points to test results placed on the record at the reverse waiver hearing that indicate he has a fifth-grade reading level and an IQ of 70. Jones characterizes these results as rendering him borderline retarded and demonstrating that his comprehension of complex matters is nonexistent. However, Jones's own acknowledgement of comprehension at the plea hearing belies his current claim that he did not understand.

[8] The plea questionnaire indicates that the elements of the offense were set forth on an attached sheet. The record copy of the plea questionnaire does not include the attachment.

"that on or about November 18, 2013 … you caused the death of Christopher Gray while as a party to the crime, attempting to commit armed robbery." This was sufficient. *See* ***State v. Brown***, 2006 WI 100, ¶56, 293 Wis. 2d 594, 716 N.W.2d 906 (circuit courts are encouraged to "translate legal generalities into factual specifics when necessary to ensure the defendant's understanding of the charges").

Jones claims he did not know that one of the elements of armed robbery is the possession of a dangerous weapon. It appears that Jones's real concern is his belief that he did not have a dangerous weapon. Although Jones and Sellers did not have a weapon when they entered Gray's residence, the hammer was picked up in the residence. Thus, a dangerous weapon was utilized when Gray was chased from his home and an attempt was made to rob him by rifling through his pockets. The misapprehension Jones claims about the dangerous weapon element of armed robbery is not related to the attempted armed robbery that occurred outside of the residence. The trial court is not required to thoroughly explain or define every element of the offense to the defendant. ***State v. Trochinski, Jr.***, 2002 WI 56, ¶20, 253 Wis. 2d 38, 644 N.W.2d 891. Nor must it ensure that the defendant specifically understands how the State will prove each element. ***Id.***, ¶22. A valid plea does not require knowledge of the "nuances and descriptions of the elements." ***Id.***, ¶29.

Jones also claims that his plea was not knowingly and voluntarily entered because of his "misunderstanding that his appeal rights were preserved if he pled guilty." Jones explains that he was worried about getting too much time on his sentence and his attorney assured him he could

appeal any decision the judge makes.[9] We first observe that Jones did not forfeit his appeal rights by his guilty plea. He in fact exercised his appeal rights. He sought postconviction relief from his sentence just as his trial counsel indicated he could. He further opted to pursue this appeal. The manifest injustice standard for plea withdrawal cannot be met by Jones's "disappointment in the punishment [he] received"; the manifest injustice standard "serves as a deterrent to impede defendants from testing the waters for possible punishments." ***State v. Manke***, 230 Wis. 2d 421, 426, 602 N.W.2d 139 (Ct. App. 1999). Additionally, the trial court is not obligated to explore with a defendant during the plea colloquy what the defendant understands to be his or her right to appeal.

Jones's citation to ***State v. Kazee***, 192 Wis. 2d 213, 531 N.W.2d 332 (Ct. App. 1995), in these circumstances is misplaced. In ***Kazee***, the defendant's motion to change his plea from not guilty to not guilty by reason of mental disease or defect was denied. ***Id.*** at 218-19. Kazee then entered an ***Alford***-type plea but, during the plea colloquy, tried to preserve his right to appeal the denial of his motion to change his plea. ***Kazee***, 192 Wis. 2d at 219. The attempt to preserve the right to appeal the denial of his motion to change his plea was ineffective and the right to appeal that denial was waived by the ***Alford***-type plea. ***Kazee***, 192 Wis. 2d at 219-220. However, the court recognized that a plea is not knowingly or voluntarily made when the defendant falsely assumed he or she has preserved a right to appeal. ***Id.*** at 220. Jones is not similarly situated as Kazee. He did not have any pretrial motions which he believed he could appeal despite the entry

[9] Jones also sets forth that when he talked to one of the sheriff deputies, he was told that "if he was given too much time he could always appeal the plea and retract it." The trial court is not required to explore every possible misapprehension a defendant may harbor from sources outside of the court proceeding.

of his guilty plea. Jones merely wants to withdraw his plea because of his disappointment in the sentence. This is not a ***Kazee*** situation where the guilty plea is defective because of a false assumption that the right to appeal was preserved. As we noted above, Jones's right to appeal was preserved and executed.

There is no arguable merit to a claim that Jones's plea was defective for any of the reasons advanced in Jones's response to the no-merit report.

Jones claims that his sentence is excessive and must be commuted under WIS. STAT. § 973.19, because ten years of extended supervision is 1.25 years longer than the law allows. The claim is based on a misunderstanding of the operation of WIS. STAT. § 973.01(2)(b)10. Felony murder is an unclassified offense. *See* WIS. STAT. § 940.03. Thus, under § 973.01(2)(b)10., the initial confinement term cannot exceed seventy-five percent of the total length of the sentence. Here the maximum Jones faced was thirty-five years' imprisonment. As Jones acknowledges, the maximum the court could have imposed was 26.25 years' initial confinement and 8.75 years' extended supervision. But contrary to Jones's position, the court could impose more than 8.75 years' extended supervision if it did not give the maximum amount of initial confinement. Here the twenty-five years of initial confinement left ten years of the maximum term to be imposed as extended supervision.[10] The sentence is not excessive.

Jones's final claim in his response is that he was denied the effective assistance of trial counsel because counsel made Jones think that his appeal rights were preserved if he pled guilty.

[10] The trial court explained this sentence structure to Jones at the plea hearing. The court told Jones that the extended supervision part of the sentence "would consist of whatever isn't used for initial confinement up to the 35 years."

As we noted earlier, Jones's appeal rights were preserved and exercised. Assuming trial counsel made the representation that Jones claims—that he could challenge the trial court's rulings—that was not inaccurate. That Jones was unsuccessful in his postconviction motion challenging the sentence does not mean that trial counsel was ineffective.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and order, and discharges appellate counsel of the obligation to represent Jones further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Mark A. Schoenfeldt is relieved from further representing Melvin Jones in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals