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February 17, 2014

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

2013AP861-CRNM & 2013AP863-CRNM — State of Wisconsin v. Marcus Fultz (L.C. #'s 2012CM1703, 2012CF4108)

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

In these consolidated appeals, Marcus Fultz appeals from judgments entered after he pled guilty to possession of a dangerous weapon by a person under the age of eighteen in Milwaukee County Case No. 2012CM1703 and to attempting to flee or elude a traffic officer in Milwaukee County Case No. 2012CF4108. *See* WIS. STAT. §§ 948.60(2)(a), 346.04(3) (2011-12).[1] Fultz's postconviction and appellate lawyer, Timothy L. Baldwin, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Fultz did not respond.

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

After independently reviewing the records and the no-merit report, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.

Case No. 2012CM1703

Officers received a report of a rifle being taken out of a trunk and passed through a window in the rear of the residence where Fultz resided with his grandmother, Annie Fultz. After conducting a search of Fultz's bedroom, officers recovered—among other things—a .22 caliber bolt-action rifle from behind a dresser. Fultz, who was seventeen at the time, admitted to getting the gun three days prior to the search. He was charged with possession of a dangerous weapon by a person under the age of eighteen.

Case No. 2012CF4108

Four months after being charged in Case No. 2012CM1703, while out on bail, Fultz was charged in this case. According to the complaint, officers in a fully marked squad car observed a black 2006 Chrysler with license plates matching those of a vehicle that was reported stolen in an armed robbery the day before. The officers followed the vehicle and later activated the red and blue emergency lights and sirens in an attempt to stop it.

In response, the driver of the Chrysler accelerated, increasing his speed to approximately eighty-five miles per hour in a residential neighborhood with a speed limit of twenty-five miles per hour. The Chrysler ultimately crashed into a tree, the airbag deployed, and the occupants fled on foot. Two of the occupants were caught quickly. Fultz, who was identified by one of the officers as the driver of the Chrysler, was found walking and talking on his cell phone on a

nearby street. The officer who took Fultz into custody observed that he was out of breath and sweating profusely. In addition, the officer observed scratches on Fultz's wrists and arms as well as white particles on his tank top that were consistent with his having been in an accident where the airbag deployed. Fultz told officers that he knew the vehicle he was driving was stolen, which is why he sped up and tried to flee.

In his no-merit report, counsel addresses whether there would be any arguable merit to an appeal on three issues: (1) the validity of Fultz's pleas; (2) the circuit court's exercise of sentencing discretion; and (3) whether Fultz's trial counsel was ineffective. For reasons explained below, we agree with the conclusion that there would be no arguable merit to pursuing these issues on appeal. Additionally, although counsel does not address it, we discuss at the outset the circuit court's denial of Fultz's motion to suppress.[2]

Motion to Suppress

In most instances, a defendant who pleads guilty waives all nonjurisdictional defects and defenses. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362 N.W.2d 439 (Ct. App. 1984). However, WIS. STAT. § 971.31(10) makes an exception to this rule, which allows appellate review of an order denying a motion to suppress evidence, notwithstanding a guilty plea. ***Smith***, 122 Wis. 2d at 434-35.

[2] The Honorable Daniel L. Konkol presided over the suppression hearing in Case No. 2012CM1703. Case No. 2012CM1703 was subsequently joined with Case No. 2012CF4108 for purposes of a global resolution. The Honorable Jean DiMotto presided over the combined plea and sentencing hearing and entered the judgments of conviction that followed.

Here, Fultz sought to suppress evidence removed from his bedroom. As set forth in the complaint, this evidence included a .22 caliber bolt-action rifle, ammunition, a blue bandana, and a blue notebook with the words "GD Book"[3] and "Marcus Fultz" on the top corner. Fultz argued there was an issue as to when Fultz's grandmother, Annie Fultz, with whom Fultz resided, consented to the search of Fultz's bedroom. *See* ***State v. Krajewski***, 2002 WI 97, ¶24, 255 Wis. 2d 98, 648 N.W.2d 385 (Consent to search is a well-delineated exception to the requirement that law enforcement conduct searches pursuant to a warrant.); *see also* ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430 (The consent exception is satisfied when consent is given in fact and the consent given is voluntary.).

Two officers testified that Annie voluntarily consented to the search before they entered Fultz's bedroom. In contrast, Annie testified that she did not consent to the search until after the officers located the rifle, at which point she was feeling "upset and woozy." After listening to the conflicting testimony, the circuit court concluded:

> In determining the facts in this case, the Court considers the credibility of the witnesses, particularly whether the witness has an interest or lack of interest in the result of the trial, the clearness or lack of clearness of the witness's recollections, the opportunity the witness had for observing and for knowing the matters the witness testified about, the reasonableness of the witness's testimony, the apparent intelligence of the witness, bias or prejudice, if any has been shown, possible motives for falsifying testimony and all other facts and circumstances during the hearing which tend to support or to discredit the testimony.
>
> As I consider that, I think that … Ms. Fultz has a recollection of events that is not credible.

[3] The complaint relayed that the notebook contained descriptions of terms used by the street gang "Gangster Disciples."

> I think that she was so shocked when she saw that rifle that she is not particularly recalling exactly what had happened, that it was a very traumatic situation for her.
>
> I think that it's very telling as she said so much was going on she couldn't get it all down at once. I also think there's some issues here where she felt she was disrespected by the officers, that there might be some issue o[f] a gun [i]n her presence—on the premises affecting her renting situation and that she was even shocked by the rifle being there, which was then recovered from her grandson's room.
>
> I think that the officer's version of the events is much more credible. It's much more reasonable. It's concise, and I think that with all of that the officers did, in fact, come to the residence, ask for permission to search the residence or [were] given permission to search the residence without any type of overbearing overtures from the officers, that the consent was freely given, that the consent was even reduced to writing, and that the officers then did conduct a consent search of that room where they did find the various items.

In light of these findings, there would be no arguable merit to asserting that the circuit court erred by denying Fultz's motion. *See* ***State v. Patton***, 2006 WI App 235, ¶7, 297 Wis. 2d 415, 724 N.W.2d 347 ("When we review a [circuit] court's ruling on a motion to suppress, we uphold the [circuit] court's factual findings unless those findings are clearly erroneous."); *see also* ***Sensenbrenner v. Sensenbrenner***, 89 Wis. 2d 677, 700, 278 N.W.2d 887 (1979) (A "determination of credibility is the sole province of the [circuit] court sitting as the trier of fact.").

Plea

Counsel next addresses whether Fultz has an arguably meritorious basis for challenging his plea on appeal.[4] Pursuant to the plea agreement, Fultz pled guilty to possession of a dangerous weapon by a person under eighteen years of age in Case No. 2012CM1703 and to attempting to flee or elude a traffic officer in Case No. 2012CF4108. In exchange, the State made a global sentence recommendation consisting of twelve months of initial confinement and twelve months of extended supervision, imposed and stayed upon successful completion of two years of probation. As one of the conditions of probation, the State asked that Fultz spend 120 to 150 days in jail. Fultz confirmed this was his understanding of the plea agreement.

To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Fultz completed a plea questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). The relevant jury instructions were attached to the forms. The form listed, and the court explained, the maximum penalties Fultz faced. The form, along with an

[4] On this issue, counsel's analysis misses its mark. He cites only to case law from the Seventh Circuit and the United States Supreme Court with no mention of WIS. STAT. § 971.08 or the applicable case law of this state. Counsel writes that he consulted with Fultz as to whether he wanted to seek a withdrawal of his guilty plea and that Fultz advised he did not want to pursue such a challenge, "only that (1) the court made erroneous references to criminal convictions that were not his and (2) that the judge in this case made inappropriate comments about his personal background." Without any elaboration on what was erroneous or inappropriate about the court's remarks, counsel goes on to conclude "whether Fultz's guilty plea was knowing and voluntary is not a potential issue for appeal." As provided above, we have analyzed the validity of Fultz's pleas using the proper legal standards and conclude that there would be no arguable merit to challenging them. A reference to Fultz's prior record came after Fultz responded to the circuit court's inquiry as to why he had only completed nine grades in school. Fultz told the circuit court that this was because he was "locked up." The circuit court simply repeated this statement. It made no other references to Fultz's personal background in connection with the plea proceedings. Fultz has not filed a response and as such, does not elaborate on any such issue. To the extent such comments were made during the sentencing portion of the hearing, we discuss them below.

addendum, further specified the constitutional rights that Fultz was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 270-72. Additionally, the circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. There would be no arguable merit to challenging the validity of Fultz's guilty pleas.

Sentencing

The next issue the no-merit report discusses is the circuit court's exercise of sentencing discretion. We agree that there would be no arguable basis to assert that the circuit court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975).

At sentencing, the 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 it must determine which objective or objectives are of greatest importance, ***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 it may consider several subfactors. ***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. ***Gallion***, 270 Wis. 2d 535, ¶41.

The circuit court heard about Fultz's prior record from both the State and Fultz's trial counsel.[5] Additionally, Fultz addressed the court. After listening to these remarks, the circuit court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny.

With respect to the severity of the sentence, we note that Fultz faced sentences of nine months imprisonment in Case No. 2012CM1703, *see* WIS. STAT. §§ 948.60(2)(a), 939.51(3)(a), and three years and six months in Case No. 2012CF4108, *see* WIS. STAT. §§ 346.04(3), 939.50(3)(i). On the charge of possession of a dangerous weapon by a person under age eighteen in Case No. 2012CM1703, the circuit court sentenced Fultz to ninety days in the House of Correction, consecutive to his sentence in Case No. 2012CF4108. In that case, on the charge of attempting to flee or elude a traffic officer, the circuit court sentenced Fultz to one year of initial confinement and two years of extended supervision. Although these sentences exceed what the State recommended, they do not shock the public's sentiment. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. We note that the circuit court deemed Fultz eligible for the Challenge Incarceration Program. *See* WIS. STAT. § 302.045. There would be no arguable merit to a challenge to the circuit court's sentencing discretion and the severity of the sentence.

[5] In his no-merit report, Fultz's appellate counsel advises that the State correctly set forth Fultz's criminal history.

Ineffective Assistance of Counsel

Finally, the no-merit report states that appellate counsel has not identified anything in the record indicating that circuit counsel was ineffective. We, too, have not identified an issue of arguable merit with respect to trial counsel's performance.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgments are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy L. Baldwin is relieved of further representation of Fultz in these matters. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals