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DISTRICT I

August 1, 2023

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

2021AP650-CRNM	State of Wisconsin v. Lamon Devell Davis, Jr. (L.C. # 2018CF1195)
2021AP651-CRNM	State of Wisconsin v. Lamon Devell Davis, Jr. (L.C. # 2018CF3045)

Before White, 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).

Lamon Devell Davis, Jr., appeals judgments of conviction entered in two consolidated cases. In one case, Davis pled guilty to two counts of armed robbery; in the other case, he pled guilty to intimidating a witness and bail jumping. The circuit court imposed an aggregate thirty-year term of imprisonment. Davis's appellate counsel, Attorney David Malkus, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT.

RULE 809.32 (2021-22).[1] Davis filed a response, and Attorney Malkus filed a supplemental no-merit report. Upon consideration of the no-merit reports, Davis's response, and an independent review of the records as mandated by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

In Milwaukee County Circuit Court case No. 2018CF1195, which underlies appeal No. 2021AP650-CRNM, the State filed a criminal complaint alleging that on January 7, 2018, D.A.V. reported to police that he had arranged to meet his drug dealer, Davis. When D.A.V. drove up to the meeting place, Davis brandished a gun, ordered D.A.V. out of his car, and drove away in D.A.V.'s vehicle after firing a shot in D.A.V.'s direction. Police recovered the car and found Davis's fingerprints on it.

The complaint further alleged that on January 12, 2018, I.G. and M.T. reported a robbery. They told police that a male suspect had approached them at a casino and requested a ride. The three men left the casino in a Suzuki vehicle that I.G. had borrowed from his mother. When I.G. drove into an alley, the suspect produced a handgun and demanded "everything." I.G. gave the gunman $200 and a jacket that contained his iPhone. M.T. gave the gunman an identification card. The gunman then drove away in the Suzuki. Using the "find iPhone" application, police located the suspect that same day and arrested him after a foot chase. Davis was identified as the suspect. At the time of his arrest, he had two bags of marijuana and $200 on his person.

Based on the foregoing, the State charged Davis with three counts of armed robbery and one count each of recklessly endangering safety, obstructing an officer, and possessing a

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

controlled substance. Davis requested a jury trial. On the June 25, 2018 trial date, however, the prosecutor advised the circuit court that the State had uncovered evidence of Davis's efforts to intimidate M.T., I.G., and I.G.'s mother D.N.C., who were all witnesses in the case. The circuit court adjourned the trial to permit the State an opportunity to investigate this evidence.

The State then filed a complaint in Milwaukee County Circuit Court case No. 2018CF3045, which underlies appeal No. 2021AP651-CRNM. In this complaint, the State charged Davis with two counts of intimidating a witness and two counts of bail jumping. According to the complaint, a Milwaukee County Jail inmate that the State believed was Davis, used another inmate's personal identification number (PIN) to place a call to M.T.'s telephone number on March 24, 2018. The caller inquired "how much" the called party wanted and added "whatever ya'll want." The complaint further alleged that, later that day, several calls from the jail were placed to a second telephone number using both Davis's PIN and another inmate's PIN. The caller, who appeared to be the same person in each instance, encouraged the called party to "contact 'them'" and apply "pressure."

The two circuit court cases were joined for trial. On the trial date, however, M.T., I.G., and D.N.C. did not appear. The circuit court therefore held a hearing on the State's motion to admit the missing witnesses' hearsay statements on the ground of forfeiture by wrongdoing, specifically, that Davis had forfeited his right to confront those witnesses by inducing their nonappearance with threats and bribes. The circuit court granted the motion.

Davis then elected to resolve the charges with a plea agreement. Pursuant to its terms, he pled guilty to two counts of armed robbery—the counts involving D.A.V. and I.G.—in case No. 2018CF1195, and one count each of intimidating a witness and bail jumping in case

No. 2018CF3045. The State agreed to recommend "substantial prison" as a global disposition and moved to dismiss and read in the other charges for sentencing purposes. The circuit court accepted Davis's guilty pleas and granted the State's motions regarding the other charges.

The matters proceeded to sentencing. For each armed robbery conviction, a Class C felony, Davis faced a maximum penalty of a $100,000 fine and forty years of imprisonment and, because he had a prior conviction for possessing a firearm while a felon, he also faced a minimum of five years of initial confinement. *See* WIS. STAT. §§ 943.32(2), 939.50(3)(c), 973.123(1)-(2), (3)(a) (2017-18). For intimidating a witness, a Class G felony, Davis faced a maximum penalty of a $25,000 fine and ten years of imprisonment. *See* WIS. STAT. §§ 940.43(7), 939.50(3)(g) (2017-18). For bail jumping, a Class H felony, Davis faced a maximum penalty of a $10,000 fine and six years of imprisonment. *See* WIS. STAT. §§ 946.49(1)(b), 939.50(3)(h) (2017-18).

The circuit court imposed an eighteen-year term of imprisonment for the armed robbery of D.A.V., bifurcating the sentence as twelve years of initial confinement and six years of extended supervision. The circuit court imposed a consecutive twelve-year term of imprisonment for the armed robbery of I.G., bifurcating the sentence as eight years of initial confinement and four years of extended supervision. For each of the other two convictions, the circuit court imposed an evenly bifurcated two-year term of imprisonment and ordered Davis to serve those sentences concurrently with any other sentence. The circuit court also found Davis eligible for the Wisconsin substance abuse program after serving eighteen years of initial confinement.

Davis pursued a postconviction motion, seeking sentence credit for the entirety of the period from January 12, 2018, when he was first arrested in connection with the crimes charged in case No. 2018CF1195, until his sentencing on January 3, 2019. The circuit court granted the motion, awarding him 356 days of credit against his aggregate sentence in case No. 2018CF1195, and 186 days of credit against his sentences in case No. 2018CF3045. He appeals.

We first consider whether Davis could pursue an arguably meritorious claim for plea withdrawal on the ground that his guilty pleas were not entered knowingly, intelligently, and voluntarily. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). The records show that at the outset of the plea hearing, the circuit court established that Davis had signed a plea questionnaire and waiver of rights form and addendum for each case, that he had reviewed those forms and attachments with his trial counsel, and that he understood them. *See* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (providing that a completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent, and voluntary plea). The circuit court went on to conduct a colloquy with Davis as required when accepting a plea other than not guilty.[2] *See* ***id.***, ¶18; *see also* WIS. STAT. § 971.08. The records—including the plea questionnaire and waiver of rights forms and addenda; the attached jury instructions that Davis signed describing the elements of the crimes to which he pled guilty; and the plea hearing

[2] During the plea colloquy, the circuit court fulfilled its duty to explain the range of punishments that Davis faced for each conviction. *See* ***State v. Cross***, 2010 WI 70, ¶18, 326 Wis. 2d 492, 786 N.W.2d 64; WIS. STAT. § 971.08(1)(a). The circuit court then slightly overstated the maximum aggregate punishments, stating that Davis faced an aggregate maximum imprisonment of 100 years rather than ninety-six years, and an aggregate maximum fine of $250,000 rather than $235,000. Minimal overstatements of this kind do not undermine the knowing, intelligent, and voluntary nature of a plea. *See* ***Cross***, 326 Wis. 2d 492, ¶40.

transcript—demonstrate that Davis entered his guilty pleas knowingly, intelligently, and voluntarily. We agree with appellate counsel that further pursuit of a challenge to the validity of Davis's guilty pleas would lack arguable merit.

We also agree with appellate counsel's conclusion that Davis could not mount 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. Before pronouncing sentence, the circuit court identified protection of the public as the primary sentencing goal, and the circuit court discussed the factors that it viewed as relevant to achieving that goal. *See* ***id.***, ¶¶41-43. The circuit court's discussion included consideration of the mandatory sentencing factors, namely, "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentences imposed were within the maximums allowed by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and were not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Accordingly, a challenge to the circuit court's exercise of sentencing discretion would be frivolous within the meaning of ***Anders***.

In response to the no-merit report, Davis alleges that his trial counsel was ineffective. A defendant who claims that counsel was ineffective must show that counsel's performance was deficient and that the deficiency was prejudicial. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate deficiency, a defendant must show that counsel's performance "fell below an objective standard of reasonableness." *See* ***id.*** at 688. 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, a reviewing court need not address the other. *See* ***id.*** at 697.

Davis asserts that his trial counsel failed to investigate his contention that D.A.V. willingly gave his car to Davis. According to Davis, he told his trial counsel that he accompanied D.A.V. to four different places where D.A.V. tried to use his bank card to withdraw money so that he could purchase drugs from Davis. When D.A.V. could not get any money, he agreed to give his car to Davis in exchange for drugs. According to Davis, he had "several witnesses" to this agreement but his trial counsel failed to interview them, failed to obtain surveillance video from the businesses where Davis and D.A.V. purportedly went to get cash, and failed to subpoena D.A.V.'s bank records. Davis goes on to allege that trial counsel's failure to investigate was "the only reason [he] did not proceed with jury trial."

Appellate counsel advises that he has reviewed trial counsel's file, and it reflects that trial counsel was unable to obtain surveillance footage from the businesses that Davis identified because the recordings had been overwritten and no longer existed. Clearly, it would be frivolous for appellate counsel to allege that trial counsel performed deficiently for failing to obtain evidence that does not exist. *See* ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16. We also agree with appellate counsel's assessment that Davis could not demonstrate prejudice as a consequence of trial counsel's alleged failure to subpoena D.A.V.'s bank records. D.A.V.'s banking activity would neither demonstrate that D.A.V. gave his car to Davis nor rebut evidence that Davis stole D.A.V.'s car.

As to Davis's claim that his trial counsel failed to investigate potential witnesses, appellate counsel advises that his review of both trial counsel's file and the file of Davis's

predecessor appellate counsel revealed that Davis did not tell either of those attorneys about witnesses who allegedly saw D.A.V. willingly give his car to Davis. Appellate counsel further advises that he himself never previously received information from Davis about such witnesses. This court's independent review of the appellate records does not reveal any such disclosures from Davis in the pretrial letters that he filed in the circuit court on his own behalf. Moreover, the records reveal that after sentencing, Davis wrote a letter to the circuit court seeking sentence modification based on trial counsel's alleged deficiencies, and that letter did not include any suggestion that trial counsel failed to investigate witnesses.[3] Instead, Davis stated that he "did not go thru [sic] with jury trial because my attorney ... told me if I plead guilty that I will receive no more than 5 to 7 years in prison." In sum, nothing shows that Davis ever told trial counsel about witnesses who might support a claim that D.A.V. willingly gave his car to Davis. It would be frivolous for Davis to argue that his trial counsel was ineffective for failing to investigate witnesses that Davis did not disclose. *See* ***State v. Jones***, 2010 WI App 133, ¶33, 329 Wis. 2d 498, 791 N.W.2d 390.

In light of Davis's postconviction letter to the circuit court seeking sentence modification, we have also considered whether Davis could mount an arguably meritorious claim that his trial counsel was ineffective for telling him that he would receive a prison term that did not exceed seven years. We conclude that Davis could not do so. Assuming without deciding that trial counsel made such a statement, Davis could not demonstrate prejudice as a result. The record shows that when Davis entered his guilty pleas, the circuit court described the maximum terms of

[3] Davis addressed his letter to the chief judge of the Milwaukee County Circuit Court. Court staff responded to the letter and explained that the chief judge has no authority to interfere with sentences imposed by other judges.

initial confinement and extended supervision that he faced for each conviction and then advised him that, "regardless of what people might recommend or argue," the circuit court was free to "impose the maximum sentences and run them consecutive to each other." Additionally, the guilty plea questionnaire and waiver of rights forms, which Davis acknowledged reviewing with counsel and said that he understood, provided: "I understand that the judge is not bound by any plea agreement or recommendation and may impose the maximum penalty." The maximum penalty for each crime was set forth on the forms.

Accordingly, the record conclusively shows that Davis knew and understood at the time of his guilty pleas that the circuit court could sentence him to more than seven years in prison. The information provided at the plea hearing overrides any contrary assertion that his trial attorney may have made before the hearing began. *See* ***State v. Bentley***, 201 Wis. 2d 303, 319, 548 N.W.2d 50 (1996). Davis therefore could not pursue an arguably meritorious claim that he was prejudiced by trial counsel's alleged sentencing prediction.

Davis additionally claims that he was deprived of his constitutional rights when he was held "without charges" from March 9, 2018, until March 16, 2018. Appellate counsel's supplemental no-merit report explains, and the records support, that the State originally charged Davis in Milwaukee County Circuit Court case No. 2018CF210, with the armed robberies and related crimes that arose on January 12, 2018. Davis was in custody awaiting trial on those charges when, on March 9, 2018, the State obtained a dismissal of case No. 2018CF210. On March 14, 2018, the State filed case No. 2018CF1195, reissuing the charges that arose on January 12, 2018, and adding additional counts. On March 16, 2018, Davis made an initial appearance in case No. 2018CF1195.

The foregoing demonstrates that if, as Davis claims, he was in custody "without charges" from March 9, 2018, until a new complaint was filed in 2018CF1195, that allegation does not raise an arguably meritorious claim for postconviction relief. When a court grants a motion to dismiss a complaint, the court may order the defendant to remain in custody for up to seventy-two hours pending issuance of new charges. *See* WIS. STAT. § 971.31(6). Because seventy-two hours is less than eleven days, Saturdays and Sundays are excluded from the calculation. *See* WIS. STAT. §§ 972.11(1), 801.15(1)(b). Accordingly, the records do not support a claim that Davis was wrongly confined during the three business days that passed from Friday, March 9, 2018, when case No. 2018CF210 was dismissed, until Wednesday, March 14, 2018, when the State filed a new complaint.[4] Moreover, even if Davis could show that his detention during that period exceeded the statutory time limit, a challenge to the timeliness of an initial appearance is forfeited if not raised before conviction. *See* ***State v. Evans***, 187 Wis. 2d 66, 85, 522 N.W.2d 554 (Ct. App. 1994).

In the no-merit report, appellate counsel examines Davis's allegation of a wrongful detention in light of the rule requiring a defendant to receive a judicial determination of probable cause within forty-eight hours after a warrantless arrest. *See* ***State v. Koch***, 175 Wis. 2d 684, 696, 499 N.W.2d 152 (adopting the rule set forth in ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991)). Assuming that ***Riverside*** is applicable to Davis's detention from March 9, 2018, until March 16, 2018—when a court commissioner found probable cause at Davis's initial appearance in case No. 2018CF1195—***Riverside*** does not provide grounds for a meritorious

[4] We may take judicial notice of the days of the week on which specific dates fall. *See* ***State ex rel. Shimkus v. Sondalle***, 2000 WI App 262, ¶13, 240 Wis. 2d 310, 622 N.W.2d 763.

challenge to Davis's convictions. A guilty plea forfeits a claim of a ***Riverside*** violation. *See* ***State v. Aniton***, 183 Wis. 2d 125, 128, 515 N.W.2d 302 (Ct. App. 1994).

We have also considered whether Davis could allege that his trial counsel was ineffective for failing to seek a remedy for a ***Riverside*** violation. That remedy is not dismissal of the charges but may be suppression of evidence obtained as a result of the illegal detention, *see* ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994), and it appears that Davis might be able to assert that some such evidence exists. Specifically, the State's claim that Davis induced the nonappearance of witnesses included an allegation that on March 24, 2018, Davis used another inmate's PIN to make telephone calls to an accomplice's telephone number. The State's proof that Davis telephoned the accomplice using another inmate's PIN included an inmate call log showing calls to the alleged accomplice's telephone number using Davis's PIN. Some of the calls made with Davis's PIN were placed during the period of March 9, 2018, to March 16, 2018. Assuming without deciding that trial counsel performed deficiently by failing to suppress evidence of those calls, Davis cannot show prejudice. The call log spanned Davis's entire time in custody and reflected that, after March 16, 2018, Davis's PIN was used to call the alleged accomplice's telephone number many times. Those calls amply supported the inference that Davis was the inmate calling the accomplice's number using another inmate's PIN.

Our independent review of the records 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 judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney David Malkus is relieved of any further representation of Lamon Devell Davis, Jr. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals