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August 18, 2020

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

2018AP606-CRNM State of Wisconsin v. Pao Yang (L. C. No. 2015CF901)

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).

Pao Yang appeals from a judgment of conviction entered after a jury found him guilty of fourteen crimes. Yang's appellate counsel, Philip Brehm, 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). Yang filed

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

a response to the no-merit report, and Brehm filed a supplemental no-merit report. Yang filed a second response. In July 2020, pursuant to our order dated June 19, 2020, Brehm filed a second supplemental no-merit report addressing one issue. We have now reviewed the reports and the responses, and we have independently reviewed the record as mandated by ***Anders***.[2] We conclude that there is no issue of arguable merit that could be pursued on appeal. However, we have identified the need for a modification of the judgment of conviction, as directed in footnote 5. Therefore, we summarily affirm the judgment, as modified.

Yang was charged with fourteen crimes, all alleged to have taken place on October 7, 2015, in three different locations. First, the complaint alleged that at 3:00 p.m., Yang sold methamphetamine to a confidential informant ("CI") in a controlled drug buy at a parking lot. According to the police report accompanying the complaint, Yang was seated in the driver's seat of a vehicle when the CI approached the vehicle, gave Yang "$300.00 in pre-recorded buy money," and then received from Yang a "gem bag" of methamphetamine. The police report also noted that a man named Sou Yang (hereafter, "Sou"), who is Yang's cousin and who was known to law enforcement, was in the passenger seat next to Yang. Yang was charged with one count of delivery of methamphetamine as a second or subsequent offense.

Second, the complaint alleges that law enforcement officers followed Yang's vehicle when he left the scene of the drug sale and observed the vehicle make "two stops exhibiting behavior consistent [with] further drug delivery … or pickup." At one point, Sou exited the

[2] Our review of this case was delayed after we held this appeal in abeyance pending the Wisconsin Supreme Court's consideration of an appeal concerning jury instruction WIS JI—CRIMINAL 140, which was used at Yang's trial. Based on the Wisconsin Supreme Court's resolution of that appeal, there would be no arguable merit to pursuing postconviction proceedings based on the use of that jury instruction in this case. *See* ***State v. Trammell***, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564.

vehicle, leaving only Yang traveling in the vehicle. Officers conducted a traffic stop and immediately arrested Yang for selling drugs to the CI at the parking lot. They searched Yang's vehicle after a K-9 detected the odor of drugs. The officers recovered methamphetamine from two locations in the car, as well as marijuana. They also found in Yang's wallet $280 of the CI's $300 pre-recorded buy money. Based on the drugs recovered from the vehicle, Yang was charged with two counts of possession with intent to deliver methamphetamine as a second or subsequent offense and with one count of possession of THC.

Third, after the traffic stop, a search warrant was obtained for Yang's residence. The search warrant application included information about an investigation of Yang that began months earlier, as well as information about the October 7, 2015 drug sale and traffic stop. When officers executed the search warrant, they found in the residence methamphetamine, marijuana, firearms, ammunition, a silencer, two digital scales, "gem bags" used to package drugs, and other drug paraphernalia. Yang was charged with ten crimes related to the evidence seized from various locations in the home, including: two counts of possession of a firearm by a felon; possession of a firearm silencer; possession with intent to deliver THC as a second or subsequent offense; possession of THC; possession of methamphetamine; possession of methamphetamine drug paraphernalia; and two counts of possession of drug paraphernalia.[3]

[3] We observe that there appear to be two separate scrivener's errors in the criminal complaint that are related to evidence seized from the home. According to the search warrant, the home is located in the Town of Plover. The complaint indicates, however, that the home is in the Village of Hatley, which is nearby and was listed as the mailing address for Yang in the complaint. In addition, the complaint alleges that two of the crimes that took place at the home were committed in the Town of Easton, which was the location of the traffic stop. These same errors are repeated in the Information, amended Information, and verdict forms.

(continued)

Yang filed a motion to suppress the evidence discovered in the home. He alleged that the search was illegal because the home belonged to his mother, who lived in the home, and she was not named in the search warrant.[4] Yang further asserted that he did not live in the home and that the property seized was not his. The circuit court held a motion hearing at which the parties offered legal arguments. The court denied the motion, concluding that there was no legal requirement to name the owner of the home in the search warrant.

The case proceeded to a jury trial. Yang did not testify or present any witnesses. Yang's defense strategy was to assert that the State had not proven that Yang arranged the drug transaction and to suggest that his cousin, Sou, may have arranged everything. Yang's trial counsel further argued that there was insufficient evidence that Yang was living in his mother's home or that the evidence seized was his property.

The jury found Yang guilty of all fourteen counts. The circuit court imposed fourteen sentences concurrent to each other and to a revocation sentence that Yang was already serving. The longest sentences imposed were eight years of initial confinement and five years of extended supervision. The court also declared Yang eligible for the Substance Abuse Program. Finally, the court ordered Yang to provide DNA samples and pay the mandatory DNA surcharges,

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We conclude that these errors do not present an issue of arguable merit. Defects in the complaint or Information "shall be raised before trial by motion or be deemed waived." *See* WIS. STAT. § 971.31(2). Yang's trial counsel did not raise these errors before or even during the trial. Further, it is undisputed that all of the crimes were committed in Marathon County, so there would be no basis to challenge the venue. *See* WIS. STAT. § 971.19(1) ("Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided.").

[4] The motion referred to Yang's grandmother, but the woman who owned and lived in the home was Yang's elderly mother, as Yang's trial counsel indicated at the motion hearing.

stating, "I believe under current law, it's got to be on every count, and pay the surcharges."[5] *See* WIS. STAT. § 973.046(1r) (mandating payment of DNA surcharge for each felony and misdemeanor conviction); ***State v. Cox***, 2018 WI 67, ¶24, 382 Wis. 2d 338, 913 N.W.2d 780 ("[T]he plain meaning of … § 973.046(1r) is that, with respect to crimes committed after January 1, 2014, courts must impose the indicated surcharge; there is no discretion to waive it.").

The no-merit report addresses eight issues, including: whether three sets of charges were multiplicitous; whether the circuit court should have ruled on the sufficiency of the search warrant that it personally signed; whether there was sufficient evidence to support each conviction; whether the court erroneously exercised its sentencing discretion; whether there was a basis to seek sentence modification; and whether Yang's trial counsel provided ineffective assistance. This court is satisfied that the no-merit report properly analyzes the issues it raises, and based on our independent review of the record, we agree with counsel's assessment that none of those issues presents an issue of arguable merit.

Yang's responses raise numerous issues. We conclude that none of the issues Yang identifies have arguable merit. In addition to relying on appellate counsel's supplemental report, we will address the primary issues raised in Yang's responses.

[5] Although the circuit court properly imposed the mandatory DNA surcharge for each conviction, the written judgment of conviction reflects the imposition of only one DNA surcharge. The court's oral pronouncement controls the written judgment. *See* ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987). The error in the judgment is merely a defect in the form of the certificate of conviction that may be corrected in accordance with the court's actual determination. *See* ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. Upon remittitur, the circuit court either may correct the clerical error in the sentence portion of the written judgment of conviction itself or direct the clerk's office to do so. *See* ***id.***, ¶5.

First, Yang asserts that he lacks sufficient knowledge of English, which is his second language. In his supplemental no-merit report, appellate counsel notes that he "has had no issues discussing … Yang's case with him." Further, we have not identified anything in the record that indicates Yang had difficulty understanding or participating in the proceedings. Yang spoke directly to the circuit court on several occasions, including during his allocution at sentencing, which included answering a question from the court. Neither Yang nor his trial counsel requested a translator for Yang, even though they asked for a translator for Yang's mother. Finally, the presentence investigation report writer explicitly stated that Yang "was able to actively engage in the interview process, complete the paperwork requested and reported understanding the questions asked of him." We conclude that Yang has not identified an issue of arguable merit with respect to his English language skills.

Second, Yang raises several issues with respect to the CI who arranged and completed the drug transaction with Yang. The State did not call the CI as a witness at the trial. Instead, it presented evidence from the detective who witnessed the drug transaction from several feet away, seated in the CI's vehicle.

Yang argues that he "had a right to know" the CI's identity. Five months before the jury trial, Yang filed a motion seeking the CI's name and address, which is generally referred to as an ***Outlaw*** motion. *See* ***State v. Outlaw***, 108 Wis. 2d 112, 321 N.W.2d 145 (1982); *see also* WIS. STAT. § 905.10. At a subsequent pretrial hearing, the State indicated that it was not going to call the CI as a witness and, therefore, did not "believe disclosure would be appropriate." Yang's trial counsel did not object or continue to pursue the motion to disclose the CI's identity. Because Yang's trial counsel did not pursue the ***Outlaw*** motion, there would be no arguable merit to asserting that the circuit court or the State erred by not identifying the CI.

There would also be no arguable merit to Yang's assertion that his trial counsel's failure to pursue the disclosure of the CI's identity was constitutionally ineffective. To prove a claim of ineffective assistance of counsel, a defendant must show that his or her lawyer performed deficiently and that this deficient performance prejudiced him or her. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We conclude, like appellate counsel, that there would be no arguable merit to asserting that Yang was prejudiced by the non-disclosure of the CI's identity.

Yang does not deny that he was in the vehicle and accepted the money from the CI. He argues, however, that he had "a right to cross[-]examine" the CI "to establish whether Pao Yang was the actual individual who actually handled the drugs over to [the CI] and did such without instructions from Sou Yang[,] or whether Sou Yang was the actual seller and boss of the sale." Yang further suggests that he might have been "under duress to commit or assist in the committing of the crime by simply being a driver."

Yang's assertions do not provide a basis to bring a postconviction motion alleging ineffective assistance. The detective testified that Yang accepted the money from the CI and handed the CI the drugs, although the detective acknowledged that he could not see whether "there was an exchange between Sou and Pao [Yang]." There is no indication that the CI would have the information that Yang seeks. Indeed, the "debrief" of the CI outlined in a police report that was provided to the defense notes that the CI told officers that Yang "had the meth in his hand," that the CI handed him $300, and that Yang handed the CI the methamphetamine. The record does not support a basis to allege that Yang was prejudiced by his trial counsel's performance.

Yang also argues that the State should have been required to provide a copy of the CI's recorded statement to the defense and that Yang's trial counsel was ineffective for not obtaining a copy of that recording. Yang further argues that the defense should have been given additional evidence concerning text messages between Yang and the CI and that his trial counsel was ineffective for not obtaining video or audio recordings of the drug buy.

We directed appellate counsel to determine whether a copy of the CI's recorded statement exists and whether the State was willing to provide it. Appellate counsel filed a second supplemental no-merit report addressing those questions. He explains that the State has now provided appellate counsel with an audio recording of the debriefing, which is less than two minutes long. Appellate counsel also received from the State photographs of the text messages that the CI sent.

Appellate counsel has reviewed the recording and the photographs. He determined that "[t]he contents of the audio recording and photographs are summarized succinctly and accurately" in a police report that was provided to the defense before trial and was included as an attachment both to Yang's response to the no-merit report and to the supplemental no-merit report. Appellate counsel concludes that there would be no arguable merit to assert that trial counsel provided ineffective assistance or that the State committed a ***Brady*** violation by not providing the recording or photographs prior to the trial. We agree with appellate counsel's analysis and conclusion that there would be no arguable merit to seek relief based on the recording or the photographs. Finally, there is nothing in the record that suggests there is any other video or audio evidence that was not provided to the defense. Therefore, Yang has not raised an issue of arguable merit.

Next, Yang argues that his trial counsel provided ineffective assistance by failing to call Yang's mother as a witness. Yang asserts that his mother "could have testified … [that] numerous individuals had access to the residence as well as stayed at that residence." The record indicates that an attorney was appointed to represent Yang's mother and spoke with her through a translator. That attorney told the circuit court that Yang's mother said that "she would not testify that the drugs that were found or the gun or guns were hers." Yang's trial counsel indicated that the defense had decided not to call any witnesses. Based on the record, including trial counsel's explicit decision not to call any witnesses and the lack of any indication that Yang's mother would offer testimony that exculpates Yang, we conclude that there would be no arguable merit to asserting that Yang's trial counsel provided ineffective assistance by failing to call Yang's mother as a witness.

Yang also argues that his trial counsel provided ineffective assistance by not asserting that the guns recovered from the home "were planted evidence by law enforcement." He asserts that there were no photographs taken of the guns and that neither fingerprints nor DNA were found on the guns.[6] He further argues that his trial counsel should have hired an investigator to investigate the crime scene and other issues in the case. We conclude that there would be no arguable merit to pursuing a postconviction motion based on Yang's bald assertions. There is nothing in the record suggesting the evidence was planted, and it is speculation to suggest an investigator could have found evidence helpful to Yang, or provided useful testimony at trial.

[6] At trial, detectives testified that they did not conduct DNA or fingerprint testing of the guns.

In his response to the supplemental no-merit report, Yang asserts that the detective who testified about the controlled buy provided inconsistent or perjured testimony about whether Sou was in the vehicle with Yang when the CI purchased the drugs. The record does not support Yang's assertion. It is clear from the totality of the detective's testimony that he testified Sou was with Yang during the drug sale but later exited the vehicle before the traffic stop was initiated. There would be no arguable merit to challenge Yang's convictions based on the detective's testimony about Sou's presence at the controlled drug buy.

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

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction, modified as directed in footnote 5, is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Philip Brehm is relieved from further representing Pao Yang 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