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December 13, 2013

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

2013AP246-CRNM State of Wisconsin v. Tony Charles Witz (L.C. #2011CF4107)

Before Fine, Kessler and Brennan, JJ.

Tony Charles Witz appeals a judgment convicting him of operating while intoxicated, as a sixth offense. He also appeals an order denying his motion for sentence modification. Attorney Alexander D. Cossi filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2011-12),[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Witz filed a response. After considering the no-merit report and the response, and after

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

conducting an independent review of the record, we conclude that there are no issues of arguable merit that Witz could raise on appeal. Therefore, we summarily affirm the judgment of conviction and the order denying Witz's motion to modify his sentence. *See* WIS. STAT. RULE 809.21.

The no-merit report and Witz's response address whether there would be arguable merit to a claim that Witz's trial lawyer was constitutionally ineffective. Witz contends his lawyer should have moved to suppress evidence obtained by the police. He contends that the police did not have a reasonable suspicion that he was driving while intoxicated because the person who reported that Witz was driving erratically incorrectly identified Witz's vehicle as an Oldsmobile Delta, rather than an Oldsmobile Cutlass.

To prove a claim of ineffective assistance of counsel, a defendant must show that his lawyer's performance was deficient and the deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish that a lawyer's performance was deficient, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." ***Id.*** at 690. A police officer has a reasonable suspicion to detain a person to investigate if the officer "reasonably suspect[s], in light of his or her experience, that some kind of criminal activity has taken or is taking place." ***State v. Richardson***, 156 Wis. 2d 128, 139, 456 N.W.2d 830 (1990) (quoting ***Terry v. Ohio***, 392 U.S. 1, 30 (1968)). The officer's "reasonable suspicion must be based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.'" ***Id.*** (citing ***Terry v. Ohio***, 392 U.S. at 21).

Here, the police were informed by a citizen witness that a blue Oldsmobile with Witz's license plate number was driving erratically. The police ran a check of the license plate, learned the car was registered to Witz and drove to his residence. The police saw a blue Oldsmobile with the same license plate driving on Witz's block about forty-five minutes after receiving the tip. The information the police had was sufficient to justify the investigatory stop, because the witness correctly identified the license number, color and make of the car. The incorrect model description does not dilute the accuracy of the identification. Because the police had a reasonable suspicion that criminal activity had taken place, a suppression motion would not have been successful. Therefore, there would be no arguable merit to a claim that Witz's lawyer provided constitutionally ineffective assistance by failing to file a motion to suppress.

The no-merit report addresses whether Witz's guilty plea was knowingly, intelligently, and voluntarily entered. In order to ensure that a defendant is knowingly, intelligently, and voluntarily waiving the right to trial by entering a guilty plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which he is pleading guilty, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. *See* WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986).

During the plea colloquy, the circuit court reviewed with Witz some of the constitutional rights he was waiving by entering a plea. The circuit court explained the meaning of each right in depth and ascertained that Witz understood the significance of his decision to waive each right. For the rights that the circuit court did not explicitly discuss, it ascertained that Witz had reviewed the rights with his lawyer and understood the information contained on the plea questionnaire. The circuit court also explained the elements of the crime to Witz and the

potential maximum penalties he faced by entering his plea, and asked him whether he understood that he could be sentenced to the maximum penalty. Witz said he understood.

The plea agreement was stated on the record and Witz and his lawyer both told the circuit court that the agreement as stated was in accord with their understanding. The circuit court told Witz that he would be giving up all of the defenses he could assert at a trial, including any argument that the police stop of his vehicle was unconstitutional. Witz told the circuit court that he understood. The circuit court asked Witz if he had enough time to go over everything with his lawyer before he decided to plead guilty, and whether he had reviewed the plea questionnaire form with his lawyer. Witz said that he did. The circuit court asked Witz whether he was pleading guilty because he was in fact guilty of the acts alleged in the complaint, which Witz admitted were true, and Witz said that he was. The circuit court informed Witz that he could be deported if he was not a U.S. citizen. Witz said he understood. The circuit court asked Witz's lawyer whether she thought her client understood everything she had explained to him. Witz's lawyer told the circuit court that she thought he understood, and provided details to the circuit court about the things she had explained to him. The circuit court then accepted Witz's plea. Because the plea colloquy complied with the mandates of WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d at 266-72, there would be no arguable merit to a claim that Witz's guilty plea was not knowingly, intelligently and voluntarily entered.

The no-merit report and Witz's response address whether there would be arguable merit to a claim that the circuit court misused its discretion when it sentenced Witz to four years and eight months of imprisonment, with thirty-two months of initial confinement and two years of extended supervision, to be served consecutively to another sentence that Witz was already serving. The circuit court said that Witz had repeatedly consumed alcohol and then decided to

drive a car since his first conviction for operating while intoxicated in 1999, and that he was unable to stop himself from continuing with this dangerous behavior. The circuit court found particularly aggravating the fact that Witz was on extended supervision for a previous conviction of operating while intoxicated when he committed this crime and found aggravating that his blood alcohol concentration was .264. Deciding that the need to protect the community was its paramount concern, the circuit court concluded that Witz was a danger to the public and needed a prison sentence. The circuit court also concluded that he should serve the sentence consecutively to one he was already serving for a prior conviction of operating while intoxicated so that he would be in prison longer, and thus not out on the streets presenting a danger to the public. The circuit court explained its application of the various sentencing considerations in depth in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197, and its decision was a reasonable exercise of discretion in light of the circumstances presented. There would be no arguable merit to a challenge to the sentence on appeal.

The no-merit report and Witz's response address whether Witz received all of the sentence credit to which he was entitled. "A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." WIS. STAT. § 973.155(1)(a). Where, as here, a defendant is incarcerated awaiting trial on new charges *and* pursuant to revocation proceedings on prior charges due to the new arrest, "time in custody is to be credit to the sentence first imposed" and "is not to be duplicatively credited to more than one of the sentences imposed to run consecutively." ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). Witz received no credit for the days he was incarcerated after his arrest, but before his sentencing,

because he was being held for revocation of his extended supervision on a different case at that time, and his sentence in this case was imposed consecutively. The days that Witz spent in custody prior to his sentencing on this case were credited toward his sentence in the prior case. There would be no arguable merit to this claim.

In his response, Witz contends that he was improperly charged in a prior case in Waukesha County, 2004CF233. He states that he was initially charged with operating while intoxicated as a fifth offense, but he should have been charged with operating while intoxicated as a fourth offense. He contends that the circuit court records were later changed by officials "to cover their tracks," and the records now show that the Waukesha case was his fourth offense. Witz's assertion that the records were improperly altered is incorrect. The circuit court's online docket entries (CCAP) currently show that Witz was charged with and convicted of operating while intoxicated, as a fifth offense, in the Waukesha case. The records do *not* show that this Waukesha case was his fourth offense. Moreover, Witz may not raise a challenge to a prior conviction in the context of his appeal of this conviction. He must file a collateral postconviction motion in the circuit court from the prior conviction if he believes he is entitled to relief.[2] There would be no arguable merit to this claim on appeal.

Witz contends in his response that his lawyer, Rosemary Reyes Cuevas, appeared hours late for his plea and sentencing hearing on December 2, 2011, which caused the judge to become angry and give him a more lengthy sentence due to his lawyer's tardiness. The transcript of that

[2] Witz also contends that a DNA surcharge was improperly imposed on him in this prior case. Like his claim that he was improperly charged, he cannot raise this claim in the context of this appeal because it is a different case.

hearing does not reflect the fact that Cuevas was late. Moreover, there is nothing in the transcript that suggests that the circuit court was "angry" or treated Witz unfairly. There would be no arguable merit to this claim.

Witz contends in his response that he filed a motion to dismiss Cuevas, but the circuit court did not decide the motion for reasons unknown to him. During the plea and sentencing hearing, Witz told the circuit court that he no longer wished to pursue the motion he had filed with regard to his lawyer. Therefore, there would be no arguable merit to this claim.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction and order denying Witz's motion for sentence modification. Therefore, we affirm the judgment and order, and relieve Attorney Alexander D. Cossi of further representation of Witz.

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

IT IS FURTHER ORDERED that Attorney Alexander D. Cossi is relieved of any further representation of Witz in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals