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May 5, 2020

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

2018AP1279-CRNM State of Wisconsin v. Frank N. McClinton (L.C. # 2013CF2409)

Before Brash, P.J., Donald and White, 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).

Frank N. McClinton appeals a judgment of conviction and an order denying postconviction relief. A jury found him guilty, as a party to a crime, of possession with intent to deliver more than five grams but not more than fifteen grams of cocaine and of maintaining a drug trafficking place. The circuit court found that McClinton committed each crime as a second or subsequent

offense relating to a controlled substance. For possession with intent to deliver cocaine as a party to a crime, McClinton faced maximum penalties of $50,000 and nineteen years of imprisonment. *See* WIS. STAT. §§ 961.41(1m)(cm)2. (2011-12),[1] 939.50(3)(e) (2011-12), 939.05 (2011-12), 961.48(1)(b) (2011-12). The circuit court imposed a thirteen-year term of imprisonment, bifurcated as eight years of initial confinement and five years of extended supervision. For maintaining a drug trafficking place as a party to a crime, McClinton faced maximum penalties of $10,000 and seven and one-half years of imprisonment. *See* WIS. STAT. §§ 961.42 (2011-12), 939.50(3)(i) (2011-12), 939.05 (2011-12), 961.48(1)(b) (2011-12). The circuit court imposed a concurrent seven-year term of imprisonment, bifurcated as five years of initial confinement and two years of extended supervision. The circuit court awarded McClinton the nineteen days of sentence credit that he requested, imposed two DNA surcharges, and denied him eligibility for the challenge incarceration program and the Wisconsin substance abuse program.

McClinton, by Attorney Dustin C. Haskell, filed a postconviction motion for a new trial on the ground that McClinton did not knowingly, intelligently, and voluntarily waive his right to remain silent at trial. He also moved to vacate the DNA surcharges as unconstitutional penalties. Following a hearing, the circuit court rejected his claims.

Attorney Haskell next filed a no-merit notice of appeal and a no-merit report on McClinton's behalf pursuant to WIS. STAT. RULE 809.32. McClinton filed two responses, and Attorney Haskell filed a supplemental no-merit report in reply. Upon consideration of the no-merit reports, McClinton's responses, and an independent review of the record as mandated by

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

Anders v. California, 386 U.S. 738 (1967), we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The procedural history underlying this appeal involves two related criminal proceedings. In July 2012, the State charged McClinton in Milwaukee County Circuit Court case No. 2012CF3312, with the two drug-related offenses at issue here.[2] In February 2013, shortly before the scheduled trial date, the State moved to dismiss the charges without prejudice because its witnesses were unavailable. The circuit court granted the motion. On May 28, 2013, the State refiled the charges in the instant case, along with an additional allegation of bail jumping.

The amended criminal complaint here alleged that on July 3, 2012, police were conducting surveillance of McClinton's Milwaukee, Wisconsin apartment in the 9000 block of West Birch Avenue in preparation for the execution of a search warrant for both that apartment and for McClinton's car. When officers observed McClinton leave the apartment and drive away in his car, they stopped him and explained that they were executing a search warrant. McClinton complained of chest pains and was taken to the hospital. Meanwhile, officers searched his apartment and found crack cocaine in a total amount of approximately 14.6 grams, a digital scale, and lists of names and numbers that police believed were ledgers documenting drug sales.

The amended complaint next alleged that Milwaukee Police Officer Dean Newport spoke to McClinton in the hospital on the day of the search. McClinton said that he lived in the Birch Avenue apartment and that he stored cocaine there for a person named "Mike." McClinton told

[2] Although the substantive drug-related charges in Milwaukee County case No. 2012CF3312 were the same as those alleged in the instant case, the earlier charges did not include allegations that McClinton acted as a party to a crime or that the crimes were second or subsequent narcotics offenses.

the officer that he usually stored "about a kilogram ... but had recently held 2.5 kilograms of cocaine for Mike." The complaint went on to say that in Milwaukee County Circuit Court case No. 1999CF2233, McClinton previously was convicted of maintaining a drug trafficking place, and that the conviction in that matter had not been reversed.

The amended complaint further alleged that, as of November 2012, McClinton was not in custody in case No. 2012CF3312, but was free on bond in that matter subject to the condition that he notify the circuit court within forty-eight hours after changing his address. During November 2012, police did not see McClinton at the Birch Avenue apartment. On January 29, 2013, police executed a search warrant at an apartment in the 3000 block of North 28th Street in Milwaukee, Wisconsin. The search uncovered documents and other items with McClinton's name on them reflecting that he lived in the apartment. McClinton arrived at the apartment while the search was underway and asked one of the officers to retrieve $1000 in cash that was hidden in the home. The officer found the money in the hiding place that McClinton described.

The parties conducted pretrial litigation and the case then proceeded to a jury trial. The jury found McClinton not guilty of bail jumping but convicted him as a party to a crime of possessing more than five but not more than fifteen grams of cocaine and of maintaining a drug trafficking place.

In the no-merit report, appellate counsel first examines whether McClinton could pursue an arguably meritorious challenge to the circuit court's orders denying his pretrial suppression motions. Whether to suppress evidence presents a question of constitutional fact. *See* ***State v. Samuel***, 2002 WI 34, ¶15, 252 Wis. 2d 26, 643 N.W.2d 423. When we review such questions, we

uphold the circuit court's factual findings unless they are clearly erroneous but we independently determine whether those facts satisfy the constitutional standard. *See* ***id.***

McClinton sought to suppress the suspected drug ledgers and $1000 in cash that police found during the search of his home on North 28th Street in January 2013. The circuit court rejected McClinton's claim that the cash and ledgers fell outside the scope of the search warrant, which was issued based on allegations that McClinton had moved to a new home in violation of his bond in case No. 2012CF3312. As appellate counsel explains in the no-merit report, the circuit court correctly determined that the items in fact fell within the scope of the warrant because they connected McClinton to the residence. Moreover, as appellate counsel also explains, the circuit court's ruling, even if erroneous, was harmless beyond a reasonable doubt. The State did not introduce either the cash or the ledgers at trial, and therefore no possibility exists that the failure to suppress the evidence contributed to McClinton's convictions. *See* ***State v. Harvey***, 2002 WI 93, ¶49, 254 Wis. 2d 442, 647 N.W.2d 189.

McClinton also sought to suppress the statement he made to Newport while McClinton was hospitalized on July 3, 2012. McClinton alleged that he was in custody at the hospital and therefore the officer wrongly questioned him without first giving him the warnings required by ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).[3] McClinton also alleged that "his will was overborne" by the circumstances of his hospitalization and that his statement was therefore involuntary. The State conceded that McClinton did not receive ***Miranda*** warnings but contended that they were

[3] Before questioning a suspect in custody, officers must inform the person of, *inter alia*, the right to remain silent, the fact that any statements made may be used at trial, the right to have an attorney present during questioning, and the right to have an attorney appointed if the person cannot afford one. *See* ***Miranda v. Arizona***, 384 U.S. 436, 478-79 (1966).

not required because McClinton was not in custody. The State further disputed McClinton's claim that his statement was coerced.

The circuit court conducted an evidentiary hearing at which Newport and McClinton both testified. The State also presented an audio recording of the interview. Newport testified that McClinton was handcuffed when he was first stopped by police on July 3, 2012, but he was uncuffed when he complained of chest pains, and the cuffs were never reapplied. Police did not restrain McClinton at the hospital, and Newport told McClinton at the start of the interview that he could ask the police to leave. Newport said that a second officer was in the hospital room during the interview with McClinton, but that second officer did not take part in the questioning and merely observed the interview while nurses also came and went. The audio recording of the interview confirmed that Newport told McClinton that he was not in custody, he would not be arrested due to his medical condition, he did not have to answer any questions, and if he directed the officers to leave his hospital room they would do so.

McClinton testified somewhat differently. He claimed that he was handcuffed at the hospital and that police told him he could not leave. The circuit court credited Newport's testimony, however, and disbelieved McClinton. We defer to the circuit court's credibility determinations when we review a suppression motion. *See* ***State v. Owens***, 148 Wis. 2d 922, 929-30, 436 N.W.2d 869 (1989). Based on Newport's testimony and the audio recording, the circuit court found that McClinton was not handcuffed at the hospital and that he was alert and oriented. The circuit court further found that Newport told McClinton that the officers would leave if McClinton asked them to do so and that McClinton did not make that request but instead agreed to cooperate. Those findings are not clearly erroneous, and we therefore accept them. *See* ***State v. Morgan***, 2002 WI App 124, ¶11, 254 Wis. 2d 602, 648 N.W.2d 23. We concur with the circuit

court's legal conclusion that McClinton was not in custody at the hospital, *see* ***id.***, and that he gave his statement to Newport freely and voluntarily, *see* ***State v. Clappes***, 136 Wis. 2d 222, 235-36, 401 N.W.2d 759 (1987). A challenge to the order denying McClinton's motion to suppress his statement would therefore lack arguable merit.

In response to the no-merit report, McClinton asserts that his trial counsel was ineffective in pursuing the motion to suppress his statement at the hospital because his trial counsel failed to present video evidence that he arrived at the hospital in handcuffs on July 3, 2012, and similarly failed to present testimony from hospital and law enforcement personnel that he remained handcuffed while in an emergency room bed. In his view, this evidence would have demonstrated that police erred in questioning him without first giving him ***Miranda*** warnings.

A defendant who claims that counsel was ineffective must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant must show specific acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To demonstrate prejudice, "[t]he 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." ***Id.*** at 694. If a defendant fails to satisfy one prong of the analysis, the court need not address the other. *See* ***id.*** at 697.

Appellate counsel's supplemental no-merit report demonstrates that McClinton could not pursue an arguably meritorious claim that his trial counsel was ineffective in litigating the motion to suppress McClinton's statements. Assuming for the sake of argument that trial counsel could have obtained either video or testimonial evidence that McClinton was in handcuffs when he

arrived at the hospital on July 3, 2012, McClinton cannot demonstrate that the evidence would have affected the outcome of the suppression hearing.[4] The determinative question in assessing whether police were required to give McClinton the ***Miranda*** warnings is not whether he was handcuffed, but rather whether he was in custody when the officer questioned him. *See* ***State v. Vorburger***, 2002 WI 105, ¶64, 255 Wis. 2d 537, 648 N.W.2d 829 (explaining that a person is not necessarily in custody merely because police placed the person in handcuffs for a short time). As we have seen, Newport's testimony and an audio recording reflect that Newport told McClinton before the interview began that he was not under arrest, he would not be arrested, he did not have to answer questions, and he could tell the officers to leave and they would comply. In response, McClinton said he would answer the officer's questions. Even if trial counsel had been able to show that McClinton arrived at the hospital in handcuffs, the totality of the circumstances here would nonetheless support the circuit court's conclusion that McClinton was not in custody when he spoke to Newport. *See* ***id.*** We agree with appellate counsel that further pursuit of this issue would lack arguable merit.[5]

[4] Appellate counsel advises that video does not exist of McClinton's arrival at the hospital more than eight years ago.

[5] McClinton hints that his trial counsel was also ineffective for failing to argue that his statement to Newport at the hospital was involuntary because McClinton was sick from pain medication he consumed before leaving his home. To the extent that he is making such a claim, it lacks arguable merit. "Proof of physical pain and/or intoxication should not affect the admissibility of the evidence where there is no proof that the confessor was irrational, unable to understand the questions or his responses, otherwise incapable of giving a voluntary response, or reluctant to answer the questions posed by the authorities." ***State v. Clappes***, 136 Wis. 2d 222, 241-42, 401 N.W.2d 759 (1987). No such proof exists here. Accordingly, trial counsel was not ineffective by forgoing reliance on the alleged effect of McClinton's pain medication as a basis for claiming that his statement was involuntary. *See* ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16 (holding that counsel does not perform deficiently by failing to pursue a meritless claim).

We next consider whether the jury trial presents any issues for an arguably meritorious appeal. Upon review of the proceedings, the no-merit reports, and McClinton's responses, we agree with appellate counsel that McClinton cannot present arguably meritorious claims of procedural error with respect to jury selection, the admission of evidence that he challenged, the jury instructions, or the arguments of counsel. We also conclude that appellate counsel properly summarizes the trial evidence that satisfied the elements of each crime and correctly explains why McClinton cannot pursue an arguably meritorious claim that the State failed to present sufficient credible evidence to support the guilty verdicts. No further discussion of these issues is warranted.

We turn to McClinton's claims that trial counsel was ineffective during the trial. McClinton alleges, first, that his trial counsel should have presented evidence that the money found in his home during the January 2013 search originated from a legitimate business loan and therefore did not come from drug dealing. In support, McClinton has provided this court with a document showing that he borrowed $1510 from the Payday Loan Store in January 2013. Assuming without deciding the authenticity of this document, McClinton fails to show that his trial counsel performed deficiently by not offering it at trial. *See* ***Strickland***, 466 U.S. at 687. As we have already explained, the State did not present any evidence that police found cash in McClinton's home during the January 2013 search, so the source of that cash was not relevant.[6] Trial counsel is not ineffective for declining to present irrelevant evidence. *See* ***State v. Carter***, 2010 WI 40, ¶24, 324 Wis. 2d 640, 782 N.W.2d 695.

[6] We observe that even if McClinton had showed the jury that he borrowed a large sum of money from a legitimate business, that evidence would not have negated an inference that he had a lot of cash on hand because he needed it to support a drug dealing scheme.

McClinton also alleges that his trial counsel was ineffective for failing to present certain witnesses at trial who were at the courthouse and available to testify on his behalf. Appellate counsel explains, however, that the witnesses who were not called to testify would have duplicated testimony from two defense witnesses who told the jury that McClinton often carried a lot of cash and served as a paid money lender. McClinton does not suggest that the defense witnesses who were not called would have added anything to the testimony presented. Trial counsel is not ineffective for failing to introduce cumulative evidence. *See* ***State v. Eckert***, 203 Wis. 2d 497, 513-14, 553 N.W.2d 539 (Ct. App. 1996). Further pursuit of this claim would lack arguable merit.

We turn next to whether McClinton could pursue an arguably meritorious challenge to the circuit court's postconviction order denying him a new trial on the ground that he testified at trial without knowingly, intelligently, and voluntarily waiving his right to remain silent. We conclude that such a claim would lack arguable merit.

Whether McClinton knowingly, intelligently, and voluntarily waived his right not to testify is a question of constitutional fact. *See* ***State v. Denson***, 2011 WI 70, ¶48, 335 Wis. 2d 681, 799 N.W.2d 831. We review such questions using a two-step process. *See* ***id.*** We first review the circuit court's findings of historical fact and uphold them unless they are clearly erroneous, and we then independently apply constitutional principles to those facts. *See* ***id.***

In this case, McClinton alleged in his postconviction motion that he was in so much pain during trial that he consumed more than his prescribed dose of oxycodone, and therefore he was not competent during his colloquy with the circuit court regarding his desire to take the stand and testify. During the hearing, however, McClinton admitted that he made the decision to testify at his trial well before it began, while he was at home "talking to [his] witnesses." Based on the

testimony presented at the postconviction hearing, the circuit court found that McClinton made a strategic decision to take the stand in his own defense, and the circuit court concluded that he knowingly, intelligently, and voluntarily waived the right to remain silent. The circuit court's factual findings are supported by the record, and we will not disturb them. *See* ***id.*** We independently conclude that the facts support the legal conclusion that McClinton properly waived his right to remain silent and elected to testify at trial. *See* ***id.***

McClinton suggests in his response to the no-merit report that the circuit court did not receive sufficient information to decide the postconviction motion because his postconviction counsel "refuse[d] to subpoena [McClinton's] person[a]l medical record ... validating that [McClinton] had been on oxycodone 30 MG 1mm" tablets. Pursuant to WIS. STAT. RULE 809.32(1)(g), this court can, in appropriate cases, remand the record for further fact finding to determine whether an appeal would have arguable merit. Here, however, no remand is required. Attached to the postconviction motion were not only medical records showing that McClinton had a prescription for oxycodone but also pharmacy records showing that he filled prescriptions for thirty milligram tablets of oxycodone during the time frame of his trial. Accordingly, McClinton shows no basis for further fact finding in regard to the postconviction motion.

We next consider whether McClinton could pursue an arguably meritorious claim that the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. We agree with appellate counsel that he could not do so. The circuit court indicated that punishment, protection of the community, and deterrence were the primary sentencing objectives, and the circuit court discussed appropriate factors that it deemed relevant to achieving those objectives. *See* ***id.***, ¶¶41-43. The sentences imposed were well within the maximum aggregate sentence that McClinton faced upon conviction, and he therefore cannot

mount an arguably meritorious claim that his sentences are excessive or shocking. *See* ***State v. Mursal***, 2013 WI App 125, ¶26, 351 Wis. 2d 180, 839 N.W.2d 173. Accordingly, a challenge to the sentences would be frivolous within the meaning of ***Anders***.

We next consider whether McClinton could mount an arguably meritorious challenge to the circuit court's decision finding him ineligible for the challenge incarceration program and the Wisconsin substance abuse program. Successful completion of either prison treatment program permits an inmate serving a bifurcated sentence to convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2.[7] Under most circumstances, a circuit court exercises its discretion when determining a defendant's eligibility for these programs. *See* WIS. STAT. § 973.01(3g)-(3m).[8] However, a defendant is statutorily disqualified from participating in the challenge incarceration program if the defendant has attained the age of forty years before his or her participation would begin. *See* § 302.045(2)(b). The record is uncontroverted that McClinton was sixty-three years old on the date of sentencing. Accordingly, any challenge to the order denying him eligibility for the challenge incarceration program would be frivolous within the meaning of ***Anders***.

McClinton was not statutorily disqualified from participation in the Wisconsin substance abuse program, but the circuit court found McClinton ineligible because, in its view, he "[does

[7] We cite the current version of WIS. STAT. § 302.045 and WIS. STAT. § 302.05 because neither statute has been amended since McClinton was sentenced in April 2014.

[8] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

not] have a usage problem. [He] ha[s] a dealing problem. And that's a problem for the entire community, and ... needs some serious punishment."[9] The eligibility decision was thus consistent with the sentencing goals. We will sustain a circuit court's discretionary eligibility decision if it is supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006 WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187. Because the decision here has proper support, further pursuit of this issue would lack arguable merit.

Last, we conclude that McClinton could not pursue an arguably meritorious challenge to the circuit court's order denying him relief from the DNA surcharges imposed in this case. In postconviction proceedings, he alleged that the mandatory surcharges imposed under WIS. STAT. § 973.046(1r) (2013-14), violated the *ex post facto* clauses of the United States and Wisconsin Constitutions because the version of the statute in effect when he committed his crimes in 2012 did not mandate a DNA surcharge for either of his offenses. *See* U.S. CONST. art. I, §§ 9-10, cl. 1, WIS. CONST. art. I § 12. The *ex post facto* clauses prohibit a law that "makes more burdensome the punishment for a crime after its commission." *See* ***State v. Williams***, 2018 WI 59, ¶21, 381 Wis. 2d 661, 912 N.W.2d 373 (citation and brackets omitted). While the postconviction motion was pending, the supreme court determined that application of § 973.046(1r) (2013-14) to defendants who committed their crimes before its enactment does not run afoul of the *ex post facto* clauses. *See* ***Williams***, 381 Wis. 2d 661, ¶¶16, 43. Further pursuit of this issue would be frivolous within the meaning of ***Anders***.

[9] We observe that the medical records attached to McClinton's postconviction motion did not include a diagnosis of substance abuse and reflect his physician's view that he had "no problems with morphine."

Our independent review of the record does not disclose any other potential issues for appeal. We conclude that further postconviction or appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved of any further representation of Frank N. McClinton. *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