OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

October 21, 2015

To:

Hon. Timothy G. Dugan
Milwaukee County Circuit Court
901 N. 9th Street, Branch 10
Milwaukee, WI 53233-1427

Hon. Jonathan D. Watts
Milwaukee County Courthouse
821 W. State Street, Branch 15
Milwaukee, WI 53233-1427

Hon. Daniel L. Konkol
Milwaukee County Courthouse
821 W. State Street, Branch 5
Milwaukee, WI 532233-1427

John Barrett, Clerk
Milwaukee County Circuit Court
821 W. State Street, Room 114
Milwaukee, WI 53233

Ann Auberry
Rebholz & Auberry
1414 Underwood Avenue, Suite 400
Wauwatosa, WI 53213

Karen A. Loebel
Assistant District Attorney
Milwaukee County Courthouse
821 W. State Street
Milwaukee, WI 53233

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Marius Gerard Erby, #389695
6974D North 43rd Street
Milwaukee, WI 53209

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

2015AP355-CRNM State of Wisconsin v. Marius Gerard Erby
(L.C. #2012CF941)

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

Marius Erby appeals from a judgment of conviction entered after a jury found him guilty of one count of possession with intent to deliver cocaine (between one and five grams), contrary to WIS. STAT. § 961.41(1m)(cm)1r. (2011-12).[1] Erby also appeals from the denial of his

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

postconviction motion. Erby's postconviction/appellate counsel, Ann Auberry, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Erby has not filed a response. We have independently reviewed the record and the no-merit report as mandated by ***Anders***, and we conclude that there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm.

Erby was charged with the aforementioned crime after police officers conducted a traffic stop, asked Erby to exit the vehicle, and saw a small bundle of what appeared to be cocaine on the driver's seat. Inside the bundle were nineteen individually wrapped packages of cocaine. The officers subsequently found more than $2000 in cash, two cell phones, and a gun for which Erby had a valid concealed carry permit.

Erby filed a motion to suppress evidence seized from him and the vehicle. The motion contained information about the stop that was alleged in the police reports, and it did not assert that Erby disputed those facts. Instead, the motion asserted that under those facts, the evidence should be suppressed. In its written response, the State argued that the motion should be denied without an evidentiary hearing because the motion did not contain "a factual scenario or legal theory on which the defendant may prevail."[2]

The trial court agreed with the State and denied the motion without an evidentiary hearing. In a written order, the trial court explained that based on the facts alleged, there was no basis for suppression. Specifically, the motion alleged that the stop was based on Erby's failures

[2] The State also noted that although the motion asserted that Erby was challenging a "frisk," there was no frisk or pat-down in this case. Rather, once an officer saw suspected cocaine on the driver's seat, Erby was placed under arrest and searched incident to arrest.

to stop at a stop sign and wear a seat belt. The officers asked Erby for identification and information on the vehicle, which the officers had determined was a rental car, and Erby refused to provide either. The officers observed that Erby was nervous and asked him to get out of the vehicle. Although Erby at first refused, he finally did step out. When he did so, the officers saw the bundle of suspected cocaine on the driver's seat where Erby had been sitting. The trial court concluded that there was a valid basis for the stop: the traffic violation of failing to stop at the stop sign. Further, it explained, police officers may ask a driver to exit a vehicle that has been stopped for a traffic violation. Finally, the cocaine was in plain view after Erby exited the vehicle, which provided probable cause for the police to seize it. Accordingly, the trial court concluded, Erby was not entitled to relief.

The case proceeded to trial. The State produced testimony from the arresting officers, a forensic investigator, an analyst from the crime lab, and a detective familiar with narcotics trafficking. The defense called Erby as its only witness. The jury found Erby guilty and further found that the cocaine weighed more than one gram.

This was Erby's first felony conviction,[3] and his exposure for the crime was twelve-and-one-half years of imprisonment. The trial court sentenced him to two-and-one-half years of initial confinement and three years of extended supervision.[4] The trial court also ordered Erby to provide a DNA sample and pay the DNA surcharge, stating: "Because it's your first time you

[3] Erby had two prior misdemeanor convictions for disorderly conduct.

[4] The Honorable Timothy Dugan presided over the jury trial and sentenced Erby.

are submitting the sample, it is appropriate you pay the surcharge both for rehabilitation, for punishment and that the program is appropriate and needs to be funded."[5]

Counsel filed a no-merit report that discussed four issues: (1) whether trial counsel provided ineffective assistance by not including Erby's version of the facts in the suppression motion and by not arguing that the officers lacked probable cause to stop the vehicle and order Erby out of the vehicle; (2) whether trial counsel provided ineffective assistance by not objecting to one officer's testimony about information he received from other officers via police radio; (3) whether the verdict was supported by sufficient evidence; and (4) whether the trial court erroneously exercised its sentencing discretion. This court concluded "that there would be arguable merit to filing a postconviction motion alleging that trial counsel provided ineffective assistance by not adequately challenging the traffic stop." *See* ***State v. Erby***, No. 2013AP1003-CRNM, unpublished slip op. and order at 4 (WI App Jan. 15, 2014). We rejected the no-merit report and dismissed the appeal without prejudice, without addressing the other issues that were raised in the no-merit report. *See* ***id.*** at 4, 7.

Postconviction/appellate counsel subsequently filed a postconviction motion in the trial court alleging that trial counsel provided ineffective assistance by not filing an adequate suppression motion. The trial court scheduled a ***Machner***[6] hearing so that it could hear

[5] In ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393, this court held that a trial court must exercise its discretion when determining whether to impose the DNA analysis surcharge under WIS. STAT. § 973.046(1g). *See* ***Cherry***, 312 Wis. 2d 203, ¶¶9-10. To that end, we held that the trial court "should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decision." ***Id.***, ¶9. The trial court's explanation in this case was adequate; there would be no arguable merit to challenging the imposition of the DNA surcharge.

[6] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

testimony from trial counsel. Prior to that hearing, counsel filed a supplemental motion alleging that trial counsel also provided ineffective assistance by "failing to properly prepare Erby to correctly answer the questions regarding the existence of and number of his prior criminal convictions and failing to address Erby's prior criminal record during direct examination, resulting in a prejudicial exchange between Erby and the prosecutor during cross-examination."

At the ***Machner*** hearing, trial counsel testified about his decisions concerning the suppression motion and his advice to Erby about his prior convictions. The trial court concluded that trial counsel had performed deficiently with respect to the suppression motion and scheduled an evidentiary hearing to determine whether Erby was prejudiced by trial counsel's deficient performance. The trial court denied the supplemental postconviction motion, however, after concluding that trial counsel had not provided constitutionally deficient representation concerning his advice to Erby about his prior convictions.[7]

The trial court conducted an evidentiary hearing at which three police officers testified about the traffic stop. Erby chose not to testify, which the trial court confirmed in a colloquy with him. The trial court accepted the officers' testimony and ultimately concluded that the traffic stop and seizure of cocaine were constitutional. Accordingly, the trial court concluded that Erby was not prejudiced by his trial counsel's deficient performance concerning the suppression motion, because even if a motion hearing had been conducted prior to trial, the

[7] The Honorable Daniel Konkol presided over the ***Machner*** hearing and denied the supplemental postconviction motion. After the case was transferred due to judicial rotation, the Honorable J.D. Watts presided over the evidentiary hearing ordered by Judge Konkol and ultimately denied the postconviction motion concerning the suppression motion.

evidence would not have been suppressed. The trial court denied Erby's postconviction motion. This appeal follows.

The no-merit report addresses three main issues: (1) whether trial counsel provided ineffective assistance by not effectively litigating the suppression motion or by not objecting to one officer's trial testimony concerning information provided by other police officers; (2) whether the verdict was supported by sufficient evidence; and (3) whether the trial court erroneously exercised its sentencing discretion. This court agrees with postconviction/appellate counsel's description and analysis of the potential issues identified in the no-merit report and independently concludes that pursuing them would lack arguable merit. In addition to agreeing with appellate counsel's description and analysis, we will briefly discuss those issues, as well as one additional issue: whether trial counsel provided ineffective assistance concerning Erby's testimony about his prior convictions.

We begin with the issue of ineffective assistance. "[A] convicted defendant must show two elements to establish that his counsel's assistance was constitutionally ineffective: First, that counsel's performance was deficient; second, that the deficient performance resulted in prejudice to the defense." ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 805 N.W.2d 334. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** (citations and internal quotation marks omitted).

The first potential instance of ineffective assistance concerns the issue the trial court addressed after we rejected the first no-merit report: trial counsel's performance concerning the suppression motion. As noted, the trial court concluded that trial counsel's performance was deficient because he did not file a motion that would have warranted an evidentiary hearing, but that Erby was not prejudiced because the trial court ultimately conducted that evidentiary hearing and found that there was no legal basis to suppress the cocaine discovered during the traffic stop. We have reviewed the hearing transcript, as well as the trial court's lengthy oral decision, both of which are addressed in the no-merit report. We agree with counsel that there would be no merit to challenge the trial court's factual findings. Erby chose not to testify, so no alternative version of the facts was offered. Further, the trial court found the officers' testimony to be credible.

There would also be no basis to challenge the trial court's legal conclusions. As the trial court and the no-merit report recognize, the officers who stopped Erby were permitted to rely on the collective knowledge of other officers (including the knowledge that Erby failed to stop at a stop sign and wear a seat belt) to establish reasonable suspicion for the stop, *see* ***State v. Rissley***, 2012 WI App 112, ¶19, 344 Wis. 2d 422, 824 N.W.2d 853, and they were legally permitted to ask Erby to exit his vehicle, *see* ***Pennsylvania v. Mimms***, 434 U.S. 106, 111 (1977). Further, once the officers saw the cocaine in plain view on the seat where Erby had been sitting, they were justified in seizing it. *See* ***State v. Ragsdale***, 2004 WI App 178, ¶17, 276 Wis. 2d 52, 687 N.W.2d 785 (discussing the seizure of contraband or evidence in plain view).

Next, we turn to the second potential issue concerning ineffective assistance: whether trial counsel should have objected to one officer's trial testimony that he learned about Erby's traffic and seat belt violations via radio from other officers who observed Erby driving. The no-merit report notes that trial counsel did not object to that testimony "as either hearsay or a

violation of Erby's right to confront the officers making the initial observations." Postconviction/appellate counsel asserts that trial counsel need not have objected because the information about the violations was not hearsay—it was not offered to prove the existence of the traffic and seat belt violations, but instead to explain why the officers stopped the vehicle.

Further, postconviction/appellate counsel explains, even if there was a basis to exclude the testimony, Erby was not prejudiced by its admission, because "it could have had no impact on the jury's determination of the issues relative to Erby's guilt or innocence." We agree that there would be no arguable merit to asserting that Erby was prejudiced by the admission of the testimony that the arresting officers were told by other officers that Erby failed to stop at a stop sign and failed to wear a seat belt. Those facts were not relevant to the disputed issues in the case: whether Erby knew there was cocaine in the vehicle and whether he intended to sell it. Erby could not demonstrate "that there is a reasonable probability that, but for counsel's [alleged] unprofessional errors, the result of the proceeding would have been different." *See* ***Love***, 284 Wis. 2d 111, ¶30 (citations and internal quotation marks omitted).

The third potential instance of ineffective assistance of counsel was identified by postconviction/appellate counsel in the supplemental postconviction motion. At the final pretrial conference, the parties discussed the number of crimes Erby had been convicted of, in anticipation of the possibility that he would testify and would be asked for that number. The parties recognized that Erby had two prior convictions for disorderly conduct, but agreed that they did not know whether a prior operating-after-revocation charge was criminal or not. The parties stipulated to two convictions. During the direct examination of Erby at trial, trial counsel did not ask him about his prior convictions. When the State cross-examined Erby, it began with the following questions:

Q Mr. Erby, have you ever been convicted of a crime?

A Disorderly conduct.

Q Is that the only thing?

A That's it.

Q Okay. You didn't have another prior conviction?

A For?

Q I'm asking you.

A Disorderly conduct. Maybe a driving. That's it.

The trial court then interrupted the questioning and said: "If there are going to be any additional questions, we need to talk." The parties had a sidebar with the trial court, after which the State continued its examination:

Q So, Mr. Erby, you have been convicted of a crime. How many times have you been convicted of a crime?

A Twice.

Erby's supplemental postconviction motion alleged that trial counsel performed deficiently by "fail[ing] to address the existence of and number of Erby's prior criminal convictions during direct examination" and by not properly preparing Erby to answer "yes" and "two" when asked whether he had previously been convicted of a crime. The motion alleged that the prejudice to Erby was "obvious." It explained:

> Erby stood convicted of two disorderly conduct charges, which … are considered relatively minor matters. However, due to the exchange between the prosecutor and Erby and the sidebar conference … the jury was left to wonder just what those two convictions were and whether Erby was attempting to hide the fact that one or both of them were for something far more serious than "disorderly conduct" or "driving."

At the ***Machner*** hearing, trial counsel said that he and Erby decided ahead of time that they would tell the jury the nature of Erby's prior convictions, given that two disorderly conduct convictions were not serious and did not involve drugs. Further, trial counsel said that he made a strategic choice not to ask Erby about his convictions on direct examination, because the State sometimes forgets to ask about prior convictions and then the jury never hears about them at all. Trial counsel said that after the State asked about the convictions, he intended to follow up with Erby on redirect examination to discuss the nature of the convictions, but he forgot.

The trial court accepted trial counsel's testimony and concluded that trial counsel did not perform deficiently by deciding in advance to identify the nature of the convictions and by waiting to see if the State remembered to ask about prior convictions. The trial court did not explicitly address whether trial counsel performed deficiently by not following up with Erby on redirect examination, but it concluded that Erby had not suffered prejudice from any alleged deficiencies. It explained: "He has two prior disorderly conducts, he was able to tell the jury he had two convictions, he said that they were disorderly conduct. I don't see that that in any way is prejudicial to the defense." We agree with the trial court that there would be no arguable merit to alleging that trial counsel provided constitutionally deficient representation. There would be no arguable merit to challenge the strategic decisions trial counsel made prior to trial, and while Erby's answers about the nature of the convictions could have been presented in a less confusing way, there would be no arguable merit to suggest that he was prejudiced by the information the jury learned.

The next issue addressed in the no-merit report is whether there would be any merit to challenging the sufficiency of the evidence. Having reviewed the trial transcript, we agree with postconviction/appellate counsel that there is no basis to challenge the sufficiency of the

evidence. The jury heard evidence that Erby was the only person in the vehicle, that the officers found a bundle of cocaine on his seat after he exited the vehicle, and that the bundle of cocaine contained nineteen smaller packages of cocaine and had a total weight of over three grams. The jury also heard that the officers recovered the following from Erby and the vehicle: over $2000 in cash, including 90 twenty-dollar bills; two cell phones; and a gun. The detective testified that those items were consistent with the sale of drugs, as was the lack of any "utensils" that a person might use to personally consume the cocaine. These facts support the elements of possession with intent to deliver. *See* WIS JI—CRIMINAL 6035. The jury, which is the sole judge of credibility, was entitled to accept that evidence over Erby's testimony that he borrowed the vehicle from a man who was going to sell him another vehicle and that Erby did not know that there was cocaine in the vehicle. *See* ***State v. Burgess***, 2002 WI App 264, ¶23, 258 Wis. 2d 548, 654 N.W.2d 81 ("[T]he jury is sole judge of credibility; it weighs the evidence and resolves any conflicts.").

Finally, we turn to the sentencing. We conclude that there would be no arguable basis to assert that the trial court erroneously exercised its sentencing discretion, *see* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197, or that the sentence was excessive, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

At sentencing, the trial 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 trial 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 trial court's discretion. *See* ***Gallion***, 270 Wis. 2d 535, ¶41.

In this case, the trial court applied the standard sentencing factors and explained their application in accordance with the framework set forth in ***Gallion*** and its progeny. The trial court discussed the offense and the negative effects of drug-dealing on the community. It said the fact that Erby had a gun was "an aggravating factor." The trial court said another aggravating factor was that it believed Erby had lied on the stand, although the trial court said it would not enhance the penalty on that basis. The trial court recognized that Erby had a high school diploma and work history, but it concluded that "probation would unduly depreciate the seriousness of the offense" because "[t]here clearly has to be a message first to you and others in the community that drug dealing isn't appropriate and you haven't accepted that at this point." We conclude that based on the trial court's explanation of its sentence, there would be no merit to challenge the trial court's compliance with ***Gallion***.

Further, there would be no merit to assert that the sentence was excessive. *See* ***Ocanas***, 70 Wis. 2d at 185. Erby's total sentence of five-and-one-half years was less than half the maximum sentence; it was not unconscionable. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 ("A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable."). There would be no merit to challenging the trial court's exercise of sentencing discretion.

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

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Ann Auberry is relieved of further representation of Erby in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals