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DISTRICT II

September 4, 2019

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

2019AP353-CRNM State of Wisconsin v. Patrick J. Clemon (L.C. #2015CF1059)

Before Neubauer, C.J., Reilly, P.J, and Gundrum, J.

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).

Patrick J. Clemon appeals from a judgment convicting him of possession of a firearm by a felon, possession with intent to deliver heroin (<=3 grams), possession with intent to deliver cocaine (>1-5 grams), and possession of narcotic drugs. Clemon's appointed appellate counsel

has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Clemon has exercised his right to file a response. Upon consideration of the no-merit report and response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment and order because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Clemon was the driver of a vehicle stopped for a traffic violation.[2] Police found a cell phone, a peach pill tablet that Clemon said was Viagra, and $270 dollars in small denominations on his person. Upon searching the interior of the vehicle, they detected the odor of fresh marijuana. In the glove box, they found a handgun with a live round in the chamber and three live rounds in the inserted magazine and numerous drugs of various kinds. Clemon told police he sells the drugs to support his family and keeps the gun for protection.

Clemon, a convicted felon, was charged as follows:

> Count 1: Carrying a concealed weapon, as a repeater;
>
> Count 2: Possession of a firearm as a felon and as a repeater;
>
> Count 3: Possession with intent to deliver heroin in or near a park as a second and subsequent offense and as a repeater;
>
> Count 4: Possession with intent to deliver cocaine in or near a park as second or subsequent offense and as a repeater;
>
> Count 5: Possession with intent to deliver or manufacture THC in or near a park as a second and subsequent offense and as a repeater;

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The record does not reveal the nature of the traffic violation.

> Count 6: Possession with intent to deliver narcotics in or near a park as a second and subsequent offense and as a repeater;
>
> Count 7: Possession of illegally obtained prescription as a repeater;
>
> Count 8: Possession with intent to deliver other schedule I controlled substances in or near a park as a second and subsequent offense and as a repeater.

With the penalty enhancers, Clemon faced up to 133.5 years' imprisonment and $130,500 in fines.

After lengthy negotiations, Clemon entered no-contest pleas to Counts 2, 3, 4, and 6 with no penalty enhancers, and Count 6 was amended to simple possession of narcotic drugs. The State further agreed to dismiss and read in the remaining charges and to ask for prison without recommending the length of the sentence. The court sentenced Clemon as follows:

> Count 2: five years' initial confinement (IC) followed by five years' extended supervision (ES), consecutive to the sentence currently being served;
>
> Count 3: three and one-half years' IC followed by five years' ES, consecutive to Count 2;
>
> Count 4: three years' IC followed by three years' ES, but stayed for five years' probation; consecutive to Count 3 if revoked;
>
> Count 6: one and one-half years' IC followed by two years' ES, consecutive to stayed sentence in Count 4, but stayed for three years' probation, concurrent with probation in Count 4; consecutive to Counts 2, 3, and 4 if revoked.

The circuit court denied Clemon's postconviction motion for plea withdrawal after a hearing.[3] Appellate counsel then filed a no-merit appeal but voluntarily dismissed it and filed a

[3] Clemon also moved for sentencing relief because the court had found him eligible for the Substance Abuse Program but the judgment of conviction indicated that he was not eligible. The court ordered that the JOC be amended accordingly.

supplemental postconviction motion, again seeking plea withdrawal. After a second evidentiary hearing, the circuit court denied the motion. This no-merit appeal followed.

The no-merit report addresses whether: (1) Clemon's no-contest pleas were entered knowingly, voluntarily, and intelligently; (2) the circuit court erroneously exercised its discretion in imposing the sentence; (3) the circuit court erred in denying Clemon's postconviction motion; and (4) the circuit court erred in denying Clemon's supplemental motion for postconviction relief. As our review of the record satisfies us that the no-merit report properly analyzes these potential issues and concludes they are without merit, we address them no further. We add only that Clemon's no-contest pleas, knowingly and understandingly made, constitute a waiver of all nonjurisdictional defects and defenses including claimed violations of constitutional rights. *See* ***State v. Kraemer***, 156 Wis. 2d 761, 765, 457 N.W.2d 562 (Ct. App. 1990).

Clemon first contends in his response that none of his series of defense attorneys[4] filed any discovery motions or a motion to suppress the evidence found in the search incident to his arrest. He suggests that counsel was ineffective for not doing so. As best we can discern, he seems to believe the traffic stop was pretextual and was based on a tip from an anonymous informant, whose reliability should have been challenged.[5]

To establish ineffectiveness, a defendant must show both that counsel's performance was deficient, and that the deficient performance prejudiced his or her defense. ***Strickland v.***

[4] One moved out of state; another accepted new employment that precluded his continuing to represent Clemon.

[5] We note that Clemon personally freely, knowingly, and voluntarily waived his preliminary hearing. By doing so, he agreed the State could prove probable cause.

Washington, 466 U.S. 668, (1984). To prove deficient representation, a defendant must point to specific acts or omissions by the lawyer that are "outside the wide range of professionally competent assistance." ***Id.*** at 690. To prove prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** at 694.

Defense counsel testified at the postconviction hearing that nearly half of his practice is devoted to criminal defense and that, while he did not specifically recall discussing the issue with Clemon, it is his standard practice to "review the police report to see if there are any motion issues," and that, if he had felt there was a motion issue, he would have discussed it with Clemon. Clemon's strong focus, he said, was on resolving the matter with the least prison exposure.

Clemon presented no evidence at the hearing, and offers none here, that counsel deviated from his standard practice. He also does not hint at what information would have been revealed if counsel had sought discovery of drug test results to ascertain their correct weight, searched for witnesses for or against him, or challenged the reliability or learned the identity of the alleged confidential informant. A defendant alleging a failure to investigate "must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the case." ***State v. Leighton***, 2000 WI App 156, ¶38, 237 Wis. 2d 709, 616 N.W.2d 126.

Even if counsel might have done more discovery, he opted to work toward Clemon's emphatic goal of getting the shortest prison term possible. Strategic decisions made after even less than complete investigation of law and facts still may be found reasonable. ***State v. Carter***,

2010 WI 40, ¶23, 324 Wis. 2d 640, 782 N.W.2d 695. We see neither deficient performance nor prejudice.

Clemon next claims counsel misstated a record cite in concluding that the circuit court confirmed that Clemon understood the nature of the plea agreement. He contends the no-merit report cites record entry twenty-eight, which is irrelevant, and that even if counsel meant to cite record entry thirty-eight, that also does not support counsel's assertion. We do not see where Clemon got "28." The no-merit report cites record entry 46:3-4, which clearly supports counsel's assertion that the circuit court confirmed that Clemon understood the nature of the plea agreement.

Clemon contends the plea colloquy was insufficient under ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), because he gave only "perfunctory" answers ("Yes.") to the court's queries regarding his various understandings. He overstates ***Bangert***'s caution. Perfunctory affirmative responses by the defendant that he or she understands the nature of the offense do not satisfy the requirement of WIS. STAT. § 971.08 *when there is no affirmative showing* that the nature of the crime has been communicated to him or her or that the defendant has at some point expressed his knowledge of the nature of the charge. ***Bangert***, 131 Wis. 2d at 268-69. The record is clear that Clemon was properly advised.

Clemon next complains that appellate counsel "manipulated a dismissal" of the first no-merit appeal, then did not present the "issues of merit" to the circuit court. The supplemental postconviction motion argued that the circuit court failed to ask Clemon during the plea colloquy whether any threats or promises prompted his plea and that Clemon would testify that his lawyer repeatedly promised him he would get no more than five years' incarceration. This was

thoroughly litigated at the second postconviction motion. Clemon does not say what, if any, other issue he believes counsel should have raised.

We reject all of Clemon's issues as being without arguable merit. To the extent we have not specifically addressed any of them,[6] we nonetheless have considered them and reject them as being without arguable merit as well. Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Clemon further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Christopher P. August is relieved from further representing Clemon in this appeal. *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

[6] For example, he asserts that, at the second postconviction motion hearing, the court allowed the State to proceed first at one point, although Clemon was the movant, and that Clemon's counsel did not object to all of the court's leading questions.