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September 23, 2013

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

2012AP1102-CRNM State of Wisconsin v. Calvin D. Buckner (L.C. #2009CF1645)

Before Curley, P.J., Fine and Brennan, JJ.

Calvin D. Buckner appeals from a judgment of conviction, entered upon a jury's verdict, on one count of possession with intent to deliver between ten and fifty grams of heroin.

Appellate counsel, Katie R. York, has filed a no-merit report,[1] pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[2] Buckner was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and Buckner's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

On October 8, 2009, Monona police officer Ryan Losby was conducting surveillance on a Denny's parking lot; there had been multiple complaints from customers and employees regarding drug activity. Shortly before 2 a.m., Losby noticed a car pull into the parking lot and park in the middle, away from all the other cars in the lot and away from the restaurant's front doors. No one exited the vehicle to enter the restaurant. Approximately fifteen minutes later, a minivan pulled in and parked next to the first car. The driver got out of the minivan and into the back passenger seat of the car. After about ten seconds, he got back out of the car and, while looking around the perimeter of the parking lot, got back into the minivan and drove away. The car drove away, too. When the vehicles arrived at the Beltline highway, they went in opposite directions.

As the vehicles departed Denny's parking lot, Losby had radioed for assistance in stopping them. Monona police officer Adam Nachreiner was extremely close—Losby was able

[1] Buckner was originally represented by Attorney Elizabeth Ewald-Herrick, who submitted the no-merit report in this matter. While this appeal was pending, Ewald-Herrick evidently left the legal profession, and the Office of the State Public Defender moved to appoint successor counsel. By order dated April 3, 2012, this court granted the public defender's request. We directed that the successor determine whether to rely on Ewald-Herrick's no-merit report or whether to take some other action. Attorney Katie R. York was appointed, and she advised this court that she would rely on the previously submitted report.

[2] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

to watch him get behind the minivan and confirm to him that it was the correct subject. As Nachreiner pursued the minivan, Losby stopped the car, identifying its occupants as Eddie Ash and Demetrius Washington. Losby asked Ash whether he had contact with anyone. Ash told him no. When Losby told Ash that the officer had been watching the parking lot, Ash told him that he had met someone at the parking lot simply to retrieve his cell phone. Washington told Losby he had just woken up and was not too clear about what was happening.

Losby obtained consent to search both men and the car. On Ash, he found $250 in cash. On Washington, he found $2887. In the car, Losby found an abundance of dryer sheets tucked into the seats and air vents, along with what appeared to be a drug transport bag—a plastic shopping bag inside another bag, with a layer of liquid fabric softener between them. Losby, from experience, knew these laundry supplies were commonly employed to deceive drug-sniffing dogs. However, Losby did not find any drugs in the car or on either man. He therefore suspected the minivan would contain drugs, and called Nachreiner.

Nachreiner, meanwhile, had stopped the minivan and made contact with the driver, Buckner. Buckner told Nachreiner he had gone to the Denny's to meet his brother and give him $1000 for rent. Nachreiner noticed that Buckner would not make eye contact and appeared to have a tear in the corner of his eye as though he may have been crying. When Nachreiner told him that was not the story Losby had gotten from the other car, Buckner clarified that when he said "brother," he was speaking colloquially and meant a close friend. Further, his real brother

had asked him to go meet "E" from Chicago and give "E" the $1000.[3] Buckner also told Nachreiner that he did not know either person in the car. When Nachreiner requested Buckner's consent to search the minivan, Buckner declined.

When Nachreiner stopped Buckner at approximately 2:08 a.m., he asked his dispatcher to find a K9 unit to assist. Officer Blaine Hall from the Mt. Horeb police department received the request at 2:24 a.m. and, according to his log, arrived at 2:45 a.m., the approximate travel time from Mt. Horeb to Nachreiner's location. Hall's dog, Bak, alerted on Buckner's minivan. Hall and a state trooper who had also arrived to assist in the stop searched the minivan. Hall found a large package of suspected drugs. Nachreiner recovered the softball-sized package and discovered a large plastic bag, holding eight smaller bags, each holding ten smaller bags of what field-tested as heroin. Three small loose bags were also recovered. Based on the eighty-three bags of heroin, which weighed well over thirty grams, Buckner was arrested and charged with possession with intent to deliver between ten and fifty grams of heroin.

Trial counsel moved to suppress the drugs, but the motion was denied. The case was tried to a jury. At trial, Buckner testified, telling jurors that he had gone only to drop off the money. While he was in the car, Ash asked him to do him a favor and handed over the ball of heroin. When Buckner refused to take it, Ash locked the car doors and told him he was not leaving without it. Washington then shifted in his seat, causing Buckner to feel threatened because he did not know whether either man was armed. Buckner testified that he was in the car

[3] At trial, Buckner testified that a friend had called him, seeking to collect $350 that Buckner owed, plus $650 owed to him by others. Buckner was supposed to go collect the $650 before meeting the car from Chicago.

for one or two minutes and that, once he realized what he had been given, he planned to dispose of the drugs. The jury, which was instructed on a coercion defense and the lesser-included charge of simple possession, convicted Buckner of the original possession-with-intent charge. The circuit court sentenced him to one and one-half years' initial confinement and four years' extended supervision.

Counsel raises three potential issues, each of which she concludes lack arguable merit. In Buckner's response, we are able to discern two potential issues, though we conclude those issues also lack arguable merit. We address each in turn.

Counsel first addresses whether there is any arguable merit to a claim the circuit court erroneously denied Buckner's suppression motion. He had challenged the stop, asserting there was no probable cause or reasonable suspicion. He also challenged the extension of the stop.[4]

Whether police violated Fourth Amendment protections against unreasonable searches and seizures is a question of constitutional fact. *See* ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. We defer to the circuit court's findings of evidentiary or historical fact, but we independently apply constitutional principles to those facts. *See* ***id.***

Police may temporarily stop an individual when, at the time of the stop, they possess "specific and articulable facts which would warrant a reasonable belief that criminal activity was afoot." ***State v. Waldner***, 206 Wis. 2d 51, 55, 556 N.W.2d 681 (1996); *see also* WIS. STAT.

[4] Trial counsel also indicated a challenge to the lack of consent to search the minivan; Buckner had declined to authorize a search, either because he knew he had contraband or, more benignly, because the van was not his. However, Bak's sniff was not a search, *see* ***State v. Arias***, 2008 WI 84, ¶3, 311 Wis. 2d 358, 752 N.W.2d 748. and, once Bak indicated on the minivan, the officers had a reason to search its interior, regardless of consent.

§ 968.24. Based on the facts recited above, taken primarily from the suppression hearing testimony, it is more than obvious that Losby had a legitimate basis for directing the stop of both vehicles.[5] However, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." ***Florida v. Royer***, 460 U.S. 491, 500 (1983) (plurality opinion). Buckner complained that the stop was impermissibly extended during the wait for a K9 unit.

There was a small factual discrepancy about the length of the detention: while Hall's log shows he arrived at 2:45 a.m., Nachreiner's showed him arriving at 2:59 a.m. It does not appear that the circuit court expressly determined which one was accurate, because the timing was ultimately irrelevant to its decision. For purposes of review, we will assume that the challenged period lasted fifty-one minutes, from the stop at 2:08 a.m. until 2:59 a.m., the later arrival time attributed to Hall.

To determine whether the extension of a stop was constitutional, we apply a two-part test. *See* ***State v. Arias***, 2008 WI 84, ¶29, 311 Wis. 2d 358, 752 N.W.2d 748; *see also* ***Terry v. Ohio***, 392 U.S. 1, 19-20 (1968). First, we "must determine whether the seizure was justified at its inception." *See* ***Arias***, 311 Wis. 2d 258, ¶30. Second, we must determine whether the delay "'was reasonably related in scope to the circumstances which justified the interference [with a person's liberty] in the first place.'" ***Id.*** (citation omitted).

[5] Losby's and Nachreiner's trial testimony was consistent with their suppression-hearing testimony.

There is no doubt on this record that, as part of a drug investigation, the stop and seizure of Buckner almost immediately after he left the Denny's parking lot was justified at its inception. Further, it is obvious that the delay—occasioned solely by the wait for a K9 unit to verify or dispel the suspicion of illegal drugs, especially in light of Buckner's refusal to grant consent—was reasonably related to the original circumstances of the stop. *See* ***Royer***, 460 U.S. at 500 (plurality opinion). Indeed, if drugs were in the vehicle as the officers could reasonably suspect at that time, the police would be greatly interested in preventing their release into the community as a whole. *See* ***Griffith***, 236 Wis. 2d 48, ¶54 ("To determine whether the stop was unreasonably prolonged, the court must consider the law enforcement purposes to be served by the stop and the time reasonably needed to accomplish those purposes.").

There is no bright-line rule for determining the reasonableness of a seizure, *see* ***Arias***, 311 Wis. 2d 358, ¶34, so there can be no bright-line rule for the amount of time at which a stop or seizure becomes unconstitutionally prolonged. Here the stop was delayed only for the minimum amount of time necessary for Officer Hall to arrive to aid in the drug investigation.[6] We therefore agree with counsel's assessment that there is no arguable merit to a challenge to the circuit court's decision to deny the motion to suppress.

The second issue counsel raises is whether sufficient evidence supports the jury's verdict. We view the evidence in the light most favorable to the verdict, and if more than one reasonable inference can be drawn from the evidence, we must accept the one drawn by the jury. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 504, 451 N.W.2d 752 (1990). "[T]he jury verdict will be

[6] A Town of Madison K9 officer had attempted to respond earlier, but discovered that Monona would exceed a jurisdictional limit imposed by his chief, thus preventing him from assisting.

overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt." ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation omitted). Moreover, the jury is the sole arbiter of the credibility of witnesses and it alone is charged with the duty of weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506. "This court will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts." ***State v. Tarantino***, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

To prove possession with intent to deliver heroin, the State had to show that (1) Buckner possessed a substance; (2) the substance was heroin; (3) Buckner knew or believed the substance was heroin; and (4) Buckner intended to deliver the heroin. *See* WIS JI–CRIMINAL 6035. The State also had to convince the jury that the quantity of drugs in Buckner's possession was more than ten grams. The State provided sufficient evidence that would allow the jury to find guilt beyond a reasonable doubt. Losby, Nachreiner, and Hall testified about the surveillance, traffic stop, Buckner's behavior during the stop, and recovery of the heroin. Martin Koch, from the crime lab drug identification unit, testified that he tested the recovered substance and confirmed it to be heroin. He also testified that the weight, out of package, was 23.642 grams. Sabrina Sims, a sheriff's deputy and detective from the Dane County Narcotics and Gang Task Force, testified that the packaging and lack of paraphernalia for use were consistent with someone who would be distributing and not using drugs. She also testified that the source for many drugs in the Dane County area was Chicago. From this evidence, the jury could draw appropriate inferences and find facts necessary to convict Buckner.

When an affirmative defense is successfully put at issue, the burden is on the State to disprove the defense beyond a reasonable doubt. *See* ***State v. Head***, 2002 WI 99, ¶106, 255 Wis. 2d 194, 648 N.W.2d 413. The State satisfied this burden with respect to Buckner's coercion defense once the jury rejected Buckner's version of events and accepted the State's by resolving what were clearly credibility questions.[7] There is no arguable merit to a challenge to the sufficiency of the evidence to support the conviction.

The final issue counsel raises is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

[7] The State pointed out that, while Buckner claimed he was forced to take the drugs from the car, he did not testify that he was given any instructions on what to do with them once he had them. It also argued that the jury should not believe Buckner intended to dispose of the drugs—if his story were true, and he felt threatened in the car, he would not destroy the drugs and risk incurring the wrath of the drugs' true owners. The State also got Buckner to admit that, once Nachreiner stopped him, he did not immediately surrender the drugs, attempt to report a crime, or ask Nachreiner for help in any way.

Here, the circuit court considered several mitigating factors, like Buckner's low likelihood of re-offense and his "very difficult" family background. However, Buckner also had a lengthy criminal record, including "too many" prior convictions. The circuit court determined that Buckner probably was not a "big time" drug dealer but that he was certainly a courier, which involves him in the drug trade. He also had a very large, "very illegal" quantity of heroin in this case. The circuit court also concluded that probation would unduly depreciate the seriousness of the offense, and that it was important to impose a sentence that would serve as a specific deterrent both to Buckner and the community.

The maximum possible sentence Buckner could have received was twenty-five years' imprisonment. The sentence totaling five and one-half years' imprisonment is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is 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). There would be no arguable merit to a challenge to the sentencing court's discretion.

Buckner's response raises two issues that we can discern.[8] First, he contends that trial counsel "said something in the beginning of my trial … about me being a drug dealer or I knew that I was going to pick up drugs." We perceive this to be a challenge to the effective assistance of trial counsel regarding opening statements. However, we have reviewed counsel's opening

[8] Buckner may also be raising two other issues. He indicates that when his appellate attorney asked him why he wanted to appeal, he told her it was because the drugs were not his and he is innocent. To the extent this is a challenge to the sufficiency of the evidence, the main text of this opinion explains why there is no arguable merit to such a claim. Buckner also complained that he needed glasses, but his institution has not provided them. By our calculations, Buckner should now be on extended supervision but, in any event, we have no supervisory authority over correctional institutions, so any complaint about the institution's treatment would have to be pursued elsewhere.

remarks and cannot find any such comment. True, counsel did concede that Buckner was in possession of the heroin, but that fact really was undisputed. Counsel also told the jury, "I'd be willing to bet that you're going to hear testimony about whether it's consistent with the amount that a dealer would have." However, this was nothing more than counsel's prediction—accurate, as it turns out—regarding the State's case, and it was mentioned as a prelude to counsel's opening explanation that Buckner would be presenting a coercion defense. There is no arguable merit to a challenge to counsel's opening statement.

Buckner also complains about the "Dane County Sheriff, interfering in Monona Police investigation and let the other two men go [costing] me the case I rightfully [deserved] and a proper defense." On this record, it is not clear to what Buckner refers, though he testified that after he was transferred by Monona police to the Dane County Public Safety Building—and, thus, presumably, the county jail—the "Dane County Sheriff head of narcotics" came to ask Buckner whether he had any information that might help with his case. Buckner responded by requesting an attorney. Additionally, the record indicates that a predecessor to the district attorney who tried Buckner's case had decided not to pursue charges against Ash or Washington.

There is no issue of arguable merit from these complaints. We know of no rule preventing agencies with concurrent jurisdiction from aiding in or sharing information about investigations of another agency. When Buckner invoked his right to counsel, as far as this record indicates, the sheriff's questioning properly ceased. Further, though the record does not reveal why charges against Ash and Washington were not filed, or even whether they were arrested, the charging decision is a matter of prosecutorial discretion, and there is no basis in this record for challenging that discretion.

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

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Katie R. York is relieved of further representation of Buckner in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals