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DISTRICT II

February 5, 2014

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

2013AP772-CRNM State of Wisconsin v. Ricky McMorris (L.C. #2011CF185)

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

Ricky McMorris appeals from a judgment of conviction for possession of cocaine as a second or more offense and resisting an officer, as a habitual offender. 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). McMorris has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record,

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

we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* RULE 809.21.

McMorris was observed at a gas station gesturing and yelling at patrons in an incomprehensible manner. The police were called and McMorris was arrested after he failed to comply with the officer's request to allow a pat-down search. McMorris was charged with resisting an officer and disorderly conduct, as a habitual offender, possession of cocaine as a second or more offense, and possession of drug paraphernalia. McMorris's motion challenging the officer's contact with him and to suppress evidence found on his person was denied. McMorris entered a guilty plea to the two counts of which he is convicted under a plea agreement in which the prosecution promised a certain sentencing recommendation and dismissed as read-ins the two other counts. At sentencing the prosecution gave the promised sentence recommendation. McMorris was sentenced to an eight-month jail term on the resisting conviction, to be served concurrently with a sentence McMorris would serve upon the revocation of extended supervision on a prior conviction. On the possession conviction, a three-year sentence was imposed but stayed in favor of three years' probation consecutive to the sentence on the resisting conviction.

The no-merit report addresses the potential issues of whether McMorris's motion to suppress evidence was properly denied, whether his plea was freely, voluntarily and knowingly entered, and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the plea and sentencing issues. Although the report sets forth the proper standard of review of the decision on the suppression motion, it fails to include a discussion of the applicable legal principles and the trial court's decision. However, at the suppression hearing the trial court set forth the correct legal principles

and explained how its findings of fact satisfied those principles. The suppression motion was properly denied. Our review of the record persuades us that no issue of arguable merit could arise from the points discussed in the no-merit report.

In his response,[2] McMorris discusses the motion to suppress evidence and suggests that there was surveillance video that would have showed that the officers' testimony about what

[2] At the conclusion of his response, McMorris states, "If the attorney don't want to do his job, I am asking the court to send documentation of appeal procedures, and ninety days to submit my brief." Although this suggests that McMorris wants to proceed pro se, it is not responsive to this court's directive that if McMorris wanted to discharge his appointed counsel and withdraw the no-merit appeal, he was to make an unequivocal statement that he wanted to proceed pro se.

Before this appeal was filed, appointed counsel moved to withdraw because McMorris wanted to proceed pro se. After the trial court conducted a colloquy with McMorris about the waiver of his right to counsel, counsel's motion to withdraw was withdrawn and the no-merit appeal filed. In his first response to the no-merit report McMorris wrote that he intended to hire an attorney and he sought an extension of time to do so. An extension of time for McMorris to file a response to the no-merit report was granted with the observation that McMorris had, in the face of counsel's motion to withdraw, requested a no-merit appeal. When McMorris disagreed that he had elected a no-merit appeal, we construed his complaint to be that he wanted to discharge appellate counsel and withdraw the no-merit report. The consequences of discharging appointed counsel, the no-merit process, and the responsibilities and dangers of proceeding pro se were set forth to McMorris in an order which also required McMorris to file a response clarifying whether he wanted to discharge counsel, withdraw the no-merit report, and proceed pro se. In response McMorris filed a response complaining that the no-merit report was fatally constitutionally flawed and suggesting that his waiver of counsel could not be considered voluntary. McMorris asked for ninety days to retain private counsel. Because the response did not demonstrate that McMorris wanted to proceed pro se, the time for McMorris to file a response to the no-merit was extended by ninety days. Just weeks prior to the deadline for McMorris's response, he filed the letter addressing the suppression motion and requesting a chance to file a brief. We construed the letter as his response to the no-merit report but gave him more than a month to submit any additional response he wanted considered. At the expiration of the additional extension, McMorris simply requested more time because he had asked the state public defender to appoint new counsel. We denied the request for additional time because McMorris had previously been informed that new counsel would not be appointed simply because there was disagreement about the issues to be pursued on appeal and nearly six months had passed since the no-merit report was filed. At no time did McMorris waive his right to appointed counsel or withdraw the no-merit appeal.

happened was not true. He complains that his appellate counsel refused "to ask the officer who retrieved the video why he didn't retrieve the whole video, and the rest was deleted." The record demonstrates that McMorris's trial counsel and the prosecutor tried to obtain a more complete copy of the surveillance video but that the portion not originally preserved by the police was deleted by the building owner. When this was explained to the trial court, there was no suggestion that the police acted with malevolent foresight in not preserving the surveillance video depicting what occurred before police arrived or before they attempted to conduct the pat-down search. Moreover, McMorris accepted the plea agreement and entered his guilty plea knowing that the entirety of the incident was not preserved on video tape. He forfeited any claim that further exploration should have been made of why the video of the entire incident was not preserved. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886 (observing the general rule that a guilty plea waives all nonjurisdictional defects, including constitutional claims). Appellate counsel could do nothing about video that simply could not be produced.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent McMorris 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 Scott A. Szabrowicz is relieved from further representing Ricky McMorris in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals