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DISTRICT IV

March 23, 2023

To:

Hon. Wendy J.N. Klicko
Circuit Court Judge
Electronic Notice

Alecia Pellerini-Kast
Clerk of Circuit Court
Juneau County Justice Center
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Brian J. Jones 296501
Columbia Correctional Center
P.O. Box 900
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You are hereby notified that the Court has entered the following opinion and order:

2020AP516-CRNM	State of Wisconsin v. Brian J. Jones (L.C. # 2016CF198)
2020AP517-CRNM	State of Wisconsin v. Brian J. Jones (L.C. # 2016CF202)
2020AP518-CRNM	State of Wisconsin v. Brian J. Jones (L.C. # 2017CF213)

Before Kloppenburg, Fitzpatrick, and Nashold, 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).

Attorney J. Steven House, as appointed counsel for Brian Jones, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Jones responded to the report. We ordered counsel to address one issue further, which counsel

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

These appeals were consolidated by this court's June 19, 2020 order, pursuant to WIS. STAT. RULE 809.10(3).

did in a supplemental no-merit report, and Jones has responded to that as well. We conclude that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the records, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Jones pled no contest to one count of second-degree sexual assault, three counts of first-degree sexual assault of a child, and three counts of possession of child pornography. The court imposed sentences totaling sixty years of initial confinement and twenty-five years of extended supervision.

The no-merit report addresses whether Jones' pleas were entered knowingly, voluntarily, and intelligently. The plea colloquy sufficiently complied with the requirements of ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, and WIS. STAT. § 971.08 relating to the nature of the charge, the rights Jones was waiving, and other matters. There is no arguable basis to move for plea withdrawal based on a colloquy defect.

In Jones' response to the no-merit report, he asserts that his trial counsel coerced him into accepting the plea offer. However, Jones does not describe any specific facts that would constitute coercion by counsel. There is no arguable merit to this issue.

Jones asserts that his trial counsel presented him with a plea offer by the State that included a sentencing cap of twenty-five years, and that the State breached that agreement by recommending, at sentencing, a total of twenty-five years of initial confinement and twenty years of extended supervision. There is no arguable merit to this issue because the State's sentencing

recommendation was consistent with its obligation under the plea agreement that was described twice on the record at the plea hearing.

The no-merit report addresses whether Jones' trial counsel was ineffective for failing to seek suppression of evidence on several grounds. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the 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. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

The no-merit report concludes that trial counsel had no basis to move to suppress evidence on the ground that police executed the search warrant on Jones' residence without knocking and announcing their presence. That conclusion was based on case law holding that a violation of that requirement does not lead to application of the exclusionary rule. *See* ***Hudson v. Michigan***, 547 U.S. 586 (2006). Jones' response does not appear to dispute this point. There is no arguable merit to this issue.

Jones argues that his trial counsel should have moved to suppress evidence on the ground that police failed to secure the residence when they left. This argument lacks arguable merit because, even if such a legal requirement exists, there is no reason to believe that failure to comply with it is a basis to exclude evidence. Given that the unlawful entry was not a basis for exclusion under ***Hudson*** above, there is no reason to think that an exit without locking a door would have a different legal result.

The no-merit report addresses whether trial counsel was ineffective by not moving to suppress evidence on the ground that police began the search before the warrant was issued. The no-merit report concluded that this issue lacks merit because there is nothing in the record supporting Jones' factual contention that the search began before warrant issuance. In our order of May 9, 2022, we observed that a motion based on a theory of ineffective assistance would not be confined to the existing record, and we directed counsel to further review this issue.

Counsel has responded to that order with a supplemental no-merit report concluding that there is no basis to claim that trial counsel was ineffective, because counsel's investigation suggests that Jones never informed his trial counsel about the witness who would potentially provide factual support for the claim that the search began before issuance of the warrant. We decline to follow this analysis because it is based on numerous factual statements in the supplemental no-merit report that are not also included in counsel's accompanying affidavits. However, we conclude that the issue would be frivolous for a different reason, as we next discuss.

To prevail on a motion claiming ineffective assistance on this ground, it would be necessary for Jones to show prejudice by showing that, if a suppression motion had been filed, it would have been successful and evidence would have been suppressed. A necessary part of that showing would be proving that police did, in fact, begin the search before issuance of the warrant.

The search warrant itself contains a statement signed by the detective applicant for the warrant stating that the signed warrant was received and endorsed by him at 9:57 p.m. Jones relies on this statement as establishing the time at which the warrant was issued.

Jones relies on two sources of information to assert that the search began earlier than that. One source is a "CAD Operations Report" that he provides a copy of. He does not provide a clear explanation of what this document is. However, it appears to be a printout from the sheriff's department that contains "call detail information" for events at Jones' residence on the evening of the search.

Jones asserts that this document shows that the search began before 9:57 p.m., but he does not clearly explain what entries on the document support that conclusion. The document does not appear to support that conclusion. It appears to show that officers were "on scene" at 9:30 p.m., and that "execu[t]ion" of the search warrant was at 10:34 p.m. That latter time is consistent with a sheriff's department certification on the warrant stating that it was served at 10:34 p.m. That is also thirty-seven minutes *after* the time that Jones relies on as the issuance of the search warrant. Accordingly, this document does not appear to help prove that the search began before issuance of the warrant.

Jones' second source of information is his brother. In Jones' response to the original no-merit report, he identified his brother, who was the owner of the property where Jones resided, as a witness who saw police conducting the search before that time. According to Jones, his brother arrived home at approximately 9:45 or 9:50 p.m. and found police already in Jones' residence.

However, current counsel was unable to confirm this information. In an affidavit with the supplemental no-merit report, current counsel avers that he twice discussed this issue with Jones' brother, and that the brother could not recall what the time was when he returned to the property and saw the search underway.

In Jones' response to the supplemental no-merit report, he argues that the brother's arrival time must have been 9:45 or 9:50 p.m., based on where the brother was coming from and how long that trip should normally take. This may be well-informed speculation, but it is still only speculation. It would be frivolous to argue that this speculation, by itself, is sufficient to establish when the search began.

Jones also states that his brother previously told him that this was the time he arrived at the property. However, it is unlikely that Jones would be permitted to testify to this, because it appears to be inadmissible hearsay to which no exception applies to make it admissible. *See* WIS. STAT. § 908.02.

In sum, we conclude that a claim of ineffective assistance on this ground would be frivolous because there does not appear to be sufficient evidence to support a finding that the search was already underway when the warrant was issued.

The supplemental no-merit report addresses the brother's statement that, when he saw the search in progress, police told him that a warrant was on the way. The report considers whether a motion to suppress could have been filed based on failure to serve the warrant, or to have a warrant present, when the search began. The report concludes that this is not a basis for a suppression motion because Wisconsin law does not require service of the warrant. *See* WIS. STAT. § 968.12. Jones does not appear to dispute this conclusion, and we accept it.

The no-merit report addresses whether Jones' trial counsel was ineffective by not filing a suppression motion based on the theory that the search warrant application provided false information, or omitted material facts, related to video interviews of two child victims. The no-

merit report describes the ways in which Jones believes there was false or omitted information, and explains, with specific references to the videos, why counsel believes this issue has no arguable merit.

Counsel has provided us with copies of the video interviews, and we have reviewed them. We agree with counsel's description of the material on the videos, and that they provide no basis to claim that a suppression motion should have been filed based on false or omitted information.[2]

In Jones' response to the no-merit report, he argues that, during the video interviews of the children, the interviewer improperly used leading questions and improperly used anatomical diagrams. Flaws such as these might be a basis to argue that the interviews were not admissible at trial, or that they should be given little weight by the fact finder at trial. However, there was no trial in this case. Instead, the main use of the interviews was as a basis for the search warrant. In that context, there is no arguable merit to this issue. Jones might potentially claim that these alleged flaws should have been included in the search warrant affidavit. However, again, having viewed the videos, we do not see these flaws as changing the above conclusion that there was no basis to argue that trial counsel should have filed a suppression motion arguing that the warrant affidavit omitted information that should have been included.

In Jones' response, he argues that the sentencing judge was biased. He asserts that bias was shown because the court imposed a sentence longer than recommended in the presentence investigation report or argued for by the State and Jones, and made the sentences consecutive

[2] Due to the sensitive nature of the material, we are ordering that this court's clerk retain the videos under seal.

rather than concurrent, as recommended. There is no legal basis to argue that these exercises of judicial discretion, by themselves, establish bias.

The no-merit report addresses Jones' sentences. As explained in the no-merit report, the sentences are within the legal maximum. As to discretionary issues, the standards for the circuit court and this court are well established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the circuit court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

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

Therefore,

IT IS ORDERED that the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the clerk of this court shall retain under seal the DVD discs provided by Jones' counsel.

IT IS FURTHER ORDERED that Attorney House is relieved of any further representation of Jones 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