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DISTRICT I

July 23, 2024

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

2024AP235-CRNM State of Wisconsin v. Tony Bornes, Jr. (L.C. # 2019CF1450)

Before White, C.J., Donald, P.J., and Geenen, 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).

Tony Bornes, Jr., appeals a judgment of conviction entered upon his guilty plea to first-degree reckless injury by use of a dangerous weapon. Appellate counsel, Attorney Daniel P. Murray, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Bornes did not file a response. Upon consideration of the no-merit report and an independent review of the record as mandated by ***Anders***, we conclude that

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

no arguably meritorious issues exist for an appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Parking Enforcement Officer B.L.K. ticketed a vehicle in the early morning hours of April 2, 2019, because it was blocking a Milwaukee sidewalk. After B.L.K. placed the ticket on the vehicle, a man subsequently identified as Bornes called out that the vehicle should not be ticketed because it was parked in his driveway. Before B.L.K. could respond, Bornes punched B.L.K. in the face and chest, kicked him, and stabbed him three times in the right side, nicking his liver. The State charged Bornes with first-degree reckless injury by use of a dangerous weapon.

Bornes decided to resolve the case with a plea agreement. He agreed to plead guilty as charged, and the State promised to move to dismiss and read in a pending 2017 misdemeanor case in which Bornes was charged with possessing cocaine. In addition, the State advised that it would seek "full restitution," request preparation of a presentence investigation report (PSI), and recommend a prison sentence "of some length" after reviewing the PSI. The circuit court accepted Bornes's guilty plea, dismissed the 2017 case, and ordered preparation of a PSI.

At sentencing, Bornes faced a maximum penalty of thirty years of imprisonment and a $100,000 fine. *See* WIS. STAT. § 940.23(1)(a), 939.50(3)(d), 939.63(1)(b) (2019-2000). The State recommended eight to twelve years of initial confinement and five to six years of extended supervision. The circuit court imposed an eighteen-year sentence bifurcated as twelve years of initial confinement and six years of extended supervision. The circuit court also granted Bornes the 325 days of sentence credit that he requested. B.L.K. chose not to request restitution, and none was imposed.

In the no-merit report, appellate counsel examines whether Bornes could challenge either the validity of his guilty plea or the circuit court's exercise of sentencing discretion. We are satisfied that appellate counsel properly analyzed those issues, and we agree with appellate counsel that they lack arguable merit. Further discussion of those issues is not warranted.

We have considered whether Bornes could pursue an arguably meritorious claim that he was not competent to proceed in the circuit court. Early in the litigation, trial counsel questioned Bornes's competence in light of remarks that Bornes had made to trial counsel. A circuit court commissioner therefore referred Bornes for a competency examination. The examining psychologist, Dr. Deborah L. Collins, filed a report in which she discussed Bornes's capacity "to grasp the essentials" of the types of pleas he could enter and his ability to reason rationally about his options. Notwithstanding some "episodic psychiatric treatment" that Bornes had received in the past, and despite occasions during the competency examination "when his thoughts were somewhat loosely connected to one another," Dr. Collins opined that Bornes was competent to stand trial. Neither the State nor Bornes challenged Dr. Collins's opinion, and the circuit court found that Bornes was competent.

"[A] defendant is incompetent if he or she lacks the capacity to understand the nature and object of the proceedings, to consult with counsel, and to assist in the preparation of his or her defense." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. This court will uphold a circuit court's competency determination unless that determination is clearly erroneous. ***State v. Garfoot***, 207 Wis. 2d 214, 225, 558 N.W.2d 626 (1997). In light of the psychologist's report, the standard of review, and the parties' positions in circuit court, any further proceedings in regard to Bornes's competence would lack arguable merit.

Next, we have considered that at the conclusion of the preliminary examination, Bornes entered a special plea of not guilty by reason of mental disease or defect. As both parties requested, the circuit court appointed an expert to examine Bornes pursuant to WIS. STAT. § 971.16(2). The examining psychologist, Dr. Brooke E. Lundbohm, subsequently filed a report concluding that she could not support the special plea. Bornes then advised the circuit court that he had decided not to pursue the special plea any further but instead had decided to plead guilty. No arguably meritorious basis exists to challenge those decisions. *See* ***State v. Francis***, 2005 WI App 161, ¶¶26-27, 285 Wis. 2d 451, 701 N.W.2d 632 (holding that a defendant who is apparently competent may withdraw a plea of not guilty by reason of mental disease or defect by entering a guilty plea).

We turn to the postconviction motion that Bornes filed on his own behalf shortly after postconviction counsel was appointed. The circuit court entered an order declining to address the merits of that motion because Bornes had counsel. A challenge to the circuit court's order would lack arguable merit. When a defendant is represented by counsel, a court may refuse to consider submissions from the defendant on his own behalf. ***Moore v. State***, 83 Wis. 2d 285, 297-301, 265 N.W.2d 540 (1978); ***State v. Redmond***, 203 Wis. 2d 13, 16-17, 552 N.W.2d 115 (Ct. App. 1996).

A no-merit appeal in the court of appeals is an exception to the rule set forth in ***Moore*** and ***Redmond***. *See* ***State v. Tillman***, 2005 WI App 71, ¶18, 281 Wis. 2d 157, 696 N.W.2d 574. Accordingly, although Bornes did not ask this court to consider the allegations that he raised in his postconviction motion, that motion is part of the record, and we have reviewed it. *See* ***Anders***, 386 U.S. at 744; *see also* ***State v. Allen***, 2010 WI 89, ¶58, 328 Wis. 2d 1, 786 N.W.2d

124. We conclude that Bornes's motion did not raise arguably meritorious postconviction or appellate issues.

Bornes began by alleging that new factors warranted sentence modification. A defendant who seeks relief based on an alleged new factor has the burden to demonstrate by clear and convincing evidence that a new factor exists. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is "'a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***Id.***, ¶40 (citation omitted). If the defendant shows that a new factor exists, the circuit court decides in the exercise of its discretion whether sentence modification is warranted. ***Id.***, ¶37.

Bornes's claims did not arguably allege a new factor. Bornes contended that the COVID-19 pandemic constituted a new factor because he faced a health risk "due to conditions ... at Dodge [Correctional Institution]" where he was confined. Prison conditions, however, must be challenged by appropriate writs, not by motions for sentence modification. ***State v. Krieger***, 163 Wis. 2d 241, 259-60, 471 N.W.2d 599 (Ct. App. 1991). Bornes also contended that his progress in prison was a new factor, but rehabilitation does not constitute a new factor as a matter of law. ***State v. Krueger***, 119 Wis. 2d 327, 335, 351 N.W.2d 738 (Ct. App. 1984).

Bornes next sought postconviction relief on the ground that he had defenses to the charge against him, but Bornes entered a valid guilty plea, and he thus forfeited the opportunity to mount defenses to the charge. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 34, 294 Wis. 2d 62, 716 N.W.2d 886. Next, Bornes alleged that he was entitled to postconviction relief because the circuit court refused his request for new trial counsel. The record shows, however, that Bornes

withdrew that request and personally told the circuit court that he wanted to continue with the attorney originally appointed to represent him. Accordingly, further pursuit of this issue would lack arguable merit. *See* ***State v. Ledger***, 175 Wis. 2d 116, 135, 499 N.W.2d 198 (Ct. App. 1993) (holding that an issue abandoned in the circuit court will not be reviewed on appeal).

Finally, Bornes alleged that he received ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a defendant must show both that counsel performed deficiently and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). If a defendant does not satisfy one prong of this analysis, a reviewing court need not consideer the other. ***Id.*** at 697. Here, Bornes asserted in his postconviction motion that he "only stabbed the victim once," not three times, and he alleged that his trial counsel was ineffective for failing to pursue this claim. Regardless of whether Bornes could show that his trial counsel performed deficiently in this regard, Bornes could not mount an arguably meritorious showing that he was prejudiced by counsel's alleged omission. To establish prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. No reasonable probability exists that the outcome here would have been different if trial counsel had shown that Bornes stabbed his victim once rather than three times.[2]

[2] For the sake of completeness, we note that we have reviewed Bornes's suggestion that trial counsel performed deficiently by failing to obtain evidence that the "victim stabbed himself twice." Nothing in the record suggests that such evidence exists. A lawyer does not perform deficiently by failing to uncover nonexistence evidence. ***Krebs v. State***, 64 Wis. 2d 407, 417, 219 N.W.2d 355 (1974).

Our independent review of the record does not disclose any other potential issues warranting discussion. 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 is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Daniel P. Murray is relieved of any further representation of Tony Bornes, Jr. on appeal. *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