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

2013AP1003-CRNM State of Wisconsin v. Marius Gerard Erby
(L.C. #2012CF941)

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

Marius Erby appeals from a judgment of conviction entered after a jury found him guilty of one count of possession with intent to deliver cocaine (between one and five grams), contrary to § 961.41(1m)(cm)1r. (2011-12).[1] Erby's postconviction/appellate counsel, Ann Auberry, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Erby has not filed a response. We have independently

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

reviewed the record and the no-merit report as mandated by ***Anders***. Because we conclude that Erby could pursue an arguably meritorious challenge to his trial counsel's performance concerning the suppression motion, we reject the no-merit report, dismiss the instant appeal without prejudice, and extend the deadline for filing a postconviction motion.

Erby was charged with the aforementioned crime after police officers conducted a traffic stop, asked Erby to exit the vehicle, and saw a small bundle of what appeared to be cocaine on the driver's seat. Inside the bundle were nineteen individually wrapped packages of cocaine. The officers subsequently found more than $2000 in cash, two cell phones, and a gun for which Erby had a valid concealed carry permit.

Erby filed a motion to suppress evidence seized from him and the vehicle. The motion contained information about the stop that was alleged in the police reports, and it did not assert that Erby disputed those facts. Instead, the motion asserted that under those facts, the evidence should be suppressed. In its written response, the State argued that the motion should be denied without an evidentiary hearing because the motion did not contain "a factual scenario or legal theory on which the defendant may prevail."[2]

The trial court agreed with the State and denied the motion without an evidentiary hearing. In a written order, the trial court explained that based on the facts alleged, there was no basis for suppression. Specifically, the motion alleged that the stop was based on Erby's failures to stop at a stop sign and wear a seat belt. The motion asserted that officers asked

[2] The State also noted that although the motion asserted that Erby was challenging a "frisk," there was no frisk or pat-down in this case. Rather, once an officer saw suspected cocaine on the driver's seat, Erby was placed under arrest and searched incident to arrest.

Erby for identification and information on the vehicle, which the officers had determined was a rental car, and Erby refused to provide either. The officers observed that Erby was nervous and asked him to get out of the vehicle. Although Erby at first refused, he finally did step out. When he did so, the officers saw a bundle of suspected cocaine on the driver's seat where Erby had been sitting. The trial court concluded that there was a valid basis for the stop: the traffic violation of failing to stop at the stop sign. Further, it explained, police officers may ask a driver to exit a vehicle that has been stopped for a traffic violation. Finally, the cocaine was in plain view after Erby exited the vehicle, which provided probable cause for the police to seize it. Accordingly, the trial court concluded, Erby was not entitled to relief.

The case proceeded to trial. The State produced testimony from the arresting officers, a forensic investigator, an analyst from the crime lab, and a detective familiar with narcotics trafficking. The defense called Erby as its only witness. The jury found Erby guilty and further found that the cocaine weighed more than one gram. Erby was sentenced him to two-and-one-half years of initial confinement and three years of extended supervision.

The no-merit report discusses four issues: (1) whether trial counsel provided ineffective assistance by not including Erby's version of the facts in the suppression motion and by not arguing that the officers lacked probable cause to stop the vehicle and order Erby out of the vehicle; (2) whether trial counsel provided ineffective assistance by not objecting to one officer's testimony about information he received from other officers via police radio; (3) whether the verdict was supported by sufficient evidence; and (4) whether the trial court erroneously exercised its sentencing discretion.

This court concludes that there would be arguable merit to filing a postconviction motion alleging that trial counsel provided ineffective assistance by not adequately challenging the traffic stop, for reasons discussed below. Because this court has identified an issue of arguable merit, we do not address whether there are any other potential issues of arguable merit, including those discussed by postconviction/appellate counsel. Counsel may raise those or other issues in a postconviction motion if counsel ultimately concludes that they have arguable merit.

We begin our analysis with the legal standards for ineffective assistance. "[A] convicted defendant must show two elements to establish that his counsel's assistance was constitutionally ineffective: First, that counsel's performance was deficient; second, that the deficient performance resulted in prejudice to the defense." ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations and internal quotation marks omitted).

With respect to the first potential instance of ineffective assistance, the no-merit report implies that there was deficient performance because trial counsel "could and should have contested the facts outlined in the police reports by incorporating Erby's account of the events leading up to his encounter with police and their demand he exit the vehicle he was driving." The report further asserts that trial counsel "should have made a legal argument

that the officers were not justified in stopping Erby and ordering him out of his car (i.e., the officers did not have probable cause to believe Erby committed a traffic violation)." The report continues: "Had counsel done either of [those things], perhaps, the trial court would have granted Erby a hearing at which he could elicit evidence in support of his motion to suppress the physical evidence recovered from him and the vehicle."

The no-merit report concludes, however, that Erby was not prejudiced by his trial counsel's alleged deficiencies, because even if the motion had been written differently and an evidentiary hearing had been conducted, the result would have been the same. Counsel notes that the officers saw Erby fail to stop for a stop sign and fail to wear a seat belt.[3] Even though Erby disputes whether he failed to stop at a stop sign, he admits in an affidavit filed with this appeal that he was not wearing a seat belt. Counsel states that that violation alone provided a legal basis for the officers to stop the vehicle. *See* ***State v. Popke***, 2009 WI 37, ¶13, 317 Wis. 2d 118, 765 N.W.2d 569 (A law enforcement officer may conduct a traffic stop of a vehicle when the officer "has probable cause to believe a traffic violation has occurred."); *see also* WIS. STAT. § 347.48(2m), which mandates seat belt use when operating a motor vehicle equipped with seat belts and which was amended by 2009 Wis. Act 28 § 2991 to remove language that had previously prohibited a law enforcement officer from stopping a vehicle based solely on the failure to wear a seat belt.

[3] The officers who saw Erby commit the traffic violations radioed the information to the officers who ultimately stopped the vehicle. The no-merit report asserts that the second set of officers was permitted to rely on the collective knowledge of the other officers. *See* ***State v. Pickens***, 2010 WI App 5, ¶12, 323 Wis. 2d 226, 779 N.W.2d 1.

The no-merit report explains that once the vehicle was stopped, the officers were permitted to ask Erby to exit the vehicle. *See* ***State v. Johnson***, 2007 WI 32, ¶23, 299 Wis. 2d 675, 729 N.W.2d 182 (recognizing that in ***Pennsylvania v. Mimms***, 434 U.S. 106, 111 (1977), the United States Supreme Court "established a per se rule that an officer may order a person out of his or her vehicle incident to an otherwise valid stop for a traffic violation"). Finally, counsel concludes, once the officers saw the cocaine in plain view on the seat where Erby had been sitting, they were justified in seizing it. *See* ***State v. Ragsdale***, 2004 WI App 178, ¶17, 276 Wis. 2d 52, 687 N.W.2d 785 (discussing the seizure of contraband or evidence in plain view).

Based on the record, we cannot definitively conclude that Erby would have lost the suppression hearing. The officers who allegedly told the arresting officers—via radio—that they saw Erby driving without a seat belt and failing to obey a stop sign have never testified at any proceeding, and the record does not conclusively establish that the officers stopping Erby were, based on that radio transmission and what the officers stopping Erby perceived when they stopped him, justified in ordering him from the car rather than merely issuing a citation, especially because Erby's affidavit, contrary to what his trial lawyer apparently agreed, specifically avers that he fully cooperated with the officers' requests for documentation. The trial court would need to resolve conflicting testimony concerning what occurred once the car was stopped in order to assess the legality of the officer's actions. For these reasons, we conclude that there would be merit to filing a postconviction motion challenging trial counsel's performance concerning the suppression issue.

Upon the foregoing, therefore,

IT IS ORDERED that the no-merit report filed by Attorney Ann Auberry is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline to file a postconviction motion is extended to sixty days from the date of this order.[4]

Diane M. Fremgen
Clerk of Court of Appeals

[4] Counsel may, if necessary, move to extend this deadline. *See* WIS. STAT. RULE 809.82(2)(a).