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DISTRICT I

January 30, 2015

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

2013AP2872-CRNM State of Wisconsin v. Jesse Michael Jimenez (L.C. #2011CF3748)

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

Jesse Michael Jimenez pled no contest to one count of possessing with intent to deliver more than forty grams of cocaine. *See* WIS. STAT. § 961.41(1m)(cm)4. (2011-12).[1] The circuit court imposed a five-year term of imprisonment, bifurcated as two years of initial confinement and three years of extended supervision. The circuit court ordered that Jimenez serve the sentence concurrently with a sentence previously imposed for receiving stolen property but

[1] The judgment of conviction reflects that Jimenez is also known as "Jesse Michael Jiminez." All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

consecutively to a sentence previously imposed for failing to pay child support. The circuit court also found Jimenez eligible to participate in the Challenge Incarceration Program and ordered him to pay a $250 DNA surcharge if he had not paid such a surcharge in the past.

The state public defender appointed Attorney Hannah B. Schieber to represent Jimenez in postconviction and appellate proceedings. With her assistance, Jimenez successfully pursued a postconviction motion to receive proper credit against his sentence for his time in custody before sentencing.[2] Attorney Schieber next filed a no-merit report and a supplemental no-merit report, concluding that further proceedings would lack arguable merit. *See* ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Jimenez did not file a response. We have considered the no-merit reports, and we have independently reviewed the record. We conclude that no arguably meritorious issues exist for appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

On August 5, 2011, police found 55.41 grams of cocaine under the hood of Jimenez's car during a search that followed an encounter with Jimenez in an alley. Police also found several hundred dollars in his pocket. The State charged Jimenez with one count of possessing with intent to deliver more than forty grams of cocaine. The parties jointly sought DNA testing of the towel found wrapped around the cocaine in Jimenez's car. The testing revealed Jimenez's DNA on the towel. Jimenez then moved to suppress the evidence found during the search.

[2] The postconviction motion also included a request for relief in a second circuit court case. The judgment of conviction in that second circuit court case is not presently before us.

The circuit court denied the motion after a hearing. Jimenez thereafter pled no contest to the charge against him.

We first consider whether Jimenez could pursue an arguably meritorious challenge to the order denying his suppression motion.[3] We agree with appellate counsel that he could not.

Officer William Baker was the State's sole witness at the suppression hearing. Baker testified that he and a fellow officer were on patrol in a marked squad car on August 5, 2011, in a part of Milwaukee, Wisconsin that Baker considered a "high crime" and "high drug" area. At approximately 9:00 p.m., the officers saw a man, subsequently identified as Jimenez, standing with a male companion near a Chevy Impala that blocked an alleyway. The officers drove into the abutting parking lot without activating either lights or sirens, exited the squad car, and approached the men. As the officers approached, they saw Jimenez's companion, subsequently identified as Michael Moreno, make furtive movements and duck down out of sight behind the Impala.

Jimenez agreed to talk to Baker while Baker's partner spoke to Moreno. Baker asked Jimenez for permission to search his person, and Jimenez agreed. Baker found "approximately $500" in Jimenez's pocket but no identification. Jimenez said his identification was in his car and pointed out where his car was parked in the lot, approximately 15 feet away from the Impala. Jimenez offered to get the identification, but Baker "didn't feel comfortable" permitting Jimenez to go to his car alone. Baker testified that Jimenez gave Baker consent to retrieve Jimenez's

[3] We may review the circuit court's order denying the motion to suppress notwithstanding Jimenez's no-contest plea. *See* WIS. STAT. § 971.31(10).

identification from the car. For officer safety, Baker placed Jimenez in the back of the squad car without handcuffs while Baker went to retrieve Jimenez's identification. As Baker approached Jimenez's car, he smelled a strong odor of fresh marijuana coming from the car.

Baker testified that he retrieved Jimenez's identification, then asked Jimenez for permission to search his car. Jimenez agreed, and police eventually found cocaine wrapped in a towel under the hood of his car.

Jimenez testified on his own behalf, and his testimony conformed to Baker's in some respects. Jimenez said that he agreed to speak to Baker and consented to be searched. Jimenez also said that he pointed out where his car was parked and offered to get his identification from the car to show to Baker. Jimenez denied, however, that he consented to a search of his car.

The circuit court found Baker's testimony credible. The circuit court found Jimenez's testimony credible in part and incredible in part. Based on the testimony deemed credible, the circuit court found that the officers were justified in stopping Jimenez upon observing the blocked alleyway and Moreno's furtive movements. The circuit court further found that Jimenez consented to a search of his person, to the officer's retrieving his identification from the car, and to the search of the car. Additionally, the circuit court found that Baker smelled marijuana as he approached Jimenez's car and that the smell of marijuana gave rise to probable cause to search that vehicle.

When we review a circuit court's decision resolving a motion to suppress evidence, we uphold the circuit court's findings of historical fact unless they are clearly erroneous. ***State v. Young***, 2006 WI 98, ¶17, 294 Wis. 2d 1, 717 N.W.2d 729. When evaluating the factual findings, we defer to the credibility assessments of the circuit court "because of its superior

opportunity to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." ***State v. Carnemolla***, 229 Wis. 2d 648, 661, 600 N.W.2d 236 (Ct. App. 1999). We review *de novo* the application of constitutional principles to the facts as found by the circuit court. ***State v. Vorburger***, 2002 WI 105, ¶32, 255 Wis. 2d 537, 648 N.W.2d 829.

Jimenez could not mount an arguably meritorious challenge to his initial detention. Pursuant to ***Terry v. Ohio***, 392 U.S. 1 (1968), the reasonable suspicion necessary to detain a suspect for investigative questioning must be based on specific and articulable facts, together with rational inferences drawn from those facts, sufficient to lead a reasonable law enforcement officer to believe that criminal activity may be afoot, and that action would be appropriate. *See* ***id.*** at 21-22. "The question of what constitutes reasonable suspicion is a common sense test. Under all the facts and circumstances present, what would a reasonable police officer reasonably suspect in light of his or her training and experience?" ***State v. Jackson***, 147 Wis. 2d 824, 834, 434 N.W.2d 386 (1989). Here, the circuit court concluded that the officers had reasonable suspicion to stop and make inquiries when they saw Jimenez and his companion loitering next to a vehicle blocking an alleyway. The circuit court noted that the contact occurred in a high crime area and that one of the two men made furtive movements at the sight of the officers. A challenge to the legality of the initial detention would be frivolous.

Next, we agree with appellate counsel that Jimenez could not raise an arguably meritorious challenge to the search of his person. "'[A] search authorized by consent is wholly valid unless that consent is given while an individual is illegally seized.'" ***State v. Luebeck***, 2006 WI App 87, ¶14, 292 Wis. 2d 748, 715 N.W.2d 639 (citation omitted). Baker lawfully stopped Jimenez, and both men testified that Jimenez agreed to be searched. A challenge to that search would be frivolous.

We examine a detention lawful at its inception to determine whether the detention lasted "'no longer than is necessary to effectuate the purpose of the stop.'" ***State v. Arias***, 2008 WI 84, ¶32, 311 Wis. 2d 358, 752 N.W.2d 748 (citation omitted). In this case, the circuit court found that Baker properly prolonged the stop for the purpose of examining the identification that Jimenez said he had in his car. "It has been termed 'the essence of good police work' to briefly stop a suspicious individual 'in order to determine his identity or to maintain the status quo momentarily while obtaining more information.'" ***State v. Williamson***, 58 Wis. 2d 514, 518, 206 N.W.2d 613 (1973) (citation and footnote omitted). A challenge to Baker's decision to extend the detention for the purpose of examining Jimenez's identification would be frivolous.[4]

Finally, we agree with appellate counsel that a challenge to a search of Jimenez's car would lack arguable merit. Preliminarily, we note appellate counsel's contention that Jimenez could challenge the validity of the consent that he gave to search the car and claim that he "simply gave in." A no-merit proceeding is not the appropriate forum for this court to consider or resolve an issue that appellate counsel believes is arguably meritorious. *See* ***Anders***, 386 U.S. at 744 (if legal points are arguable on their merits, appellant must have the assistance of counsel for an appeal). Accordingly, we assume without deciding that Jimenez could present an arguably meritorious challenge to the validity of his consent to search the car. We turn instead to

[4] Baker testified that if Jimenez's identification had not been available at the scene of the detention, Baker would have taken Jimenez to the police station to fingerprint him for purposes of determining his identity. According to Baker, "it's our Milwaukee Police Department policy that we can take citizens to our district station for the purposes of identification." The circuit court commented that such a policy "flies in the face of constitutional law." Further appellate proceedings based on the Milwaukee police department policy would lack arguable merit. Baker did not convey Jimenez to the district station for the purpose of identifying him; rather, Baker examined Jimenez's identification at the scene. "[D]efendants 'may only litigate what happened to them.'" ***County of Grant v. Vogt***, 2014 WI 76, ¶49, 356 Wis. 2d 343, 850 N.W.2d 253 (citation omitted).

counsel's assertion that, regardless of the validity of that consent, Jimenez could not pursue an arguably meritorious challenge to the order denying suppression because the search was validly based on probable cause to believe that the car contained evidence of a crime. We agree with that assertion.

Jimenez and Baker both testified that Jimenez pointed out his own car parked in the lot fifteen feet from where Baker stopped Jimenez. The circuit court found that Baker smelled the odor of fresh marijuana coming from that car as he approached it. Under these facts, the evidence was in plain view.

> For the plain view doctrine to apply, three requirements must be satisfied. First, the evidence must be in plain view. Second, the police officer must have a lawful right of access to the object. Third, the incriminating character of the object must be immediately apparent, meaning the police must show they had probable cause to believe the object was evidence or contraband.

State v. Ragsdale, 2004 WI App 178, ¶17, 276 Wis. 2d 52, 687 N.W.2d 785 (citation omitted). The plain view doctrine is applicable to recognition of an item using any of the five senses, including smell. *See* ***State v. Richardson***, 156 Wis. 2d 128, 149, 456 N.W.2d 830 (1990).

The plain view doctrine is applicable here. First, Baker smelled fresh marijuana when he approached Jimenez's car. Second, Baker was entitled to approach a car parked in an open lot. *See* ***State v. Martwick***, 2000 WI 5, ¶29, 231 Wis. 2d 801, 604 N.W.2d 552 ("'no legitimate expectation that open fields will remain free from warrantless intrusion by government officers'") (citation omitted). Third, Baker immediately recognized the odor coming from the car. The "'unmistakable odor of marijuana' emanating from a car provided probable cause for an officer to believe that the car contained evidence of a crime and thus to search." ***State v. Hughes***, 2000 WI 24, ¶22, 233 Wis. 2d 280, 607 N.W.2d 621 (citation omitted). Accordingly,

when Baker smelled marijuana coming from the car, he had probable cause to search that car, regardless of the validity of Jimenez's subsequent consent to the search.[5] "If evidence is discovered in plain view, there is no reason to suppress its introduction at trial." ***Ragsdale***, 276 Wis. 2d 52, ¶17. There would be no arguable merit to further pursuit of a claim for suppression of the evidence in this case.

We turn to whether Jimenez could mount an arguably meritorious challenge to the validity of his no-contest plea. At the outset of the plea hearing, the State described the terms of the plea bargain, and Jimenez confirmed that he understood its terms. The circuit court explained to Jimenez that it was not bound by the terms of the plea bargain or the recommendations of the parties. The circuit court described the maximum penalties that it could impose upon Jimenez's conviction, and the circuit court told Jimenez that it was free to impose the penalties that it deemed appropriate. Jimenez said he understood.

A signed plea questionnaire and waiver of rights form is in the record. Jimenez said that he had reviewed the form with his attorney and that he understood it. The form reflects that Jimenez had not been promised anything outside of the terms of the plea bargain and that he had not been threatened. Jimenez confirmed that he was freely entering his plea after discussing the matter with his lawyer.

The circuit court told Jimenez that, by pleading no contest, he would waive the constitutional rights listed on the plea questionnaire and waiver of rights form, and the circuit

[5] The police did not find any marijuana in Jimenez's car, but that does not affect the analysis. The lawfulness of a search does not depend on what the officers ultimately find. *See* ***State v. Whiting***, 2003 WI App 101, ¶19, 264 Wis. 2d 722, 663 N.W.2d 299.

court reviewed those rights. Jimenez said he understood. The circuit court told Jimenez that, if he was not a citizen of the United States, his plea "may result in deportation, exclusion from admission to this country, or the denial of naturalization under federal law." *See.* WIS. STAT. § 971.08(1)(c). Jimenez said that he understood. Although the circuit court's warning deviated slightly from the precise wording required by § 971.08(1)(c), minor deviations from the statutory language do not undermine the validity of the plea. *See* ***State v. Mursal***, 2013 WI App 125, ¶20, 351 Wis. 2d 180, 839 N.W.2d 173.

"[A] circuit court must establish that a defendant understands every element of the charges to which he pleads." ***State v. Brown***, 2006 WI 100, ¶58, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the elements are hand-written on the plea questionnaire, and the circuit court reviewed the elements with Jimenez on the record. Jimenez assured the circuit court that he understood the elements of the offense.

A plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crime charged. *See* WIS. STAT. § 971.08(1)(b). In this case, Jimenez and his trial counsel both agreed that the circuit court could rely on the facts in the criminal complaint. The circuit court properly found a factual basis for Jimenez's no-contest plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

The record reflects that Jimenez entered his no-contest plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent,

and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the plea.

We next consider whether Jimenez could pursue an arguably meritorious challenge to his sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20. The circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentencing court must also "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court identified several sentencing goals. The circuit court explained that the term imposed would "help [Jimenez] not to commit [crimes] in the future." Additionally, the circuit court explained that it intended the sentence to punish Jimenez and to protect society. In fashioning a sentence to meet those goals, the circuit court found that the offense was serious because cocaine "destroy[s] ... lives," and the circuit court found that the gravity of the offense was aggravated by the large amount of cocaine involved. The circuit court considered Jimenez's character, noting that he had a "long and substantial record dating back to 2001." *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of

character). The circuit court also noted that it had disbelieved portions of Jimenez's testimony at the suppression hearing and his lack of truthfulness "reflects upon [his] character." The circuit court placed greatest emphasis, however, on the need to protect the public. The circuit court discussed how drug dealing brings additional crime and violence into a community and how neighborhoods become unsafe when residents are involved in drug trafficking and its related violence. The circuit court went on to discuss how drug dealing adversely affects both individual purchasers and their families and to discuss how drug dealers contribute to a downward spiral of addiction, drug dealing, and imprisonment in the lives of those who purchase the drugs.

The circuit court explained the factors that it considered when imposing sentence. The factors were proper and relevant. Moreover, the sentence imposed was not unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). The penalty selected here was well below the maximum penalties of forty years of imprisonment and a $100,000 fine. *See* WIS. STAT. §§ 961.41(1m)(cm)4.; 939.50(3)(c). A sentence well within the maximum sentence permitted by statute is presumptively not unduly harsh. *See* ***Grindemann***, 255 Wis. 2d 632, ¶32. We cannot say that the sentence here is disproportionate or shocking.

The circuit court declared Jimenez eligible for the Challenge Incarceration Program but ineligible for the Wisconsin Substance Abuse Program.[6] *See* WIS. STAT. §§ 302.045, 302.05. We therefore consider whether Jimenez could raise an arguably meritorious challenge to the decision denying him eligibility for the latter program.

The Wisconsin Substance Abuse Program is designed to treat inmates for substance abuse. An inmate who successfully completes the program may convert his or her remaining initial confinement time to extended supervision time.[7] *See* WIS. STAT. § 302.05(3)(c)2. At sentencing, a circuit court must decide, as part of its exercise of discretion, whether the defendant is eligible to participate in this program. *See* WIS. STAT. § 973.01(3g). When deciding eligibility, the circuit court is not required to make "completely separate findings ... so long as the overall sentencing rationale also justifies the [eligibility] determination." *See* ***State v. Owens***, 2006 WI App 75, ¶9, 291 Wis. 2d 229, 713 N.W.2d 187.

Here, the circuit court found that Jimenez was a 'drug dealer' and further found that drug dealers harm addicts, whose "lives are destroyed by the addiction. They get caught, as they always do, they come [to court], and they get sent to jail or prison." In light of these findings, the record supports the circuit court's determination that Jimenez, a drug dealer, should not have the opportunity to benefit from a prison program designed to assist drug addicted inmates.

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[6] The Wisconsin Substance Abuse Program was formerly called the Wisconsin Earned Release Program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. Both names are used to refer to the program in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).

[7] An inmate who successfully completes the Challenge Incarceration Program similarly may convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. § 302.045(3m)(b)1.

We last consider whether Jimenez could pursue an arguably meritorious challenge to the order requiring him to pay a DNA surcharge. A sentencing court must order a defendant convicted of a felony to provide a DNA sample pursuant to WIS. STAT. § 973.047. Pursuant to WIS. STAT. § 973.046(1g), however, the court has discretion to impose a DNA surcharge when sentencing a defendant for any felony that does not involve certain sex crimes.[8] *See* ***State v. Cherry***, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. Among the factors that the circuit court may consider when deciding whether to impose a surcharge are: "(1) whether the defendant has provided a DNA sample in connection with the case so as to have caused DNA cost; [and] (2) whether the case involved any evidence that needed DNA analysis so as to have caused DNA cost." ***Id.***, ¶10.

The circuit court here ordered Jimenez to pay a DNA surcharge unless he had previously given a sample and paid a surcharge in connection with that prior donation. We may search the record for reasons to support a circuit court's discretionary decision. ***State v. Pharr***, 115 Wis. 2d 334, 347, 340 N.W.2d 498 (1983). We conclude that the decision to impose a surcharge is supported by the record here, because the parties jointly sought and obtained DNA testing of the towel wrapped around the cocaine found in Jimenez's car. Thus, the case involved "evidence that needed DNA analysis," a proper basis for imposing a surcharge. *See* ***Cherry***, 312 Wis. 2d 203, ¶10. Additionally, appellate counsel advises in the supplemental no-merit report that Jimenez was not previously required to pay a DNA surcharge in connection with his prior felony convictions. The cost of collecting and analyzing a DNA specimen "is a proper consideration in

[8] Effective January 1, 2014, the legislature repealed WIS. STAT. § 973.046(1g). *See* 2013 Wis. Act 20, §§ 2353, 9426. The repeal first applies to sentences imposed on the effective date. *See* ***id.***, § 9326(1)(g). The circuit court sentenced Jimenez in June 2012.

imposing a surcharge—if a surcharge has not previously been paid based on those same costs." *See* ***State v. Simonis***, 2012 WI App 84, ¶23, 343 Wis. 2d 663, 819 N.W.2d 328. Accordingly, a challenge to the DNA surcharge would be frivolous within the meaning of ***Anders***.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Hannah B. Schieber is relieved of any further representation of Jesse Michael Jimenez on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals