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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 IV

October 12, 2023

To:

Hon. Guy D. Dutcher
Circuit Court Judge
Electronic Notice

Katrina Rasmussen
Clerk of Circuit Court
Waushara County Courthouse
Electronic Notice

Carlos Bailey
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Michael D. Zlab Jr. 382027
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:

2022AP938-CRNM State of Wisconsin v. Michael D. Zlab, Jr. (L.C. # 2021CF25)

Before Blanchard, Nashold, and Taylor, 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).

Attorney Carlos Bailey, appointed counsel for Michael Zlab, Jr., has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Zlab was sent a copy of the report and has filed a response, and counsel then filed a supplemental no-merit report. Upon consideration of the report, the response, the supplemental report, and an independent review of the record, we

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

conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Before summarizing the facts of this case and discussing potential issues, we first address a procedural matter relating to the no-merit process. In Zlab's response to the no-merit report, he asserted that counsel did not provide him with a copy of the report or the circuit court case file as requested. In counsel's supplemental no-merit report, counsel responded that he sent those materials to Zlab. Counsel also provided proof of mailing and receipt of the materials. Based on the filing date of Zlab's response, it appeared possible that Zlab had filed the response before he had received the materials. Accordingly, in an order dated July 26, 2023, this court provided Zlab with an opportunity to file a supplemental response to the no-merit report no later than September 8, 2023. This court's July 26 order also stated that Zlab should promptly inform this court if he continued to maintain that he did not receive a copy of the no-merit report and court file. We have received nothing further from Zlab. Accordingly, we now conclude that Zlab has conceded receipt of the requested materials from counsel, and we will proceed based on his existing response to the no-merit report.

Pursuant to a plea agreement, Zlab pled no contest to one count of operating a motor vehicle while under the influence of an intoxicant as a fourth offense and to two counts of battery to a law enforcement officer as a repeater. The sentences the circuit court imposed consisted in total of five years of initial confinement and six years of extended supervision, consecutive to any other sentences that Zlab was already serving.

The no-merit report first addresses whether Zlab's no-contest pleas were knowing, intelligent, and voluntary. We agree with counsel that there is no arguable merit to this issue.

The circuit court's plea colloquy, including the court's references to the plea questionnaire and waiver of rights form, complied with the requirements of WIS. STAT. § 971.08 and ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, relating to the nature of the charges, the constitutional rights that Zlab was waiving, the minimum and maximum penalties, and other matters. Although the maximum penalties stated in the plea questionnaire did not include the increased penalty for the repeater allegations on the battery charges, the court informed Zlab of the increased penalty during the plea colloquy, and Zlab stated that he understood. We see no arguable basis for plea withdrawal.

We turn to the issues raised by Zlab's response to the no-merit report. The response consists of allegations relating to potential suppression issues and other issues, none of which were raised by trial counsel in the circuit court. Accordingly, we address these allegations in the context of whether they could support a claim for ineffective assistance of counsel.

To show ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687. To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To establish 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.

Zlab's allegations raise, at most, four potential claims for ineffective assistance of counsel. In the discussion that follows, we explain why none of these potential claims has arguable merit.

The first potential claim that Zlab's response raises is whether trial counsel should have filed a motion to suppress statements that Zlab made to police. Zlab alleges that the police did not provide him with ***Miranda*** warnings. *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966). We see nothing in the record to refute this allegation, and we will assume that the allegation is true. Even so, the allegation does not support an arguably meritorious claim.

"***Miranda*** safeguards are implicated when a person in custody is subjected to either express questioning or its functional equivalent." ***State v. Cunningham***, 144 Wis. 2d 272, 277, 423 N.W.2d 862 (1988). In contrast, "[v]olunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by" the Supreme Court's holding in ***Miranda***. *See* ***Miranda***, 384 U.S. at 478. Here, we see nothing in the record or in Zlab's allegations to indicate that Zlab made statements in response to express police questioning or its functional equivalent while he was in custody. Instead, the record indicates that any statements he made after his arrest were spontaneous and voluntary. The statements were therefore admissible regardless of whether the police provided ***Miranda*** warnings. Trial counsel did not perform deficiently by failing to move to suppress admissible evidence.

As discussed further below, we note that Zlab makes allegations relating to his mental health condition at the time of his arrest. However, a defendant's personal characteristics alone "cannot form the basis for finding that the suspect's confessions, admissions, or statements are involuntary." ***State v. Moore***, 2015 WI 54, ¶56, 363 Wis. 2d 376, 864 N.W.2d 827. "Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness." ***State v. Hoppe***, 2003 WI 43, ¶37, 261 Wis. 2d 294, 661 N.W.2d 407. Nothing in the record or in Zlab's response suggests that the police engaged in any tactics designed to take advantage of his mental health condition, including taking advantage of his condition in order to elicit statements from

him. Although it may be a form of coercion for police to take subtle advantage of a person's personal characteristics, including the person's mental health, *see* ***State v. Xiong***, 178 Wis. 2d 525, 534, 504 N.W.2d 428 (Ct. App. 1993), there is no evidence that the police did that here. Accordingly, Zlab's allegations relating to his mental health, even if true, would not support an argument that he made involuntary statements.

The second potential claim that Zlab's response raises also relates to his mental health and concerns his allegation that police officers refused to transport him to a mental health facility after he stated that he wanted to harm himself. Even assuming this allegation is true, it does not provide any arguable basis for Zlab to challenge his criminal convictions. Accordingly, we see no arguable basis on which counsel could have been ineffective by failing to challenge this alleged police conduct.

The third potential claim that Zlab's response raises relates to the warrant used to obtain a sample of his blood for chemical testing. Zlab alleges that the police never presented him with the warrant. The issue this allegation raises is whether Zlab could arguably claim that trial counsel was ineffective by failing to seek suppression of the blood test results based on the alleged failure of police to present him with the warrant. We conclude for the following reasons that Zlab could not reasonably argue that counsel performed deficiently in this respect.

First, as a factual matter, it would have been difficult to prove the allegation that police failed to present Zlab with the warrant. The return on the warrant includes a signed statement by a police officer attesting that Zlab was served with the warrant, and the complaint indicates that a copy of the warrant was made for Zlab. The complaint also indicates that Zlab was present while the police were in the process of obtaining the warrant via email and phone, and that he was fully

aware that the police were obtaining the warrant. Second, as a legal matter, we are aware of no Wisconsin law that would require suppression based solely on a police failure to formally present or serve the warrant, regardless of other circumstances. *Cf.* ***United States v. Hector***, 474 F.3d 1150, 1155 (9th Cir. 2007) (concluding that suppression was not an appropriate remedy for a police failure to serve a warrant). "When the law is unsettled, [counsel's] failure to raise an issue is objectively reasonable and therefore not deficient performance." ***State v. Jackson***, 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461.

The final claim that Zlab's response raises also relates to his mental health. He alleges that he informed trial counsel that he was having a mental health crisis and problems with his mental health medications, and that he also informed counsel that his previous attorney refused to seek an evaluation of whether he was competent at the time of his arrest. In making these allegations, Zlab raises the issue of whether counsel was ineffective by failing to pursue a defense of not guilty by reason of mental disease or defect. We conclude that there is no arguable merit to this issue. There is nothing in the record to suggest that Zlab's mental health was sufficiently compromised to support such a defense, and his current allegations are not sufficient to raise a factual issue to the contrary. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-10, 548 N.W.2d 50 (1996) (defendant is not entitled to a postconviction hearing when allegations are conclusory or insufficient to raise a question of fact).

We turn to sentencing. The no-merit report addresses whether Zlab could challenge the circuit court's exercise of its sentencing discretion. We agree with counsel that there is no arguable merit to this issue. The court considered the required sentencing factors along with other relevant factors, and the court did not rely on any improper factors. *See* ***State v. Gallion***,

2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. We see no other arguable basis upon which Zlab could challenge his sentences.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Carlos Bailey is relieved of any further representation of Michael Zlab, Jr., 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