OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

June 13, 2023

To:

Hon. David L. Borowski
Circuit Court Judge
Electronic Notice

John W. Kellis
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Esther Cohen Lee
Electronic Notice

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

2021AP1483-CR State of Wisconsin v. Fredrick Dion Rivera (L.C. # 2017CF3718)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Fredrick Dion Rivera appeals from a judgment, convicting him on two counts of robbery with the use of force and one count of burglary, all as a party to the crime, and from an order denying his postconviction motion seeking to vacate two of the convictions or, in the alternative, resentencing. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).[1] The judgment and order are summarily affirmed.

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

Eighteen-year-old R.C.L. ("Ronald")[2] and his fourteen-year-old brother T.A.L. ("Thomas") were in their home, playing the basketball game NBA 2K on their gaming console, when Thomas received a message from his friend, Jevon Cole. Thomas told Cole that he was at home, playing the video game with his brother. About ten minutes later, Ronald received a phone call from his friend, who told Ronald that Cole and "some guys" were walking to Ronald's home.

When the doorbell rang, Ronald went to answer it while Thomas remained upstairs. When Ronald opened the door, he did not see Cole. Instead, he saw two other men—one with a cast and one with dreadlocks. The men forced their way inside and one of them hit Ronald in the face, causing him to fall over a coffee table. Ronald testified that the man with the dreadlocks, whom he identified at trial as Rivera, ran upstairs.

Thomas had heard yelling downstairs and heard something fall, so he started downstairs to see what was happening. As he did, a man with dreadlocks shoved him out of the way, unplugged the gaming console with the game still in it, took the console and a red controller, and went downstairs. Thomas was unable to make an identification in a photo line-up.

When Rivera came downstairs with the gaming console, one of the men asked Ronald if he had anything else. Ronald gave them some cash, although he did not know how much he had given them. The two men ran out the door.

[2] This matter involves crime victims. For ease of reading and pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use pseudonyms instead of the victims' names.

Thomas called police. Ronald told police that he had never seen the man with the cast before, but he had seen the other man with Cole in the past. Thomas told police where Cole lived. A detective and other officers went to Cole's apartment and spoke to his mother, who told them that Cole was not at home. As police were speaking with her, they saw Cole and Rivera come out of an apartment across the hall. Both were taken into custody.

The apartment Cole and Rivera exited belonged to Rivera's sister. Police asked for her consent to search the residence, which she granted. On the living room table, they found a backpack, inside of which was a gaming console connected to the television.[3] Inside the console was the NBA 2K game. On the floor, there was a red controller.

Rivera and Cole were jointly charged with one count of robbery with the use of force as party to a crime. The complaint identified Ronald as the victim. The first information filed in Rivera's case repeated the singular charge.

On August 27, 2018, the State extended a plea offer, which Rivera rejected. On September 12, 2018, the parties appeared before the trial court on the State's request to reschedule Rivera's jury trial, which was set to begin the following week. The adjournment request was based on a conflict in the prosecutor's schedule and on difficulties subpoenaing Cole. At the hearing, the State informed the court and Rivera of its intent to file an amended information with additional charges. The trial court granted the adjournment and instructed the State to "file it today and do the information and we will be operating under the amended

[3] According to the criminal complaint, police also found paternity testing paperwork belonging to Rivera in the backpack.

information then." Rivera's defense attorney acknowledged receipt of the amended information, waived its reading, and entered not guilty pleas on Rivera's behalf. The amended information kept the initial robbery charge and added a second count of robbery by the use of force with Thomas as the victim and one count of burglary, all as a party to a crime.

Rivera's jury trial began over a year later, in November 2019. The jury convicted Rivera of all three charges. After the verdicts were read, Rivera lashed out, swearing at everyone and spitting on his attorney. The trial court cleared the courtroom. It reconvened later and permitted defense counsel to withdraw, adjourning for a status of counsel hearing before sentencing. At sentencing, the trial court imposed two years of initial confinement and two years of extended supervision on each of the counts, to be served consecutively.

Rivera filed a postconviction motion seeking to vacate two of the convictions or, in the alternative, to modify his sentences. He alleged that the State and the trial court "failed to follow the procedures required by the statutes and the caselaw for the filing of an Amended Information" because the State failed to file a formal motion and the court made no express determination as to whether the amendment would prejudice Rivera. Rivera further alleged that his trial attorney was ineffective because she "never objected to the filing of the Amended Information, never asked the state for its reason for filing, and never demanded that the Court make a determination as to whether the filing of it would prejudice the defendant's rights." Alternatively, Rivera sought sentence modification, arguing that his sentence "was unduly harsh and severe, especially in light of the sentence of probation given to" Cole. The trial court denied the motion without a hearing. Rivera appeals.

I. Amending the Information

"A complaint or information may be amended at any time prior to arraignment without leave of the court"; "[a]t the trial, the court may allow amendment of the complaint, indictment or information to conform to the proof where such amendment is not prejudicial to the defendant." *See* WIS. STAT. § 971.29(1)-(2). While Rivera asserts that "[f]rom the point of arraignment on, the prosecutor is required by § 971.29(1) to seek leave of the court before it amends an information" without exception, the statute itself "does not directly address the question of the amendment of the information after arraignment and before trial." Rather, § 971.29 "'should be read to permit amendment of the information before trial and within a reasonable time after arraignment, with leave of the court, provided the defendant's rights are not prejudiced[.]'" *See* ***State v. Webster***, 196 Wis. 2d 308, 318, 538 N.W.2d 810 (Ct. App. 1995) (citation omitted).

Rivera thus contends that, in order to amend the information, the State is required to file a formal motion, after which he says the trial court must make findings "as to whether the amendment would prejudice the defendant's rights, including his right to notice, his right to a speedy trial, and his right to have an opportunity to defend the charges."[4] However, WIS. STAT. § 971.29 does not prescribe a particular process—motion or otherwise—by which the State must

[4] For this proposition, Rivera relies on ***State v. Conger***, 2010 WI 56, 325 Wis. 2d 664, 797 N.W.2d 341, but that reliance is misplaced. That case involved the circuit court's refusal to accept a plea agreement under which the State would amend a felony charge to three misdemeanors. *See* ***id.***, ¶7. Although the case references WIS. STAT. § 971.29 in its analysis, the primary questions presented in that case were "under what circumstances may a circuit court reject a plea agreement" and "what factors may a court consider when it reviews a plea agreement?" ***Id.***, ¶1. It was not an exploration of the requirements of § 971.29.

seek the trial court's permission to amend the information between arraignment and trial, nor is there a specified procedure by which the trial court must express its approval of an amendment.

Here, the State indicated its desire to amend the information when it told the trial court: "And I do also want to state that I will be filing an amended information … which will be adding the counts of robbery and adding a count of burglary." The trial court asked how the matter should be scheduled, "[f]or another jury or do you want to set a time to have the amended information filed?" When the State offered to file it "right this second," the trial court clearly authorized the amendment by responding, "Let's file them today…. [L]et's file it today and do the information and we will be operating under the amended information then."[5] That is, the trial court's comments clearly, if implicitly, reflect its approval of the State's proposed amendment.

To the extent that Rivera also complains the trial court "never made any determination as to either the two new charges that were being filed would prejudice [his] constitutional rights," he does not allege which rights were violated, or how. The trial court need not grant relief, or even a hearing, on conclusory allegations. *See* ***State v. Ruffin***, 2022 WI 34, ¶35, 401 Wis. 2d 619, 974 N.W.2d 432. Moreover, "[n]otice to the defendant of the nature and cause of the accusations is the key factor in determining whether an amended charging document has prejudiced a defendant." ***State v. Wickstrom***, 118 Wis. 2d 339, 349, 348 N.W.2d 183 (Ct. App. 1984). "When the defendant has such notice, there is no prejudice in allowing the [S]tate to

[5] After the State filed the amended information, defense counsel confirmed that she and Rivera "have received the amended information and we would waive its reading and enter a plea of not guilty." In the postconviction motion, Rivera alleged he "was not present during this conference" and that defense counsel "improperly participated in the arraignment … without the defendant being present at the time, without him even knowing that this accusatory instrument was being filed against him or the contents of it." However, the transcript reflects that defense counsel appeared "on behalf of Mr. Rivera *who appears in person*." (Emphasis added.) Rivera identifies no evidence to support his claim of nonappearance.

amend the complaint to charge additional counts supported by the original complaint." ***Id.*** The additional charges in the amended information were based on the same incident as the original charge; thus, Rivera can hardly claim a lack of notice of the factual allegations supporting the amended charges, nor can he reasonably contend that his ability to defend against the charges at a trial that began over a year later was adversely affected by the amendment.

Further, even if the trial court had denied the State's request to amend the information, the State was well within the statute of limitations and, thus, could have filed a separate complaint with the additional charges. Because the new charges arise from the same incident as the original charge, a joinder motion inevitably would have been granted, as "the purpose of joinder is to promote economy and efficiency in judicial administration and avoid multiple trials." *See* ***State v. Salinas***, 2016 WI 44, ¶43, 369 Wis. 2d 9, 879 N.W.2d 609. This process would have yielded the same result as amending the information.

Accordingly, it is clear that Rivera was not impermissibly prejudiced by the amended information in any way. For this reason, there is also no basis for Rivera to claim that trial counsel was ineffective for failing to object to the amended information. *See* ***Webster***, 196 Wis. 2d at 316 (holding that failure to obtain the court's permission to amend the information is a procedural defect that can be forfeited by failure to timely object); *see also* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("[A]n attorney's failure to pursue a meritless motion does not constitute deficient performance.").

Rivera additionally complains that defense counsel never asked the State for its reasons for amending the complaint. Believing it to be an attempt at manipulation after he rejected the State's plea offer, Rivera asserts that "there are no precedents that allow the charging of the new

crimes against the defendant for the purpose of pressing a defendant to accept a plea bargain and waive his right to trial without first obtaining the court's leave to charge the new crimes in an Amended Information." We disagree.

"While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages the negotiation of pleas.'" ***Bordenkircher v. Hayes***, 434 U.S. 357, 364 (1978) (citation omitted; brackets in ***Bordenkircher***). "It follows that, by tolerating and encouraging the negotiation of pleas, [the Supreme] Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty." ***Id.*** "[O]penly present[ing] the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution … [does] not violate" due process. ***Id.*** at 365; *see also* ***State v. Cameron***, 2012 WI App 93, ¶17, 344 Wis. 2d 101, 820 N.W.2d 433; ***State v. Williams***, 2004 WI App 56, ¶48, 270 Wis. 2d 761, 677 N.W.2d 691.

Based on the foregoing, we discern no error by the trial court in accepting the State's amendment to the information. We further discern no ineffective assistance of trial counsel relative to the amendment process.

II. Sentencing

Rivera's postconviction motion also sought resentencing. He complained that his twelve-year sentence is unduly harsh and excessive when compared to Cole's probationary sentence.

Wisconsin recognizes the importance of "individualized sentencing." *See* ***State v. Gallion***, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. Defendants do not receive the same punishment simply because they are convicted of the same offense. Rather, they are to be "sentenced according to the needs of the particular case as determined by the criminals' degree of culpability and upon the mode of rehabilitation that appears to be of greatest efficacy." ***McCleary v. State***, 49 Wis. 2d 263, 275, 182 N.W.2d 512 (1971). "[A] sentence given to a similarly situated codefendant is relevant to the sentencing decision, [but] it is not controlling." *See* ***State v. Giebel***, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995) (citation omitted). No two convicted felons stand before the sentencing court on identical footing, and no two cases will present identical factors. *See* ***Gallion***, 270 Wis. 2d 535, ¶48.

At Rivera's sentencing, the trial court clearly articulated the factors that it thought differentiated Rivera and Cole. Cole had accepted responsibility and entered a plea while Rivera continued to deny any involvement. Cole had no prior criminal record when he was sentenced. Rivera had spit on his attorney after the verdict and swore at the bailiffs and the trial court. We further note that Cole was only charged with the original count of robbery, which was amended to harboring or aiding a felon, while Rivera was convicted of two robberies and a burglary.

The trial court had also cited Cole's "overall cooperation, which Rivera protests, claiming "Cole had not cooperated at the trial and he should not have been given credit for having done so." However, the propriety of Cole's sentence is not before us. Rivera's twelve-year sentence is well within the forty-five year maximum he could have received,[6] and a sentence well within

[6] By contrast, Cole's amended offense was a Class I felony, which is punishable by a maximum of three and one-half years of imprisonment.

the limits of the maximum is presumptively not unduly harsh or unconscionable. *See* ***State v. Grindemann***, 2002 WI App 106, ¶32, 255 Wis. 2d 632, 648 N.W.2d 507.

The trial court did not err when it denied Rivera's postconviction motion.

Therefore,

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

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

Sheila T. Reiff
Clerk of Court of Appeals