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 II

September 6, 2023

To:

Hon. Samantha R. Bastil
Circuit Court Judge
Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

Winn S. Collins
Electronic Notice

Andrew H. Morgan
Electronic Notice

Kemel Westefree Green, #311704
Oshkosh Correctional Inst.
P.O. Box 3310
Oshkosh, WI 54903-3310

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

2022AP1031-CRNM State of Wisconsin v. Kemel Westefree Green (L.C. #2021CF269)

Before Gundrum, P.J., Grogan and Lazar, JJ.

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).

Kemel Westefree Green appeals a judgment of conviction entered after he pled no contest to one count of possession of forty or more grams of cocaine with the intent to deliver and one count of possession of a firearm by a felon. His appellate counsel, Andrew H. Morgan, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2021-22).[1] Green was advised of his right to file a response and has responded.

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

Appellate counsel then filed a supplemental no-merit report. Upon consideration of the no-merit report, the response, the supplemental report, and an independent review of the record as mandated by ***Anders***, we conclude that no arguably meritorious issues exist for an appeal. We therefore summarily affirm. *See* WIS. STAT. RULE 809.21.

On April 13, 2021, the State charged Green with five crimes: one count of possession of forty or more grams of cocaine with the intent to deliver; one count of possession of a firearm by a felon; one count of THC possession; one count of possession of drug paraphernalia; and one count of operating a motor vehicle with a revoked license. The charges stemmed from a traffic stop in which Sheboygan police pulled Green over for speeding and then discovered he was operating with a revoked driver's license and had several outstanding warrants. The responding officer requested a canine unit to come to the scene. The canine, trained in narcotics detection, detected narcotics in Green's vehicle. Police then recovered drug paraphernalia, marijuana, cocaine, a firearm with ammunition in the magazine, and $3,067 in cash.

Pursuant to a plea agreement, Green pled no contest to one count of possession with intent to deliver cocaine, greater than forty grams, and one count of possession of a firearm by a felon. The remaining counts were dismissed and read in. The circuit court conducted a plea colloquy with Green and accepted his pleas. The court also ordered a presentence investigation report to precede sentencing. The court ultimately sentenced Green to five years of initial confinement followed by five years of extended supervision on the cocaine-related charge, and three years of initial confinement followed by three years of extended supervision on the firearm charge. The circuit court ordered the sentences to run concurrently. This appeal follows.

Appellate counsel raises three issues in his no-merit report. Although counsel discusses the issues in the context of ineffective assistance of trial counsel, the issues can be reframed as follows: (1) whether Green's pleas were knowing, intelligent, and voluntary; (2) whether trial counsel was ineffective for failing to file a motion to suppress evidence found by the canine unit; and (3) whether the circuit court erroneously exercised its sentencing discretion.

As to the first issue, we conclude that the plea colloquy, together with the plea questionnaire/waiver of rights form, demonstrate Green's understanding of the information to which he was entitled and that his plea was knowing, voluntary, and intelligent. *See* ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). In his response, Green contends he did not understand either the proceedings or that he was "signing a plea agreement." The record belies Green's contention as it indicates Green assured the circuit court that he understood the contents of the colloquy and that he discussed his pleas with his trial counsel. The plea questionnaire, which contains Green's signature, also confirms that Green entered his pleas knowingly, voluntarily, and intelligently.

Although the circuit court's plea colloquy contains a few defects, none of the defects render Green's pleas invalid. The court did not specifically address whether any threats or promises were made to Green prior to entering his pleas; however, Green signed the plea questionnaire which includes the statement, "I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement." The court also failed to inform Green of the potential immigration consequences of his pleas, as required by WIS. STAT. § 971.08(1)(c). That error, however, is harmless as the record does not indicate that Green actually faced any potential immigration consequences. *See* ***State v. Reyes***

Fuerte, 2017 WI 104, ¶¶1-3, 378 Wis. 2d 504, 904 N.W.2d 773 (applying a harmless error analysis to a court's failure to provide the information required by § 971.08(1)(c)). We conclude therefore, that there is no arguable merit to a claim that Green's pleas were anything other than knowing, intelligent, and voluntary.

Appellate counsel's no-merit report next addresses whether trial counsel was ineffective for failing to file a motion to suppress evidence found by the canine unit. In his response, Green contends trial counsel was ineffective for failing to suppress all evidence obtained from the traffic stop because Sheboygan police had no evidence he was actually speeding. If Green's trial counsel was constitutionally ineffective for failing to file a suppression motion, counsel's ineffective assistance could provide a basis for Green to withdraw his guilty pleas. *See* ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 769 N.W.2d 110 (noting that ineffective assistance of counsel can constitute a manifest injustice permitting a defendant to withdraw his or her plea after sentencing). However, in the supplemental no-merit report, appellate counsel contends there would be no arguable merit to a plea withdrawal claim on this basis because Green cannot establish that counsel's failure constituted defective performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (stating a defendant must establish both deficient performance and prejudice to prevail on an ineffective assistance claim). Specifically, appellate counsel describes the evidence that did support reasonable suspicion of Green's traffic violation. As to the evidence obtained by the canine unit, we agree with appellate counsel's analysis and conclude that a motion to suppress the evidence found in Green's vehicle would have been properly denied. Consequently, there would be no arguable merit to a claim that Green's trial counsel was constitutionally ineffective for failing to file a suppression motion. *See* ***Berggren***,

320 Wis. 2d 209, ¶21 (counsel does not perform deficiently by failing to make a motion that would have been properly denied).

With regard to the circuit court's sentencing decision, our review of the record confirms that the court appropriately considered the relevant sentencing objectives and factors, focusing particularly on the seriousness of the offenses, the need to protect the community, and Green's rehabilitative needs. *See* ***State v Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The resulting sentences were within the maximum authorized 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 so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Therefore, there would be no arguable merit to a challenge to the circuit court's sentencing discretion.

In his response, Green also contends there was insufficient evidence to support the felon in possession charge and conviction. By entering a plea, however, Green gave up the opportunity to challenge the sufficiency of the State's evidence. *See* ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (providing that a valid guilty plea waives all nonjurisdictional defects and defenses).

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing therefore,

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

IT IS FURTHER ORDERED that Attorney Andrew H. Morgan is relieved of further representation of Kemel Westefree Green in this matter. *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