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September 11, 2018

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

2016AP2286-CRNM State of Wisconsin v. Antonio Devonte Jackson
2016AP2287-CRNM (L. C. Nos. 2014CF5375, 2015CF4177)

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

Antonio Devonte Jackson appeals from judgments of conviction for armed robbery, as a party to the crime, felony bail jumping, and obstructing an officer. 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). Jackson has filed a response to the no-merit report, and counsel then filed a supplemental no-merit report. *See* RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the records, the judgments are summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Jackson and others robbed a fur store. They stole six fur coats and $400 in cash. About nine months after the robbery, and while on bond in connection with the robbery case, Jackson was allegedly in possession of a handgun that accidentally discharged and wounded another individual. Police spoke to Jackson outside of the residence where the shooting occurred. Jackson identified himself as "Tommy D. Sanders" and told police that the man was shot by two men selling marijuana. These events resulted in Jackson being charged with felony bail jumping and obstructing an officer. Jackson entered guilty pleas to all the charges.[2] He was sentenced to fourteen years' initial confinement and eleven years' extended supervision on the armed robbery conviction. A consecutive sentence of one year initial confinement and three years' extended

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

[2] As part of the plea agreement, repeater allegations on all the charges were dropped and a charge of felon in possession of a firearm was dismissed as a read-in at sentencing.

supervision was imposed on the bail jumping conviction. A concurrent nine-month sentence to the House of Corrections was imposed on the obstructing an officer conviction.[3]

The no-merit report addresses the potential issues of whether Jackson's pleas were freely, voluntarily and knowingly entered and whether the sentences were the result of an erroneous exercise of discretion or were unduly harsh or excessive. 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.

In response to the no-merit report, Jackson claims that his trial counsel was ineffective because counsel failed to inform him of the read-in charge when Jackson executed the plea questionnaire.[4] As the supplemental no-merit report points out, a claim of ineffective assistance of counsel has two parts: the first part requires the defendant to show that his counsel's

[3] Jackson's plea to multiple counts resulted in the assessment of multiple mandatory DNA surcharges totaling $700, and that potential financial obligation was not addressed during the plea colloquy. We previously put these appeals on hold for a decision in ***State v. Odom***, No. 2015AP2525-CR, which was expected to address whether a defendant could withdraw a plea because the defendant was not advised at the time of his plea that multiple mandatory DNA surcharges would be assessed. The ***Odom*** appeal was voluntarily dismissed before oral argument in the Wisconsin Supreme Court. These appeals were then held for a decision in ***State v. Freiboth***, 2018 WI App 46, __ Wis. 2d __, __ N.W.2d __. ***Freiboth*** holds that a plea hearing court does not have a duty to inform the defendant about the mandatory DNA surcharge because the surcharge is not punishment and is not a direct consequence of the plea. ***Id.***, ¶12. Consequently, there is no arguable merit to a claim for plea withdrawal based on the assessment of mandatory DNA surcharges.

[4] Jackson claims his appellate counsel was ineffective for rejecting as frivolous all of the claims Jackson raises in his response and for not giving Jackson transcripts until after the no-merit report was filed. When appointed counsel and the client disagree about potential postconviction relief, a no-merit report is an approved method by which appointed counsel discharges the duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). This court's decision accepting the no-merit report and discharging appointed counsel of any further duty of representation rests on the conclusion that counsel provided the level of representation constitutionally required. Transcripts are for the use of counsel during representation. Appointed counsel is not required to provide transcripts to the defendant until after the no-merit report is filed. *See* WIS. STAT. RULE 809.32(1)(d).

performance was deficient; the second part requires the defendant to prove that his defense was prejudiced by deficient performance. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Jackson's complaint does not have arguable merit. The signing of the plea questionnaire with counsel is not the moment it is decided if a plea is knowingly and intelligently entered. The circuit court makes that determination by use of an in-court colloquy. Here, during the plea colloquy, the circuit court went over the read-in charge and what use the circuit court could make of the charge at sentencing. Jackson was given sufficient information about the read-in charge during the plea colloquy. Moreover, Jackson clarified to the circuit court that he did not admit to the read-in charge. Accordingly, Jackson cannot demonstrate that he suffered prejudice even if his attorney failed to inform him of the read-in charge when he executed the plea questionnaire.

Jackson also claims his trial counsel "had no trial strategy & did not inform me of the motions I could file. I feel he manipulated me into taking the plea." We first note that Jackson's pleas were entered on the day of trial, after a break in the proceedings, and just before a jury was going to be selected. It appears Jackson's trial counsel was prepared to proceed to trial. Further, during the plea colloquy the circuit court specifically asked Jackson whether he had discussed with counsel possible defenses and possible motions that might be filed. Jackson acknowledged he had discussed those things with counsel, and, when asked by the court, counsel confirmed they had discussed them. Jackson is now judicially estopped to adopt a position contrary to that which he took in the circuit court—that is, to claim now that he did not understand. *See* ***State v. Michels***, 141 Wis. 2d 81, 97-98, 414 N.W.2d 311 (Ct. App. 1987). Jackson's suggestion that he was manipulated is negated by his acknowledgement during the plea colloquy that he had not been promised anything or threatened to enter the guilty pleas. Jackson's counsel also explained that he and Jackson had discussed entering guilty pleas earlier during the week before the trial

date and revisited the topic during the break in the proceeding before jury selection. There is no suggestion on this record that trial counsel was ineffective with respect to Jackson's choice to enter the guilty pleas. There is no merit to Jackson's suggestion that his pleas were not entered knowingly, intelligently and voluntarily.

Jackson also claims there was inaccurate information at sentencing about his prior criminal record, including two "no processed" burglaries. The supplemental no-merit report includes police incident reports that indicate Jackson was investigated for burglaries and not charged. Even if the information was incorrect, as the discussion in the supplemental no-merit report concludes, there is no evidence that the sentencing court relied on the information regarding the uncharged crimes. To establish a due process violation, the defendant must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing. ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1.

Jackson also believes that the sentencing court relied on inaccurate information about his conduct during pretrial release when it observed that Jackson was in a drug house, possessed a gun, and gave police a false name. Jackson's claim amounts to nothing more than his denial that he possessed a firearm when he was arrested for the second set of charges. The sentencing court was not required to accept or agree with Jackson's denial. The complaint set forth a factual basis for the crimes Jackson committed while on pretrial release. There was no inaccurate information.

Finally, Jackson claims his eligibility for the substance abuse and challenge incarceration programs was not fully considered. He believes he had substance abuse involvement and should

have been entitled to an eligibility finding because his co-defendant was made eligible. The sentencing court found Jackson not eligible for those programs because the offenses were too aggravated and Jackson needed to serve all the time given. That was a discretionary determination by the court. *See* WIS. STAT. § 973.01(3g). The weight to be given to relevant factors is for the sentencing court to determine. Reliance on the aggravated nature of the crime was a proper exercise of discretion. Jackson's disagreement with the court's assessment is not grounds for filing a motion for sentence modification.

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

Upon the foregoing reasons,

IT IS ORDERED that the judgments of conviction are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney George Tauscheck is relieved from further representing Antonio Devonte Jackson in these appeals. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals