



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

October 9, 2013

To:

Hon. Mark T. Slate
Circuit Court Judge
P.O. Box 3188
Green Lake, WI 54941

Kyle J. Sargent
District Attorney
P.O. Box 3188
Green Lake, WI 54941-3188

Susan J. Krueger
Clerk of Circuit Court
Green Lake County Courthouse
P.O. Box 3188
Green Lake, WI 54941

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

George S. Pappas Jr.
1345 W. Mason St., Ste. 200
Green Bay, WI 54303-2072

Timothy R. Wolfe
290 Canal St.
Berlin, WI 54923

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

2013AP1452-CRNM State of Wisconsin v. Timothy R. Wolfe (L.C. #2011CF65)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Timothy R. Wolfe appeals from a judgment of conviction for sixth offense operating a motor vehicle while under the influence of an intoxicant (OWI). His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12),¹ and *Anders v. California*, 386 U.S. 738 (1967). Wolfe has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of the report, Wolfe's response, and an independent review of the record, we

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

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.

Wolfe was observed by a game warden pulling into a parking lot and then exiting his vehicle with an open beer in his hand. The warden reported the observation to the local police. When an officer arrived, he and the warden engaged Wolfe in conversation. Wolfe denied having had the beer open in the vehicle. Yet the officer detected a strong odor of intoxicants from Wolfe's breath. Wolfe failed field sobriety tests² and his preliminary breath test result was .161. Wolfe had five prior OWI convictions. He was charged as a repeater with sixth offense OWI, sixth offense operating with a prohibited blood alcohol, and the misdemeanor offenses of failure to install an ignition interlock device, possession of THC, and possession of drug paraphernalia. Pursuant to a plea agreement, Wolfe entered a no-contest plea to the sixth offense OWI, with the repeater enhancement dropped, and the remaining charges were dismissed as read ins at sentencing. The prosecution made the agreed upon sentencing recommendation of twenty months initial confinement and thirty-six months of extended supervision. Wolfe joined in that recommendation. The court imposed the sentence Wolfe requested.

The no-merit report addresses the potential issues of whether it was error to accept Wolfe's not guilty pleas to the misdemeanor charges prior to the preliminary hearing on the felony charges, whether the circuit court committed error at the initial appearance when it failed to advise Wolfe of mandatory minimums, and whether trial counsel was ineffective for not filing pretrial motions challenging the bindover and the search and seizure of Wolfe. We agree with

² Wolfe only attempted two of the four requested tests.

counsel's explanation of why these potential issues lack arguable merit. Additionally, by his no-contest plea Wolfe forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *State v. Kelty*, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

In his response, Wolfe states that the warden reported seeing Wolfe driving with an open intoxicant in his vehicle and contends the warden could not have made that observation from the place where the warden was parked. Wolfe attaches to his response pictures of the area where the warden was parked, the street, and where Wolfe parked. Although Wolfe's complaint rests on matters outside the record, we consider whether there would be arguable merit to a claim that the officer's contact or "stop" of Wolfe was not based on reasonable suspicion.

A police officer may temporarily detain an individual to investigate possible criminal behavior when the officer has reasonable suspicion that the individual has committed or is about to commit a crime. *State v. Colstad*, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394. Whether a traffic stop is based on reasonable suspicion is a question of constitutional fact. *State v. Powers*, 2004 WI App 143, ¶6, 275 Wis. 2d 456, 685 N.W.2d 869. There need not be a violation of the law to support an investigative stop. *State v. Anagnos*, 2012 WI 64, ¶47, 341 Wis. 2d 576, 815 N.W.2d 675. "The law allows a police officer to make an investigatory stop based on observations of lawful conduct so long as the reasonable inferences drawn from the lawful conduct are that criminal activity is afoot." *State v. Waldner*, 206 Wis. 2d 51, 57, 556 N.W.2d 681 (1996).

During his testimony at the preliminary hearing, the warden indicated that he observed Wolfe drive to a parking spot and then exit the vehicle with an open beer. The warden

acknowledged that he could not see clearly into the vehicle and yet he had not seen any movement from which it appeared that Wolfe opened the beer after parking or upon exiting the vehicle. There was sufficient suspicion that Wolfe had the beer open in the vehicle when driving to the parking area. The police officer's investigation was justified, and the observation of the odor of intoxicants within one-half hour of Wolfe's arrival at the parking area gave rise to a reasonable suspicion that Wolfe was intoxicated when he drove to the area.³ Despite Wolfe's belief that his photos establish that he could not have been seen driving with an open beer in his vehicle, there is no arguable merit to a claim that the evidence of intoxication garnered during the officer's contact with Wolfe should have been suppressed.

The no-merit report also concludes that there would be no merit in challenging the plea colloquy. The record shows that the trial 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. The complaint was used as a factual basis for the plea without objection by Wolfe. The complaint attached evidence of Wolfe's five prior OWI convictions. The record established that Wolfe's plea was freely, voluntarily and knowingly entered.

The no-merit report fails to address sentencing and whether there is arguable merit to a claim that the sentence was the result of an erroneous exercise of discretion. Because the sentence imposed was the same as that recommended by Wolfe, Wolfe has no basis to challenge

³ The warden reported his observation to police at 2:16 p.m. The preliminary breath test was done after field sobriety tests and was recorded at 2:55 p.m. Wolfe indicates in his response that the police officer arrived about one-half hour after he talked to the game warden.

his sentence on appeal. *See State v. Magnuson*, 220 Wis. 2d 468, 471-72, 583 N.W.2d 843 (Ct. App. 1998).

Our review of the record discloses no other potential issues for appeal.⁴ Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Wolfe further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney George S. Pappas, Jr., is relieved from further representing Timothy R. Wolfe in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

⁴ Before the filing of the no-merit notice of appeal, Wolfe filed two pro se motions for sentence adjustment under WIS. STAT. § 973.195. The reasons for denying both motions are supported by the record. There is no basis to suggest that postconviction counsel should have pursued those motions for Wolfe.