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January 28, 2020

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

2016AP1888-CRNM State of Wisconsin v. Jafari Mahonie (L. C. No. 2014CF979)

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).

Counsel for Jafari Mahonie has filed a no-merit report concluding there is no basis to challenge Mahonie's convictions for delivery of heroin and conspiracy to deliver heroin. Mahonie responded, and counsel filed a supplemental no-merit report. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no merit

to any issue that could be raised on appeal, and we summarily affirm. WIS. STAT. RULE 809.21 (2017-18).[1]

Mahonie and several other individuals were the subject of a large-scale sting operation in the Green Bay area conducted by the Brown County Drug Task Force. Mahonie was allegedly the main source of heroin supplied to the Green Bay drug trafficking network, bringing the heroin from Chicago. The task force arranged for controlled buys of heroin from Mahonie on at least nine separate occasions.

Mahonie eventually pleaded guilty to six counts involving the delivery of heroin and conspiracy to deliver heroin. Four other counts involving the delivery of heroin were dismissed and read in. The circuit court imposed sentences consisting of five years' initial confinement and five years' extended supervision on each of the delivery of heroin counts and twenty years' initial confinement and ten years' extended supervision on the conspiracy count, concurrently.

The no-merit report addresses potential issues regarding whether: Mahonie's pleas were knowingly, intelligently, and voluntarily entered; the circuit court properly denied motions to suppress evidence; and the court properly exercised its sentencing discretion. Upon our independent review of the record, we agree with counsel's description, analysis, and conclusion that any challenges to these issues would lack arguable merit, and we will not further address them.

We turn to the numerous matters raised in Mahonie's response to the no-merit report. Mahonie first argues that his trial counsel failed to provide him with evidence that he actually

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

possessed heroin of the quantities alleged. However, Mahonie conceded his guilt during the plea colloquy, including admitting to the quantities of heroin alleged as to each individual count.

Mahonie also argues his trial counsel failed to raise or argue impeachment evidence concerning the confidential informant in his case. However, there was no trial due to Mahonie's pleas. Therefore, the issue of impeaching a confidential informant was no longer implicated. Mahonie does not identify any other opportunity where his trial counsel could have impeached the confidential informant. Mahonie also contends there is a "possibility" the confidential informant "pinched" some of the heroin for his own use. This contention is speculative. At best, the record shows that a middleman from whom the confidential informant obtained the heroin took some of the heroin for his own use. The record, however, does not support there being any deception on the part of the confidential informant. Mahonie also suggests the confidential informant was motivated by a desire to reduce or eliminate the informant's prison sentence. The motivation of a confidential informant who may be facing charges to cooperate in exchange for a reduction in charges is not uncommon and fails to raise an arguable issue for appeal under circumstances where the defendant pleaded guilty.

Mahonie also contends his trial counsel did not request a hearing to suppress all evidence supplied by the confidential informant, citing ***Franks v. Delaware***, 438 U.S. 154 (1978). In ***Franks***, the Supreme Court held that the Fourth Amendment requires a hearing at the defendant's request if a defendant makes a substantial preliminary showing that a false statement made knowingly and intentionally, or with reckless disregard for the truth, was included in an affidavit for a search warrant, and if the allegedly false statement is necessary to a finding of probable cause. ***Id.*** at 155. Our independent review of the record fails to support the existence of any false

statements made knowingly and intentionally, or with reckless disregard for the truth, regarding the search warrant. Mahonie again simply speculates that such statements exist.

Mahonie also argues that his trial counsel failed to investigate the credibility of the confidential informant, particularly regarding charges against the informant in the State of Washington. However, these charges were known to trial counsel and were a part of the record, as evidenced by trial counsel's challenges to the credibility of the confidential informant in motions alleging police use of defective search warrants.

Mahonie asserts that he relied upon his trial counsel's advice to accept the plea offer, but that he did not understand "what was going on." However, we have already concluded that Mahonie's pleas were demonstrated to be knowingly, voluntarily, and intelligently entered. In any event, throughout the plea colloquy, Mahonie stated he understood the charges, the elements of the offenses, the constitutional rights he was waving, and the potential punishment. These statements were supported by his completed plea questionnaire and waiver of rights form, which Manhonie stated he read and understood.

Mahonie further argues that the State breached the plea agreement by comparing his case to two other cases where the defendant received twenty-five years, consisting of fifteen years' initial confinement and ten years' extended supervision, for conspiracy to distribute cocaine. According to Mahonie, the plea agreement only allowed the State to argue for substantial prison while arguing sentencing factors, yet no specific numbers. The plea agreement, however, also provided that the "State can further argue a comparative analysis with other drug conspiracies, wiretaps, or drug cases." The State specifically referenced this comparison purpose when making the sentencing argument. The State also acknowledged that the present case and the comparative

cases were "different cases" involving "a different drug." Furthermore, the circuit court responded to the State's comparison argument during rebuttal by Mahonie's trial counsel, "I have no idea what it involved. I don't really find it particularly compelling, because it's a different situation, different set of facts, different drug, different time frame, different Judge, different people."

Mahonie also argues his trial attorney incorrectly stated the maximum potential punishment for his crimes was 87.5 years, yet the State represented at sentencing the maximum potential punishment was "165 years on these offenses." Mahonie claims he "would not have agreed to plead guilty if he had known this." At the outset, we noted that Mahonie's citation to the sentencing transcript fails to support his contention. In any event, at the plea hearing, the circuit court addressed each of the charges and correctly advised Mahoney of the maximum potential punishment as to each count. The court went on to state, "I haven't added it up, but that's well over 100 years of maximum penalties, do you understand that? Mahonie responded, "Yes, ma'am." The record demonstrates Mahonie clearly understood the maximum potential punishment he was facing for each count to which he pleaded.

Mahonie further asserts that there are other issues of arguable merit not raised in the no-merit report.[2] Mahonie claims he was denied the right to a speedy trial when his trial counsel agreed to waive his speedy trial right, but the circuit court did not ask Mahonie if he agreed. However, a valid guilty or no-contest plea constitutes a waiver of any nonjurisdictional defenses or defects. ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

[2] Mahonie repeatedly uses the phrase "abused its discretion." We have used the phrase "erroneously exercised its discretion" since 1992. *See* ***Shirk v. Bowling, Inc.***, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

Mahonie also claims that he is entitled to withdraw his plea because the prosecutor failed to disclose exculpatory evidence, citing ***Brady v. Maryland***, 373 U.S. 83 (1963). Mahonie fails to identify any evidence that was actually exculpatory, and it does not appear Mahonie is claiming that he did not receive the discovery of which he complains, only that he did not receive it at the time he asked for it—prior to entering his pleas. For example, Mahonie contends the State "did not give Trial Counsel … a witness list, lab reports, or fingerprint analysis when he asked for it when demanding a speedy trial." He also asserts the State "withheld evidence that could have dismissed numerous charges or lead [sic] to the case being dismissed before Mr. Mahonie's speedy trial." Mahonie also contends the State failed to disclose the confidential informant "was a fugitive from justice in the State of Washington …." As mentioned, however, this information was known to Mahonie's trial counsel and was a part of the record, as evidenced by trial counsel's challenges to the credibility of the confidential informant in motions. Nevertheless, Mahonie chose to enter his pleas following a negotiated settlement, which served as a waiver of nonjurisdictional defenses. ***Lasky***, 254 Wis. 2d 789, ¶11.

Mahonie also contends that his appellate counsel should have raised an issue regarding the use of illegal wiretaps because the drug task force "used wire-taps surveillance without the appellant knowing about it and without asking him to permit law enforcement (Government) to wire tape [sic] his conversation & observation for illegal drugs and distribute it to other alleged drug dealers and users." Mahonie's argument is confusing. However, our independent review of the record fails to disclose any evidence of an illegal wiretap.

Mahonie also argues that the circuit court relied upon inaccurate information concerning his juvenile record at the time of his sentencing. He attaches to his response to the no-merit report a document that he purports is a copy of a confidential juvenile record. This document was

apparently not part of the record on appeal, and thus was not available to the circuit court or to the author of the presentence investigation (PSI) report. The court did not refer to Mahonie's juvenile record, but referenced an "adjudication for possession of a stolen vehicle." This was how the PSI described the matter based upon Mahoney's own reporting. The PSI author also stated, "Records regarding this term of juvenile probation were not available."

Mahonie claims the circuit court's reference to possession of a stolen vehicle was error because the actual juvenile adjudication was for "attempted vehicle hijacking." This is a distinction without a difference. When discussing this incident at sentencing, the court stated, "There's also information [in the PSI] that there was a juvenile adjudication for possession of a stolen vehicle …. And you talked about [the vehicle theft] and why the vehicle was taken and how that actually occurred." The record is clear, that the court and Mahonie were discussing the same thing, regardless of the precise label given to the adjudication. Furthermore, the fact that Mahonie was placed on probation as a result of that incident is undisputed. To the extent Mahonie argues that he was denied due process because the court referenced his juvenile record, he fails to develop an argument to explain the basis for this belief but, as mentioned, the PSI described the matter based on Mahonie's own reporting.

In sum, our independent review of the record discloses no issues of arguable merit in Mahonie's response to the no-merit report. Mahonie also filed numerous documents contending that his appointed appellate counsel has not provided competent representation on appeal, that appointed counsel has a conflict of interest, and asking that he be appointed new and competent counsel. In this regard, Mahonie claimed his family "informed him they had retained [private counsel] to represent him …." Mahonie also claimed his family informed him "that there were three attorneys they could have retained for him, however, each attorney told Appellant Mahonie's

family that if they retained them and this Court did not release Appointed Appellate Counsel … from his appointed duty to represent Appellant Mahoney, that they would forfeit the retainer's [sic] fee."

A no-merit report is an approved method by which appointed counsel discharges his or her duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). Mahonie is not entitled to the appointment of new counsel because he disagrees with counsel's no-merit conclusion. We have concluded there is no arguable merit to further postconviction or appellate proceedings in this case. 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 required level of representation.

Our independent review of the record discloses no other potential issue for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Gregory P. Seibold is relieved of his obligation to further represent Jafari Mahonie in this matter. *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