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February 18, 2015

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

2014AP385-CRNM State of Wisconsin v. Burrell Dion Maull (L. C. #2013CF63)

Before Hoover, P.J., Stark and Hruz, JJ.

Counsel for Burrell Maull has filed a no-merit report concluding no grounds exist to challenge Maull's convictions for one count of possession with intent to deliver between five and fifteen grams of cocaine and two counts of possessing narcotic drugs, all counts as a second or subsequent offense. Maull was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could

be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.[1]

The State charged Maull with resisting an officer; possession with the intent to deliver between five and fifteen grams of cocaine; and two counts of possessing narcotic drugs, the latter three counts as a second or subsequent offense. The circuit court denied Maull's pretrial motion to suppress evidence. In exchange for his guilty pleas to the three drug-related charges, the State agreed to dismiss the resisting charge outright, and recommend four years' initial confinement and four years' extended supervision. Out of a maximum possible thirty-six-year sentence, the court imposed concurrent sentences resulting in a total of ten years, consisting of five years' initial confinement followed by five years' extended supervision.

The no-merit report addresses whether there is any basis for challenging the denial of Maull's pretrial suppression motion. Maull moved to suppress the fruits of what he claimed was an illegal search of his person. A pat-down for weapons conducted by police, commonly known as a "frisk," is a search. ***State v. Morgan***, 197 Wis. 2d 200, 208, 539 N.W.2d 887 (1995). Consequently, a frisk must satisfy the reasonableness requirement of the Fourth Amendment to the United States Constitution and article I, section 11, of the Wisconsin Constitution. Relevant to this case, a "search authorized by consent is wholly valid" under the Fourth Amendment. *See* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 222 (1973); *see also* ***State v. Wantland***, 2014 WI 58, ¶20, 355 Wis. 2d 135, 848 N.W.2d 810. The court must determine, however, whether the defendant in fact consented and, if so, whether that consent was voluntary. ***State v. Phillips***, 218

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Wis. 2d 180, 197, 577 N.W.2d 794 (1998); *see also* ***Schneckloth***, 412 U.S. at 222-23. Consent to search need not be given verbally; it may be in the form of words, gesture, or conduct. ***Phillips***, 218 Wis. 2d at 197. In turn, the test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied. ***Id.*** This determination is made after looking at the totality of the circumstances, considering both the circumstances surrounding the consent and the characteristics of the defendant. ***Id.*** at 198. No single criterion controls. ***Id.***

At the suppression motion hearing, three Milwaukee police officers testified consistently about the events leading to Maull's arrest. The officers were investigating an anonymous tip regarding illegal drug activity at a particular Milwaukee address. The officers were sitting in an unmarked police car outside the address when Maull arrived via taxi with Gabrielle Hanson. Maull was known to one of the officers, Dustin Frank, as having had prior drug-related convictions. Maull and Hanson began walking in the direction of the police car and when they were a few feet away, Frank stated: "Hey Burrell, can I talk to you for a second[?]" Maull stopped walking and said, "What's going on?" The officers exited the car and Frank engaged Maull in "small talk" regarding where Maull was living and where he was going.

Frank testified that Maull did not attempt to end the conversation and seemed interested in why Frank wanted to talk to him. Frank then asked Maull if he had anything illegal, like weapons or drugs, on him. Maull replied, "no" and when the officer asked if he could check, Maull said, "go ahead" and raised his arms to allow the search. Another officer, Andrew Molina, performed a pat-down search on the outside of Maull's clothing as Maull continued to chat with Frank. When the officer felt "the corner of a firmly wedged object in between" Maull's buttocks, he asked Maull what he had there and Maull responded, "nothing." Maull then

attempted to flee, and after his capture and arrest, Maull retrieved drugs from the back of his pants.

Although Hanson testified that Maull never consented to the search, the circuit court found her testimony to be "wholly incredible" and found the officers' testimony to be credible. The circuit court, as fact-finder, is the ultimate arbiter of witness credibility, and we must uphold its factual findings unless they are clearly erroneous. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; *see also* WIS. STAT. § 805.17(2). Based on what it deemed to be the officers' credible testimony, the court found that Maull in fact consented to be searched. There is sufficient evidence in the record to support the court's credibility determination.

Applying the test for voluntariness outlined in ***Phillips***, the court also determined Maull's consent was voluntary. The court noted that the officers "did not use any misrepresentation, deception, or trickery to entice" Maull to consent. Further, the court found "no credible evidence that [the officers] threatened physical force or intimidation or punishment" of Maull. Rather, the entire encounter, up until the point when Molina detected the wedged object, "was very laid back, consensual, cooperative." Although the court acknowledged there was little information concerning Maull's characteristics, other than his past contact with one of the officers, no single criterion controls. *See* ***Phillips***, 218 Wis. 2d at 198. In light of the totality of the circumstances, the court properly concluded that Maull voluntarily consented to the search of his person.

Maull alternatively argued that even if he voluntarily consented to a pat-down search, the officer went beyond the scope of the consent. "A consent search is constitutionally reasonable to the extent that the search remains within the bounds of the actual consent." ***State v. Douglas***,

123 Wis. 2d 13, 22, 365 N.W.2d 580 (Ct. App. 1985). Maull argued the officer exceeded the scope of the consent as "he would have had to at least reached between … Maull's butt cheeks." The officer testified, however, that with a "palm bladed hand," he used the top portion of his fingers "in one upper motion" in the buttocks area. The officer added that he did not "apply any pressure" or "attempt to stick any part of [his] hand inside" the body. The court ultimately rejected Maull's argument, concluding the pat-down outside of Maull's clothing did not exceed the scope of his consent. Any challenge to the circuit court's denial of Maull's suppression motion would lack arguable merit.[2]

The record discloses no arguable basis for withdrawing Maull's guilty pleas. The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Maull completed, informed Maull of the elements of the offenses, the penalties that could be imposed,

[2] Maull's defense counsel conceded at the start of the suppression motion hearing that the officers' contact with Maull did not constitute a stop for Fourth Amendment purposes. At the conclusion of the hearing, counsel informed the court that despite counsel's advice to the contrary, Maull wanted to challenge "the stop." Even assuming counsel was deficient for conceding the argument, Maull was not prejudiced. *See* ***Strickland v. Washington***, 466 U.S. 668, 697 (1984) (deficient performance and prejudice must be shown to establish ineffective assistance of counsel, and the court need not address both prongs when one is not established). The court agreed with counsel's conclusion that under the facts of this case, there was no legal basis for such a challenge.

A ***Terry*** stop is a form of seizure under the Fourth Amendment. ***Terry v. Ohio***, 392 U.S. 1, 16 (1968); ***State v. Goebel***, 103 Wis. 2d 203, 208, 307 N.W.2d 915 (1981). "[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen …." ***Florida v. Royer***, 460 U.S. 491, 497 (1983). A person is seized only when his or her freedom of movement is restrained by means of physical force or a show of authority such that, in view of the circumstances surrounding the incident, a reasonable person would believe he or she was not free to leave. ***United States v. Mendenhall***, 446 U.S. 544, 553-54 (1980).

Here, the court concluded Maull's contact with the officers was not a "stop" under the Fourth Amendment, noting that until the drugs were detected, the entire encounter "was very laid back, consensual, cooperative." As one of the officers testified, Maull did not attempt to end the conversation and seemed interested in why the officer wanted to talk to him. Any claim that counsel was ineffective by conceding Maull's challenge to the stop would lack arguable merit.

and the constitutional rights he waived by entering a guilty plea. The court confirmed Maull's understanding that it was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also advised Maull of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the court found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Maull committed the crimes charged. The record shows the pleas were knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Maull's character, including his criminal history; the need to protect the public; and the mitigating factors Maull raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. Under these circumstances, it cannot reasonably be argued that Maull's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Urszula Tempska is relieved of further representing Maull in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals