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DISTRICT II

February 18, 2015

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

2014AP1297-CRNM State of Wisconsin v. John J. Gay (L.C. #2011CF1448)

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

John J. Gay appeals from a judgment of conviction for possession of marijuana with intent to deliver, with the near-a-school enhancer. Gay's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738

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

(1967). Gay has filed a lengthy response[2] to the no-merit report and counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, 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* WIS. STAT. RULE 809.21.

Upon execution of a search warrant, a large marijuana growing and processing operation was found on Gay's property and in his pole barn. Gay challenged the search warrant as it was based, in part, on the odor of marijuana detected by two officers as they walked on Gay's property after dark one evening. The odor was detected while the officer stood in an area of tall grass about two hundred feet from Gay's home. Gay claimed the officers intruded on the curtilage of his home when they detected the odor. After hearing the testimony of the two officers and Gay, the trial court determined that the officers were outside the curtilage of Gay's home when they detected the odor of marijuana and that the information about the odor could be included in the affidavit in support of the search warrant. Gay entered a guilty plea to count one of the criminal complaint. A dangerous weapon enhancer was dropped and two other drug charges were dismissed as read ins. At sentencing, the prosecutor made the recommendation for seven years of initial confinement as required by the plea agreement. Gay was sentenced to six years' initial confinement and three years' extended supervision.

[2] Gay's response is eighty-four pages of single-spaced text addressing a single issue. The responsive brief is unduly long as it exceeds the number of pages an attorney would be allowed in an appellant's brief had a merit appeal been filed.

We first address whether there is arguable merit to a claim that the trial court erred in determining that the officers did not intrude on the curtilage of Gay's home when they detected the odor of marijuana.[3] Gay's entire response is devoted to the issue and he asserts that the trial court's findings of fact were clearly erroneous and the trial court misapplied the law. Gay's attack on the factual determination disregards our standard of review.

> A circuit court's findings of fact are clearly erroneous when the finding is against the great weight and clear preponderance of the evidence. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983). Under the clearly erroneous standard, "even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding." ***Reusch v. Roob***, 2000 WI App 76, ¶8, 234 Wis. 2d 270, 610 N.W.2d 168 (citation omitted). Moreover, we search the record not for evidence opposing the circuit court's decision, but for evidence supporting it. *See* ***Mentzel*** [***v. City of Oshkosh***, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988)].

Royster-Clark, Inc. v. Olsen's Mill, Inc., 2006 WI 46, ¶12, 290 Wis. 2d 264, 714 N.W.2d 530.

Although Gay may disagree with the trial court's interpretation of the evidence, the evidence supports the trial court's evidentiary or historical findings regarding the four factors relevant to the issue under ***United States v. Dunn***, 480 U.S. 294, 301 (1987). Given the breadth of the trial court's ruling, and our independent analysis of the ***Dunn*** factors, we determine that there is no arguable merit to a claim that the officers invaded the curtilage of Gay's home. That

[3] The no-merit report addresses this issue last and again in the supplemental no-merit report.

Gay can engage in an extensive discussion and devote eighty pages to his belief that the evidence leads to the opposite conclusion does not create arguable merit.[4]

The no-merit report addresses the additional potential issues of whether Gay's 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 these issues as without merit, and this court will not discuss them further.

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 Gay 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 Robert W. Peterson is relieved from further representing John J. Gay in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] Gay also discusses the other information in the affidavit in support of the search warrant and whether that information was reliable or supports issuance of the warrant in the absence of the odor of marijuana. We need not discuss the other information because it was not necessary to excise the information about the marijuana odor from the search warrant affidavit.