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

2014AP2411-CRNM State of Wisconsin v. Edmond M. Pitts (L.C. #2012CF2535)

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

A jury found Edmond M. Pitts guilty of one count of possessing a firearm while a felon. The circuit court imposed four years and six months of imprisonment, bifurcated as two years and six months of initial confinement and two years of extended supervision. Pitts appeals.

The state public defender appointed Attorney Benjamin J. Peirce to represent Pitts in postconviction and appellate proceedings. Attorney Peirce filed but withdrew a postconviction motion challenging the effectiveness of Pitts's trial counsel, then commenced the instant appeal on Pitts's behalf. Attorney Peirce filed and served a no-merit report pursuant to ***Anders v.***

California, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2013-14).[1] Pitts did not respond, but, at our request, Attorney Peirce filed a supplemental no-merit report addressing the decision to withdraw the postconviction motion.[2] This court has 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 the judgment of conviction. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, J.M. called 911 on May 17, 2012, to report that her boyfriend's son, Pitts, had fired a gun in the living room of 2544 North 28th Street, Milwaukee, Wisconsin. Police arrested Pitts in a Dodge Dakota truck outside of 2544 North 28th Street. He exhibited signs of intoxication, including slurred speech and bloodshot eyes. Police searched the truck and found a semi-automatic firearm in the flatbed. Further investigation revealed that Pitts had previously been convicted of the felony offense of possessing a short-barreled shotgun.

The State charged Pitts with the felony offenses of endangering safety by use of a dangerous weapon and possessing a firearm while a felon. The State also charged Pitts with the misdemeanor offense of endangering safety by going armed with a dangerous weapon while under the influence of an intoxicant. Pitts demanded a trial. A jury convicted Pitts of possessing a firearm while a felon and acquitted him of the other two charges.

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

[2] After Attorney Peirce filed the no-merit reports in this matter, the state public defender advised that the circumstances of Attorney Peirce's employment required the appointment of successor appellate counsel for Pitts. We granted the public defender's motion to substitute Attorney Eileen T. Evans as counsel for Pitts. Attorney Evans subsequently advised this court that, upon review of the record, she elected to rest on the no-merit reports filed by Attorney Peirce.

We first consider whether the evidence was sufficient to sustain the conviction. Before a jury could find Pitts guilty of possessing a firearm while a felon, the State was required to prove beyond a reasonable doubt that he possessed a firearm and that he previously had been convicted of a felony. *See* WIS JI—CRIMINAL 1343. J.M. testified that, on May 17, 2012, she heard a gunshot while she was in the bedroom of her home at 2544 North 28th Street. When she came out of the bedroom, she saw Pitts holding a gun. Pitts left the home, and she called 911. Officer Thomas Ackley testified that he arrested Pitts later that night and found a gun in the pickup truck that Pitts was driving. Pitts stipulated that he had a prior felony conviction that had not been reversed as of May 17, 2012.

When this court reviews the sufficiency of the evidence on appeal, we apply a highly deferential standard. We may not substitute our judgment for that of the jury "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This court will uphold the verdict if any possibility exists that the jury could have drawn the inference of guilt from the evidence. ***Id.*** In light of our deferential standard of review, an appellate challenge to the sufficiency of the evidence would lack arguable merit.

We consider next whether Pitts could mount an arguably meritorious challenge to his waiver of the right to testify. Appellate counsel did not discuss this issue. The colloquy satisfied the requirements for a valid waiver described in ***State v. Weed***, 2003 WI 85, ¶¶43-44, 263 Wis. 2d 434, 666 N.W.2d 485. The circuit court established that Pitts understood his right to testify on his own behalf, that he had discussed that right with his trial counsel, and that he

knowingly, intelligently, and voluntarily chose not to testify. Further appellate proceedings to pursue this issue would be frivolous within the meaning of ***Anders***.

We next consider whether Pitts could pursue an arguably meritorious claim that his trial counsel was ineffective. We assess claims of ineffective assistance of counsel under the two-prong test described in ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prevail, the defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Id.*** Whether the lawyer's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Strickland***, 466 U.S. at 697.

Attorney Peirce filed a motion alleging that trial counsel was ineffective for failing to call Pitts's father, Jimmie Patterson, as a trial witness. In support of the motion, Attorney Peirce submitted a sworn statement from Patterson that he had wanted to testify at Pitts's trial but was "not allowed." Patterson alleged that he owned the gun police found in the Dakota pickup truck, that he had hidden the gun in the truck, that Pitts did not know the gun was in the truck, and that Pitts was not driving the truck at the time of his arrest. Attorney Peirce subsequently withdrew the motion, explaining that, after speaking with trial counsel, he determined the issue lacked arguable merit. In a supplemental no-merit report, Attorney Peirce advised that he explored the facts underlying the postconviction motion with trial counsel, who described investigating the possibility of calling Patterson as a trial witness and concluding that he was not credible. Trial counsel directed Attorney Peirce's attention to pretrial proceedings in which trial counsel explained on the record that counsel would not call Patterson as a witness, and Pitts deferred on the record to counsel's judgment.

The record indeed shows that, during a hearing on trial counsel's motion to withdraw, counsel explained:

> [o]ne thing I would like to make clear to Mr. Pitts. I have avoided bringing this out in open court but for trial strategy, there's a key witness that I do not intend to call and I've told him why. I've made my reasons clear. I've investigated that witness, and I'm not proceeding with that witness. I've made that very clear, what my duties as counsel are to him. I will represent him well in trial, but the decision to call witnesses sometimes has to land on the attorney's call.
>
> THE COURT: Mr. Pitts, you understand that? He stated the law fairly well.
>
> THE DEFENDANT: And he said that he's not going to call this witness?
>
> THE COURT: Right.
>
> THE DEFENDANT: I concur.

Pitts went on to tell the circuit court that he understood his trial counsel's explanation, had faith in his trial counsel and did not want trial counsel to withdraw.

Pitts plainly acquiesced to his trial counsel's strategic decision. Accordingly, there is no arguable merit to further pursuit of a claim that trial counsel was ineffective for failing to call Patterson as a witness at trial.[3] *See* ***State v. McDonald***, 50 Wis. 2d 534, 538-39, 184 N.W.2d 886 (1971) (defendant who acquiesces to trial counsel's strategic choice is bound by that decision); *see also* ***State v. Pitsch***, 124 Wis. 2d 628, 637, 369 N.W.2d 711 (1985)

[3] Pitts complained when Attorney Peirce withdrew the allegation that trial counsel was ineffective for failing to call Patterson as a witness, but Pitts does not dispute that Patterson was the "key witness" who Pitts agreed on the record he would not present at trial. Accordingly, no dispute exists about the facts underlying the abandoned challenge to trial counsel's effectiveness, nor does the record suggest any need for fact finding before concluding that further proceedings to address this issue would lack arguable merit. *Cf.* WIS. STAT. RULE 809.32(1)(g) (directing this court to remand for fact finding if the appellant and the appellant's counsel dispute facts outside the record and the appellant's version, if true, would make resolution under RULE 809.32(3) inappropriate).

("'reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions'") (citation omitted).

We next consider whether Pitts could pursue an arguably meritorious claim that his trial counsel was ineffective for failing to seek to suppress the gun found in the Dakota pickup truck on the ground that either his arrest or the subsequent search of the vehicle was unlawful. Appellate counsel did not discuss this issue. We conclude it lacks arguable merit.

A lawful arrest requires probable cause. *See* ***State v. Secrist***, 224 Wis. 2d 201, 212, 589 N.W.2d 387 (1999). "Probable cause to arrest is the quantum of evidence within the arresting officer's knowledge at the time of the arrest which would lead a reasonable police officer to believe that the defendant probably committed or was committing a crime." ***Id.*** The information may include hearsay and need only be sufficient to persuade a reasonable officer that guilt is more than a possibility. *See* ***Sanders v. State***, 69 Wis. 2d 242, 255, 230 N.W.2d 845 (1975). Here, Ackley testified that he responded to a dispatcher's report of a 911 call. The caller reported that a gunman wearing a black shirt with "B O S S'' in gold lettering had fired shots inside the home at 2544 North 28th Street and was leaving the scene in a black Dakota pickup truck. Ackley said he went to the location described by the caller and saw a black Dakota pickup truck that started to drive away from the curb. The driver was wearing a black shirt with "B O S S" in gold lettering. These facts support probable cause to arrest Pitts. *See* ***Briggs v. State***, 76 Wis. 2d 313, 322, 251 N.W.2d 12 (1977) (observation of gunman's vehicle where witness last saw it and suspect matching gunman's description in close proximity to vehicle establishes probable cause to arrest suspect). The record reveals no arguably meritorious basis to challenge the arrest. Accordingly, trial counsel was not ineffective for failing to mount such a challenge. *See* ***State v. Cummings***, 199 Wis. 2d 721, 747 n.10, 546 N.W.2d 406 (1996) ("It is

well-established that an attorney's failure to pursue a meritless motion does not constitute deficient performance.").

Ackley testified he subsequently searched the truck and found a gun. Police may search a vehicle incident to a lawful arrest "when 'it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" ***State v. Stewart***, 2011 WI App 152, ¶24, 337 Wis. 2d 618, 807 N.W.2d 15 (citation and one set of quotation marks omitted). Accordingly, the search was proper. Moreover, Ackley testified he conducted an investigation at the scene and determined that Patterson, not Pitts, owned the vehicle. Patterson was present at the scene following the arrest and gave Ackley permission to search the truck. "'[A] search conducted pursuant to a valid consent is constitutionally permissible.'" ***State v. Wantland***, 2014 WI 58, ¶20, 355 Wis. 2d 135, 848 N.W.2d 810 (citation omitted). There is no arguably meritorious basis to challenge the validity of the search of the pickup truck. Accordingly, trial counsel was not ineffective for failing to pursue such a motion. *See* ***Cummings***, 199 Wis. 2d at 747 n.10.

Finally, we consider whether Pitts 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 the circuit court erroneously exercised its discretion. ***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 circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16. Additionally, the circuit court must "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 punishment, deterrence and community protection as the sentencing objectives, and the circuit court discussed the factors it deemed relevant to those objectives. The circuit court determined that the seriousness of the offense was "intermediate," acknowledging on one hand that Pitts did not use the gun to kill or rob another person, but noting on the other hand that he did not secure the gun in a safe place. The circuit court discussed the need to protect the public, observing that the Milwaukee community is rife with gun violence and that prohibiting felons from possessing firearms is a tool to control some of that violence and to relieve the accompanying community distress.

The circuit court discussed both positive and negative aspects of Pitts's character. The circuit court acknowledged that Pitts had a child that he supported, that he had some employment history, and that he had obtained his GED while in custody. The circuit court also considered, however, that Pitts had received the privilege of probation for prior offenses of possessing a short-barreled shotgun and for disorderly conduct and in both cases his probation was ultimately revoked. Further, the circuit court took into account J.M.'s testimony that, just before J.M. took

the stand at trial, Pitts made contact with her outside the courtroom and mouthed the words "don't say nothing." The circuit court described Pitts's action as an effort to "subvert the criminal justice system" and that the incident "argues badly for [Pitts's] character. It's not a thing a decent person does."

The circuit court appropriately considered probation as the first sentencing alternative. *See* ***id.***, ¶44. The circuit court rejected that option in light of Pitts's prior failures to complete probation, concluding that a further probationary disposition would unduly depreciate the seriousness of the offense. Ultimately, the circuit court concluded that the totality of the circumstances warranted a prison term of four years and six months.

The circuit court explained the factors that it considered when imposing sentence. The factors were proper and relevant. Moreover, the penalty 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). Upon conviction in this case, Pitts faced the possibility of ten years in prison and a $25,000 fine. *See* WIS. STAT. §§ 941.29(2)(a), 939.50(3)(g). The term of imprisonment imposed here was less than half the possible maximum allowed by law. "'[A] sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***Grindemann***, 255 Wis. 2d 632, ¶31 (citation omitted). Accordingly, the sentence here is not unduly harsh or excessive. We conclude that a challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

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 Eileen T. Evans is relieved of any further representation of Edmond M. Pitts on appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals