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November 16, 2016

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

2016AP405-CRNM State of Wisconsin v. Joshua J. Smith (L.C. # 2012CF756)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Joshua J. Smith appeals from a judgment of conviction for false imprisonment and mayhem, both as a domestic violence crime and with a repeater enhancer. Smith's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] and ***Anders***

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

v. California, 386 U.S. 738 (1967). Smith filed a response to the no-merit report and counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

On July 5, 2012, Smith, who was subject to a cash bond condition not to have contact with S.S., went to S.S.'s home and attacked S.S. The couple's child was in the home at the time of the attack. Smith repeatedly hit and bit S.S. He bit off a portion of S.S.'s ear. The attack lasted for approximately an hour and Smith would not allow S.S. to leave the room. S.S. managed to escape and ran to a neighbor's home for help.

Smith was charged as a repeat offender of false imprisonment, mayhem, substantial battery, second-degree reckless endangerment (of the child), disorderly conduct, and six counts of misdemeanor bail jumping. While Smith was in jail, he called S.S. telling her to not cooperate with the prosecution of the case, to avoid or disobey any subpoena, and to change her story about what happened. He indicated that he did not remember what happened and that he was "blacked out drunk." He also wrote S.S. letters. One letter included a draft of how S.S. could recant her statement and say that Smith was asleep in the house when an unknown man entered and assaulted S.S. He also wrote S.S. to not come to the trial:

> The most important thing is not coming to my court dates. The only charge my lawyer said that they may still try to charge me with without you present in court would be the mayhem and that letter [changing the story] would fix that. This Friday is when my lawyer is going to come talk to me and that's when we are going to decide if we are putting the speedy trial in motion. I'm not sure how you'd want to go about it. I know once I get a speedy trial court date, that it would be set for about exactly three months

> away. So the court date would be some where around December. So lets [sic] say the date is for Dec. 7. You'd have about 3 months to plan for a vacation. You should plan to go visit your grandma two to three days before that date. Then plan to stay and visit for a couple of weeks to be safe. My lawyer does not seem to think your [sic] willing to go through with this. I feel that you would. I really hope I'm right.

On October 30, 2012, a speedy trial demand was filed. The jury trial was set for January 29, 2013. At the January 7, 2013 pretrial conference, Smith entered a guilty plea to false imprisonment and a no contest plea to mayhem. The plea agreement called for the dismissal as read-ins of all the other charges, including a pending misdemeanor battery case and additional charges that could have been made for attempting to dissuade a victim as evidenced by the letters which S.S. turned over to the police. The prosecution agreed to recommend a total of seventeen years' initial confinement and eighteen years' extended supervision. At sentencing, the court imposed the maximum sentence on the false imprisonment conviction—five years' initial confinement and three years' extended supervision. On the mayhem conviction, Smith was sentenced to ten years' initial confinement and fifteen years' extended supervision. The sentences were ordered to be served consecutively.

On May 27, 2015, Smith moved for plea withdrawal alleging that when he entered his plea, the circuit court failed to inform him that it was possible that his trial counsel could discover defenses or mitigating circumstances that would not have been apparent to a layman and that his trial counsel was ineffective for failing to inform Smith of the defense of voluntary

intoxication.[2] Smith filed a pro se supplemental postconviction motion alleging that in advising Smith about his plea, his trial counsel operated under a conflict of interest created by counsel's alleged role in suggesting that S.S. be unavailable for the jury trial, that trial counsel failed to investigate and advise Smith of the viability of a voluntary intoxication defense, and that there was no factual basis for the convictions. At the start of the postconviction evidentiary hearing, the court engaged in a colloquy with Smith confirming Smith's desire to be represented by counsel and be heard on the motion counsel filed. Smith acknowledged that his supplemental motion would not be considered as a result of his choice to proceed with counsel.

Smith's trial counsel testified that from the start of his representation, Smith was fixated on the hope that S.S. would not show up for trial. Counsel indicated that he and Smith had a very brief conversation about the defense of voluntary intoxication and that counsel believed it was a "bull s---" defense and a ludicrous notion.[3] Counsel was aware that Smith was obviously intoxicated and that Smith remembered the evening up until he began beating S.S. but could not recall what happened after that point. Counsel explained that using a voluntary intoxication defense would involve Smith's testimony and that presented a significant problem because of Smith's four to six prior battery to women cases. Counsel was of the opinion that a voluntary intoxication defense would have taken a bad situation and made it significantly worse; in counsel's opinion, it did not take lengthy thinking to conclude that voluntary intoxication was a

[2] Appointed counsel first filed a no-merit appeal in December 2013. After reviewing Smith's responses to the no-merit report, counsel moved to voluntarily dismiss the no-merit appeal in favor of an extension of time to file a WIS. STAT. RULE 809.30 postconviction motion. The motion was granted. *See* ***State v. Smith***, No. 2013AP2691-CRNM, unpublished op. and order (WI App Oct. 21, 2014). Smith's 2015 postconviction motion was timely under additional extensions granted by this court.

[3] Pursuant to 2013 Wisconsin Act 307, effective April 18, 2014, voluntary intoxication was eliminated as a defense to criminal liability.

poor defense. Counsel also explained that the thing that led Smith to change his mind and take a plea deal was the revelation that S.S. had turned Smith's letters over to the police. Smith testified that he realized the letters made his situation worse and he faced intimidation of a witness charges. He stated that he felt like he had no other choice than to take the plea deal because he was not aware of the voluntary intoxication defense at that point.

The circuit court denied Smith's motion to withdraw his plea. The court reviewed the plea colloquy and found that the court asked Smith whether his trial counsel had discussed possible defenses to the charges and Smith had answered yes. The court found that Smith's discussion with trial counsel centered on mitigating the damages caused by Smith's letters. The court found Smith's testimony self-serving and punctuated with hindsight after receiving a sentence that Smith felt was inappropriate. It rejected Smith's testimony that he did not know what he was doing when he entered his plea and noted that a mere disappointment in the sentence is not grounds for plea withdrawal.

The no-merit report addresses the potential issues of whether Smith's plea was freely, voluntarily and knowingly entered, whether Smith should be allowed to withdraw his plea because he did not know about the voluntary intoxication defense or because trial counsel was ineffective for not informing Smith of the voluntary intoxication defense, and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit. The record shows that the circuit court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389

N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.[4] The circuit court's finding that Smith and his trial counsel discussed the voluntary intoxication defense and that Smith knew what he was doing when he entered his guilty and no contest pleas are not clearly erroneous. Smith failed to establish a manifest injustice supporting plea withdrawal. The sentence was based on appropriate factors and was a demonstrated proper exercise of discretion.[5] Although the maximum sentence was imposed on the false imprisonment conviction, we cannot conclude that the sentence is so excessive or unusual so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

In his response to the no-merit report, Smith claims that his no-merit counsel was ineffective because counsel "failed to find and pursue numerous legal points arguable on their merits." The issues Smith believes counsel should have pursued in the postconviction motion are that Smith's trial counsel had a conflict of interest that adversely affected counsel's representation of Smith, that trial counsel was ineffective for not investigating and advising

[4] Smith's postconviction motion claimed that his plea was unknowing because the circuit court did not inform Smith that it was possible that his trial counsel could discover defenses or mitigating circumstances that would not have been apparent to a layman. That information is only relevant and necessary when the defendant is not represented by counsel at the plea taking. *See* ***State ex rel. Burnett v. Burke***, 22 Wis. 2d 486, 494, 126 N.W.2d 91 (1964) (in accepting a guilty plea from an unrepresented defendant the court must ascertain that the defendant has freely and intelligently waived the right to counsel). Smith was represented by counsel and Smith acknowledged that his attorney had discussed possible defenses with him. There is no arguable merit to a claim that the plea was unknowing because Smith was not apprised that an attorney might discover defenses or mitigating circumstances.

[5] Although the sentencing court mentioned the COMPAS assessment, it explicitly stated that it put no faith in the assessment because it rated Smith's risk for violent recidivism as low and the court found that an "absurd" result. Thus, the COMPAS assessment was not used in any "determinative" way and there is no arguable merit to a claim that use of the COMPAS assessment violated the limitations of use set forth in ***State v. Loomis***, 2016 WI 68, ¶¶98-99, 371 Wis. 2d 235, 881 N.W.2d 749.

Smith on the viability of the voluntary intoxication defense, and that there was no factual basis for the false imprisonment and mayhem charges.[6]

Smith suggests that his trial counsel operated under a conflict of interest and advised Smith to take the plea agreement so that trial counsel's own alleged "illegal" or unethical conduct[7] in trying to get S.S. to absent herself from Wisconsin prior to the jury trial would not be revealed. This claim requires a showing that an actual conflict of interest adversely affected trial counsel's performance. ***Cuyler v. Sullivan***, 446 U.S. 335, 348 (1980). Smith also claims that trial counsel was ineffective for not investigating the viability of the voluntary intoxication defense and advising Smith that it was viable. This claim requires prejudice to the defense by trial counsel's conduct. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). When a plea has been entered, "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Here the circuit court found, on Smith's postconviction motion, that Smith's decision to accept the plea agreement was based on his desire to avoid additional intimidation of a witness charges. Thus, it was Smith's own conduct creating exposure to additional charges that led to trial counsel's recommendation

[6] These are the same issues that Smith set forth in his pro se supplemental postconviction motion—a motion Smith chose not to pursue. Thus, it may be that Smith waived them by his explicit choice to proceed on the issues that counsel had selected. Because Smith had a prior no-merit appeal, he had been counseled on his right to proceed without an attorney. *See* WIS. STAT. RULE 809.32(1)(b). If Smith was unhappy with the issues no-merit counsel raised in the postconviction motion, he could have elected to proceed pro se.

[7] As the supplemental no-merit report points out, there is no evidence in the record that trial counsel took any steps to procure S.S.'s absence from the jury trial. Indeed, trial counsel testified that it was Smith's idea, Smith undertook the letter campaign without counsel's knowledge, and counsel did not believe S.S. would leave Wisconsin.

and Smith's decision to enter his plea. Smith cannot show that trial counsel's advice to take the plea agreement was adversely influenced by an actual conflict of interest, if there was one. Further, there is no arguable merit to a claim of prejudice from trial counsel's allegedly deficient performance.[8]

Smith suggests that there was no factual basis for his convictions because the record does not include any specific facts that Smith had the requisite intent for either crime. Intent may be found from the defendant's acts, words, and statements, and from all the facts and circumstances. *See* WIS. JI—CRIMINAL 1246. The complaint here sets forth adequate facts giving rise to a reasonable inference of intent. Smith's claim is nothing more than an assertion that he was too intoxicated to form intent and that issue was a matter for trial. The circuit court was not required to conduct a mini-trial on Smith's level of intoxication so as to establish that Smith committed the crime charged beyond a reasonable doubt. ***State v. Black***, 2001 WI 31, ¶14, 242 Wis. 2d 126, 624 N.W.2d 363. There is no arguable merit to a claim that there was no factual basis for the convictions.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Smith further in this appeal.

Upon the foregoing reasons,

[8] Smith argues that the circuit court erred by not allowing Smith to call numerous witnesses at the postconviction hearing that would have testified about his degree of intoxication on the night of the assault. The circuit court properly exercised its discretion in determining that such testimony was not necessary because the court rejected Smith's ineffective assistance of counsel claim for a lack of prejudice.

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

IT IS FURTHER ORDERED that Attorney Paul G. Bonneson is relieved from further representing Joshua J. Smith in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals