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January 16, 2020

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

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2017AP2374-CRNM State of Wisconsin v. Kamonzi Turner (L.C. # 2015CF778)

Before Brash, P.J., Kessler and Dugan, 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).**

Kamonzi Turner appeals from a judgment, entered upon his guilty plea, convicting him of second-degree reckless injury with a dangerous weapon as a repeater. Turner's appellate

counsel filed a no-merit report.[1] *See* ***Anders v. California***, 386 U.S. 738 (1967); WIS. STAT. RULE 809.32 (2017-18).[2] Turner was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Turner's response, we conclude that there are no arguably meritorious issues that could be pursued on appeal. We therefore summarily affirm the judgment.

According to the criminal complaint, Turner wanted to buy half a pound of marijuana. On January 19, 2015, T.T. made arrangements for him and Turner to meet the dealer, M.J., at a Madison park and ride lot for the purchase. At the lot, Turner and T.T. got into M.J.'s car. As they were talking, possibly arguing, Turner produced a gun. T.T. was shot, and Turner fled. M.J. took T.T. to the hospital. The bullet lodged in T.T.'s neck, rendering him a paraplegic.

M.J. identified Turner from a photo lineup. T.T. initially told police he did not remember the events of the day and made no identification from a photo lineup that included Turner. When T.T. was interviewed about two months later, he said Turner, whom he has known since high school, was the person who shot him. T.T. also stated that Turner had been in the photo lineup, but he did not identify anyone at the time because he feared for his safety.

Later, in the presentence investigation report, Turner gave a different version of events, starting with the premise that T.T. and another man, D.C., were planning to "undermine" M.J., who was T.T.'s supplier. Turner said D.C. had given him the gun. Turner also said he originally

[1] The no-merit report was filed by Attorney Jeremy A. Newman, who has been replaced by Attorney Frances Philomene Colbert as Turner's appellate counsel.

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

wanted to just steal the marijuana, but M.J. "dived into the backseat" and they started wrestling over the gun, causing it to go off, which was how T.T. was shot.

Turner was charged with first-degree reckless injury with a dangerous weapon, first-degree recklessly endangering safety with a dangerous weapon, and carrying a concealed weapon, all as a repeater. He ultimately agreed to resolve the charges with a plea. In exchange for a guilty plea, the State agreed to amend the first charge to second-degree reckless injury with a dangerous weapon as a repeater, with the remaining offenses to be dismissed and read in. The State would additionally cap its sentence recommendation at ten years of initial confinement and six years of extended supervision, consecutive to any other sentence. The circuit court accepted Turner's plea after a colloquy. At sentencing, the State recommended ten years of initial confinement and five years of extended supervision. The circuit court imposed a sentence of eight years' initial confinement and seven years' extended supervision, to be served consecutively. The circuit court later commuted the term of extended supervision to five years.[3]

The first potential issue discussed in the no-merit report is whether Turner's guilty plea was knowing, intelligent, and voluntary. Our review of the record—including the plea questionnaire/waiver of rights form and plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as referenced

[3] Second-degree reckless injury is a Class F felony, punishable by up to seven and one-half years of initial confinement and five years of extended supervision. *See* WIS. STAT. §§ 940.23(2)(a), 939.50(3)(f), 973.01(2)(b)6m. The dangerous weapon and repeater penalty enhancers can only be used to extend a term of initial confinement, not extended supervision. *See* § 973.01(2)(c)1. Thus, the original seven-year term of extended supervision exceeded the maximum amount allowed by law. The record does not reflect how this error came to the circuit court's attention, but the circuit court appropriately remedied the excess sentence by commutation. *See* WIS. STAT. § 973.13.

in ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. We therefore agree with the no-merit report's analysis and conclusion that "[a]ny claim that the plea was not knowing, intelligent, and voluntary or that there was some other manifest injustice in connection with Turner's plea would be frivolous and without arguable merit."

The other potential issue the no-merit report discusses is whether there is any arguably meritorious challenge to the sentence. The report addresses the circuit court's exercise of sentencing discretion, whether a new factor exists, and whether Turner was sentenced on accurate information.

Sentencing is committed to the circuit court's discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider additional factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors, including an express intent to give Turner credit for what the circuit court determined was genuine remorse. The corrected thirteen-year sentence imposed is well within the twenty-three and one-half year range authorized by law, *see* ***State v. Scaccio***,

2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the circuit court's sentencing discretion.

There is no arguable merit to a new factor motion on the record before us. We also accept the no-merit report's representation that appellate counsel is unaware of any new factor outside the record that would warrant such a motion.

Regarding the claim of inaccurate information, the State told the circuit court at sentencing that, according to M.J.'s statement, Turner had pointed the gun at his right temple. The State thus claimed that "the shot that almost certainly came very close to terminating the life of [T.T.] was actually intended to terminate the life [of M.J.]." In his no-merit response, Turner also raises the issue of inaccurate information and asserts that there is a bullet trajectory report that directly refutes the State's argument that he intended to kill someone.

"[A] criminal defendant has a due process right to be sentenced only upon materially accurate information." ***State v. Lechner***, 217 Wis. 2d 392, 419, 576 N.W.2d 912 (1998). A defendant who seeks resentencing based on the circuit court's use of inaccurate information must show that the information was inaccurate and that the circuit court actually relied on the inaccuracy in the sentencing. *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. "Whether the [circuit] court 'actually relied' on the incorrect information at sentencing [is] based upon whether the court gave 'explicit attention' or 'specific consideration' to it, so that the misinformation 'formed part of the basis for the sentence.'" ***Id.***, ¶14 (citing ***Welch v. Lane***, 738 F.2d 863, 866 (7th Cir. 1984)).

We agree with the analysis in the no-merit report that there is no arguable merit to an inaccurate information claim because the record reflects that the circuit court did not actually rely on the State's representation. Rather, it credited Turner for "a complete and accurate, as far as anyone can tell, statement about what happened." There is no indication that the circuit court even considered the State's assertion that Turner intended to kill M.J., much less relied upon it.

In a related sentencing argument, Turner claims that his sentence was "harsh and unconscionable" because "he is the only individual being held fully accountable for what took place" and the sentence "lacks fundamental fairness … as his sentence is grossly disparate." He complains that the circuit court erroneously exercised its discretion because "the degree of culpability did not rest solely upon the defendant." However, this is not a sentencing discretion or a sentencing disparity issue but, rather, a claim that the State improperly exercised its prosecutorial discretion because it did not charge D.C. or T.T. for their involvement.

"[A] district attorney in Wisconsin has great discretion in deciding whether to prosecute a particular case." ***State v. Colton M.***, 2015 WI App 94, ¶16, 366 Wis. 2d 119, 875 N.W.2d 642. "Differences in treatment between individuals … are determined as a matter of prosecutorial discretion…. [S]uch discretion is not unconstitutional unless the prosecutor discriminates on the basis of unjustifiable criteria." ***State v. Villamil***, 2017 WI 74, ¶45, 377 Wis. 2d 1, 898 N.W.2d 482 (alterations in ***Villamil***; citation omitted).

We are unpersuaded that the record reflects any discrimination "on the basis of unjustifiable criteria." Here, it appears that D.C. was unknown to the State at the time it charged Turner; at sentencing, the prosecutor commented, "I didn't know the name of [D.C.], which is

now provided by the defendant in this matter, and at some point I guess I'm gonna look into seeing what he can do about [D.C.'s] involvement." With respect to T.T., the prosecutor stated:

> [He] deserves, I believe, to be held accountable for his participation in what I believe was his participation, a set-up of an armed robbery. On the other hand, he didn't deserve to be confined to a wheelchair for the rest of his natural life. He's 24 years old. He only has partial use of his hands and his arms; no use, no feeling at all below the chest. He's going to lead a tremendously restricted life for the rest of his life because of this. So he's paying a very, very, very heavy price.

In other words, the State evidently saw no need to further punish T.T. with criminal charges.

Based on the foregoing, the record does not support an arguably meritorious claim of discriminatory prosecution or an erroneous exercise of prosecutorial discretion. We also note that the State's decision not to charge other actors does not make the circuit court's otherwise proper exercise of sentencing discretion an erroneous one.

Turner also raises concerns about how he came to be pursued as a suspect. He contends that "law enforcement knew there was no credible source in this investigation" and says that M.J. first identified another individual and gave a description that does not match Turner, T.T. "gave a conflicting and contradictory statement about this incident," and information provided by M.T., who appears to be related to T.T., came from an anonymous source.[4] Turner further contends that the detective who testified at his preliminary hearing "left out the conflicting evidence in order to obtain warrants and lied under oath knowing that if she didn't there wouldn't have been sufficient evidence for probable cause to arrest, search warrants, or a bind over."

[4] We observe that the source material for these complaints is not a part of the appellate record.

"In order to be lawful, an arrest must be based on probable cause." ***State v. Kutz***, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 671 N.W.2d 660. "Probable cause for arrest exists when the totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." ***Id.*** "While the information must be sufficient to lead a reasonable officer to believe that the defendant's involvement in a crime is 'more than a possibility,' it 'need not reach the level of proof beyond a reasonable doubt or even that guilt is more likely than not.'" ***Id.*** (citation omitted). "The officer's belief may be predicated in part upon hearsay information, and the officer may rely on the collective knowledge of the officer's entire department." ***Id.***, ¶12. "When a police officer is confronted with two reasonable competing inferences, one justifying arrest and the other not, the officer is entitled to rely on the reasonable inference justifying arrest." ***Id.***

We thus perceive Turner to be suggesting there was a ***Franks/Mann*** violation based on the detective's supposed omission of "conflicting evidence." In ***Franks v. Delaware***, 438 U.S. 154, 155-56 (1978), the United States Supreme Court determined that a defendant was entitled to a hearing upon "a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included … in the [search] warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause[.]" In ***State v. Mann***, 123 Wis. 2d 375, 385-86, 367 N.W.2d 209 (1985), our supreme court held that "the principles of ***Franks*** permit an attack on criminal complaints where there has been an omission of critical material where inclusion is necessary for an impartial judge to fairly determine probable cause."

However, a valid guilty plea waives all nonjurisdictional defects and defenses, *see* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886, as well as any challenges to

the bindover decision, *see* ***State v. Webb***, 160 Wis. 2d 622, 636, 467 N.W.2d 108 (1991). Turner claims that he asked trial counsel to investigate these issues, though, so we review the ***Franks/Mann*** issue within the well-known framework of an ineffective assistance of trial counsel claim.

To be entitled to a ***Franks/Mann*** evidentiary hearing, there must be allegations that qualified facts were omitted from the complaint. ***Mann***, 123 Wis. 2d at 388. These allegations must be stated in an affidavit or offer of proof which identifies what has been omitted and what part of the complaint has been rendered inadequate for a finding of probable cause by the omission. *See* ***id.*** "If these requirements are met, and if, when the material previously omitted is inserted into the complaint, there remains sufficient content in the criminal complaint to support a finding of probable cause, no ***Franks*** hearing is required." ***Mann***, 123 Wis. 2d at 388.

Here, the fact that M.T. provided hearsay information from a confidential informant naming Turner as the suspect is insufficient to defeat probable cause. Not only may officers rely on hearsay, but Turner was also identified by the two victims in this case. The fact that M.J. first identified someone else, or that T.T. gave conflicting information, also does not defeat probable cause. Both men ultimately did identify Turner, and T.T., who claimed to have known Turner since high school, specifically explained his reason for not identifying Turner from the outset. As noted, the level of probable cause that officers must have for arrests is merely that a defendant's involvement is more than a possibility; officers do not need to be satisfied the defendant's involvement is beyond a reasonable doubt or even more likely than not. ***Kutz***, 267 Wis. 2d 531, ¶11. Officers may further choose an inference that supports a finding of probable cause, even if there are also permissible inferences to the contrary. ***Id.***, ¶12.

To the extent that Turner's complaint is that the witnesses against him were not credible, such a challenge goes to the weight of the information, not its admissibility. The forum for testing witness credibility is a trial, which Turner waived with his plea.

Based on the foregoing, any motion to dismiss for a lack of probable cause would have failed, as would any suppression motion sought on the same basis. Counsel is not ineffective for failing to pursue a meritless motion. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441. Accordingly, we conclude the no-merit response raises no arguably meritorious issue regarding probable cause or counsel's performance relative thereto.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Frances Philomene Colbert is relieved of further representation of Turner in this matter. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*