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September 21, 2016

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Darryl L. Jones
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You are hereby notified that the Court has entered the following opinion and order:

2016AP773-CRNM State of Wisconsin v. Darryl L. Jones (L.C. #2015CF117)

Before Gundrum, J.[1]

Darryl L. Jones appeals from a judgment convicting him of entry into a building, criminal damage to property, and theft. Jones's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967), to which Jones has filed a response. Upon consideration of the no-merit report and response and our independent review of the record as mandated by ***Anders***, we conclude there are no issues that would have

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

arguable merit for appeal. We summarily affirm the judgment, *see* WIS. STAT. RULE 809.21, and relieve Attorney Vicki Zick of further representing Jones in this matter.

A woman, denominated "Victim 2" in the complaint, awoke to find her patio door kicked in and several containers of quarters amounting to hundreds of dollars missing. She did not hear the break-in occur due to a hearing loss. As her husband, "Victim 1," works nights, Victim 2 was home alone with their eight-month-old baby.

Jones eventually was tied to the incident and was charged with burglary, a felony, and two misdemeanors, criminal damage to property and theft. Pursuant to a plea agreement, the burglary was reduced to entry into a building, a misdemeanor. He entered no-contest pleas. The court withheld sentence and ordered two years' probation on each count, concurrent. As conditions of probation, he was ordered to serve six months' jail time and pay restitution of $1301.61. This no-merit appeal followed.

The no-merit report considers whether a claim could be made that Jones's no-contest plea was not freely, intelligently, and voluntarily made. Jones suggests in his response that he did not understand the consequences of pleading no contest. He asserts that defense counsel told him that by pleading no contest he "was leaving it up to the Judge to see if [he was] guilty," but he "found out differently."

Our review of the record confirms that, with one exception, the circuit court's colloquy with Jones satisfied the applicable requirements of WIS. STAT. § 971.08(1)(a) and ***State v.***

Brown, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.[2] In addition, the plea questionnaire/waiver-of-rights form that Jones signed was entered into the record. It states in part, "I understand that if the judge accepts my plea, the judge will find me guilty of the crime(s) to which I am pleading …." Jones confirmed that he reviewed the form with counsel and had no questions "about the meaning or the importance of anything that's contained in that document." Any claim that his no-contest pleas were not freely, intelligently, and voluntarily made would lack arguable merit.

The report also examines whether a meritorious claim could be made that the police violated Jones's Fourth Amendment rights. Jones rents a portion of his brother's house. The brother gave police consent to search that area of the home and Jones's belongings. They found boots linking Jones to the crime. Jones contends he did not give police consent either to search his area of the house or to confiscate his boots, which he asserts were not in plain view.

A guilty or no-contest plea generally waives all nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). An exception is WIS. STAT. § 971.31(10), which allows appellate review of an order denying a motion to suppress evidence despite a valid plea. ***Smith***, 122 Wis. 2d at 434-35. No motion to suppress was filed here, however.

[2] The court failed to advise Jones of a plea's potential deportation consequences. *See* WIS. STAT. § 971.08(1)(c); *see also* ***State v. Douangmala***, 2002 WI 62, ¶21, 253 Wis. 2d 173, 646 N.W.2d 1. To be entitled to plea withdrawal on this basis, Jones would have to show "that the plea is likely to result in [his] deportation, exclusion from admission to this country or denial of naturalization." *See* § 971.08(2). There is no indication in the record that Jones could make such a showing.

The no-merit report lastly addresses whether there was sufficient evidence to establish probable cause at the preliminary hearing. Police had noted boot prints with visible tread marks in a sandbox outside the victims' home. One of the investigating officers testified at the preliminary hearing that there was sand on the frame and jamb of the kicked-in door and the boots found in Jones's belongings had sand on them. The court sustained an objection to the officer's testimony that the boots' tread was "exactly the same" as the tread on the prints in the sandbox, as he was not an expert. The officer then stated that the tread "appeared to be a similar[-]type pattern." Jones complains that the only evidence tying him to the crime was his boots and the officer could say only that the treads were "similar."

Even were we to accept Jones's contention that the evidence against him was too slim to establish probable cause, his plea waived any defect. *See* ***Smith***, 122 Wis. 2d at 434. Unlike the suppression-motion exception, there is none for errors occurring at the preliminary hearing.

Counsel's no-merit report does not address whether the trial court erroneously exercised its sentencing discretion.[3] A trial court properly exercises its discretion if the sentence is not excessive and the court relies on proper factors. *See* ***State v. Krueger***, 119 Wis. 2d 327, 336-37, 351 N.W.2d 738 (Ct. App. 1984). Having received probation after conviction of three misdemeanors, Jones cannot reasonably contend that the sentence is excessive, as it was far less than what he faced and was not "so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances." ***Ocanas v. State***, 70 Wis. 2d 179,

[3] We recognize that probation is not a sentence, but is an alternative to sentencing. ***State v. Gereaux***, 114 Wis. 2d 110, 113, 338 N.W.2d 118 (Ct. App. 1983).

185, 233 N.W.2d 457 (1975). Additionally, the record indicates that the trial court considered proper factors. It focused on the seriousness of invading the sanctity of a home, Victim 2's emotional trauma and continuing fear, and the need to protect the public, all proper considerations. It explained that Jones's significant mental health issues informed its decision for granting probation. It is within the court's discretion to give the factors the weight it sees fit. ***State v. Russ***, 2006 WI App 9, ¶14, 289 Wis. 2d 65, 709 N.W.2d 483 (2005).

There also is no arguable issue with regard to the restitution condition of probation. His counsel told the court at sentencing that whatever conditions of probation it deemed appropriate "would be fine with us as well," and "[a]s far as the restitution request, we don't object to that request at this time." Where a party has induced certain action by the trial court, he or she cannot later complain on appeal. *See* ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 582, 269 N.W. 327 (1936).

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

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved of further representing Jones in this matter.

Diane M. Fremgen
Clerk of Court of Appeals