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November 18, 2015

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

2015AP874-CRNM State of Wisconsin v. Chad W. Tucker (L.C. #2014CF20)
2015AP875-CRNM State of Wisconsin v. Chad W. Tucker (L.C. #2014CF30)

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

Chad W. Tucker appeals from judgments of conviction for three counts of failure to pay child support, party to the crime of possession of materials for manufacturing methamphetamine, and party to the crime of possession of drug paraphernalia. Tucker'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 (1967). Tucker has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, we summarily affirm the judgments because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

On January 15, 2014, a search warrant was executed in the area of a house where Tucker and a girlfriend were living. Materials for the manufacture of methamphetamine and remnants of such production were found. Tucker was charged as a party to the crime of possession of waste from methamphetamine manufacturing, possession of methamphetamine, possession of materials for manufacturing methamphetamine, possession of drug paraphernalia, and manufacturing of methamphetamine. In a separate case, Tucker was charged with seven counts of failure to pay child support for periods between 2008 and December 31, 2013. He entered no-contest pleas to the five crimes of which he is convicted and all other charges were dismissed as read-ins at sentencing. Under the plea agreement, the prosecution was free to argue at sentencing. Tucker was sentenced to consecutive terms of one year initial confinement, two years' extended supervision on each of the failure to support convictions, and two years' initial confinement and three years' extended supervision on each of the drug convictions. On remand from this court, $750 in DNA surcharges included on the child support judgment of conviction

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

were removed from the judgment.[2] The judgment of conviction for the two drug crimes includes a $250 DNA surcharge for each count for a total of $500.

The no-merit report first addresses whether the search warrant was supported by adequate probable cause, particularly whether reliance could be placed on the information provided by a named informant during a custodial interrogation regarding a methamphetamine lab operating in the informant's residence. In his response Tucker suggests the search warrant was bad, that it was based on untrue statements by the informant, and that he wrote his trial counsel at least five times asking about a challenge to the warrant and search. The search warrant is not part of the record because there was no motion challenging it. The warrant and supporting affidavit have been reproduced in the appendix to the no-merit report so this court has been able to review its contents.

> A search warrant may issue only on a finding of probable cause by a neutral and detached magistrate. ***State v. Benoit***, 83 Wis. 2d 389, 394, 265 N.W.2d 298 (1978). The quantum of evidence necessary to support a determination of probable cause for a search warrant is less than that required for conviction or for bindover following a preliminary examination. ***Id.*** On review, this court must

[2] Our August 17, 2015 order observed that $750 in DNA charges were included on the judgment for the three failure to pay child support convictions and that under ***State v. Radaj***, 2015 WI App 50, 363 Wis. 2d 633, 866 N.W.2d 758, the multiple mandatory surcharges for crimes committed before January 1, 2014, are an ex post facto violation. However, we also observed that the circuit court had given a possible discretionary reason for imposing at least one DNA surcharge but it was not known on which case the circuit court had ordered Tucker to submit the DNA swab and pay the associated cost. On remand, an amended judgment of conviction was entered on the child support convictions and the $750 in DNA surcharges no longer appears on the judgment. Although the amended judgment still recites, "Provide DNA sample if not already done and pay surcharge," the judgment on the drug convictions states the same thing. Thus, because Tucker will have already submitted a DNA sample for the drug convictions, he is not required to do so for the child support convictions and no DNA surcharge is imposed on the child support convictions.

> determine whether the magistrate issuing the warrant was apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime and that they will be found in the place to be searched. ***Id.*** at 395, 265 N.W.2d 298. The warrant may be issued on the basis of hearsay, but it must be shown that the information is substantially reliable. ***Jones v. United States***, 362 U.S. 257, 270, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

Ritacca v. Kenosha Cty. Ct., 91 Wis. 2d 72, 77-78, 280 N.W.2d 751 (1979).

Here the affidavit in support of the warrant recites that the informant was taken into custody regarding a methamphetamine lab operating in the informant's residence and the informant indicated he wanted to cooperate and provide information about another methamphetamine lab operating in the city. The informant and his attorney signed a "Proffer Agreement." The informant indicated that Tucker was cooking methamphetamine at a residence near an intersection in the city. The informant described the location of the house and that either Tucker or his brother own a construction company called CW Tucker Construction. The informant believed Tucker had been making weekly runs to Iowa to pickup precursor chemicals and doing so in his girlfriend Kristi's car. The informant had been to Tucker's residence a couple weeks earlier to buy methamphetamine and while there observed torches, Heet, glass beakers, hoses, a hot plate and possibly an aquarium hose.

The police located Tucker's residence as described by the informant and observed in the backyard a trailer that displayed a CW Tucker Construction decal. It was discovered that Tucker was in a relationship with Kristi Durr and a car registered in her name was seen parked at Tucker's residence. In a search of abandoned refuse from the residence, a blister pack containing two red Pseudoephedrine tablets, a prescription medication bottle from a Walmart in Dubuque, Iowa, and mail in Durr's name were found.

The affidavit in support of the warrant established circumstances from which the affiant could conclude that the information from the informant was reliable. The informant signed a cooperation agreement which undoubtedly left the informant vulnerable for charges for making false statements. The informant also admitted to buying methamphetamine. Statements against penal interest support the reliability of an informer. ***State ex rel. Bena v. Hon. John J. Crosetto***, 73 Wis. 2d 261, 267, 243 N.W.2d 442 (1976). Additionally, the police corroborated information provided by the informant. "When an informant is shown to be right about some things he has alleged, it is probable that he is also right about others. Independent police corroboration of the informant's tip imparts a degree of reliability to the unverified details." ***State v. Marten***, 165 Wis. 2d 70, 75, 477 N.W.2d 304 (Ct. App. 1991) (citation omitted). We conclude there was no meritorious challenge to mount against the warrant and thus, we need not consider whether trial counsel was ineffective for failing to file a motion to suppress evidence seized upon execution of the warrant. *See* ***State v. Erickson***, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999) ("the normal procedure in criminal cases is to address waiver within the rubric of the ineffective assistance of counsel.").

The no-merit report next address whether Tucker's plea was freely, voluntarily, and knowingly entered. The report correctly observes that the misstatement on the plea questionnaire about the penalties for the possession of drug paraphernalia charge was of no consequence because the circuit court recited the correct penalties during the plea colloquy and the misstatement was noted and corrected during the hearing. The circuit court engaged in an appropriate plea colloquy with Tucker and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

Additionally, the circuit court properly referred to and used the plea questionnaires at the plea hearing to ascertain Tucker's understanding and knowledge with respect to his no-contest pleas. ***State v. Hoppe***, 2009 WI 41, ¶¶30-32, 317 Wis. 2d 161, 765 N.W.2d 794. The circuit court did not address Tucker during the plea colloquy regarding the impact of the read-in offenses at sentencing. *See* ***State v. Straszkowski***, 2008 WI 65, ¶¶5, 97, 310 Wis. 2d 259, 750 N.W.2d 835 (The circuit court "should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge."). However, Tucker's signed plea questionnaires stated his understanding that the judge could consider read-in charges at sentencing but the maximum penalty would not increase, that restitution could be ordered on any read-in charges, and that read-in charges could not later be prosecuted. Thus, if the circuit court was required to make advisements about the read-in charges,[3] the failure to personally address Tucker about the effects of the read-in charge does not render his plea unintelligent. *See* ***State v. Reed***, No. 2009AP3149-CR, unpublished slip op. ¶¶17-18 (WI App Jan. 11, 2011).[4] *See also* ***State v. Johnson***, 2012 WI App 21, ¶12, 339 Wis. 2d 421, 811 N.W.2d 441 (plea withdrawal is

[3] It appears unsettled whether the advisements outlined in ***State v. Straszkowski***, 2008 WI 65, ¶¶5, 97, 310 Wis. 2d 259, 750 N.W.2d 835, are part of the circuit court's duties during a plea colloquy. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶19, 23, 317 Wis. 2d 161, 765 N.W.2d 794 (claim that the circuit court failed to notify the defendant that the read-in offenses could be considered at sentencing targeted the court's mandatory plea colloquy duties); ***State v. Lackershire***, 2007 WI 74, ¶28 n.8, 301 Wis. 2d 418, 734 N.W.2d 23 (the supreme court declined to adopt the court of appeals' characterization of read-ins as "collateral consequences" and expressly declined to address a circuit court's obligation to explain the nature of read-in offenses).

[4] WISCONSIN STAT. RULE 809.23(3)(b) allows the citation of an unpublished authored opinion issued after July 1, 2009 for its persuasive value.

not justified unless the fundamental integrity of the plea is seriously flawed). No issue of merit exists from the plea taking.

Tucker claims in his response that his plea was not freely made because he felt "backed into a corner" by trial counsel's alleged shortcomings. He points out that he asked his trial counsel to request a bond hearing and a speedy trial but counsel never did. He also points out that he complained about counsel at the first scheduled plea taking but the circuit court refused to remove counsel from the case and as punishment set the next court date out four months. He states he felt backed into a corner because he had trial counsel he did not trust and no way to get counsel he felt okay with. Tucker also complains that his plea was made without seeing the statement given by Durr.

It is accurate that the circuit court refused to require the appointment of a new attorney for Tucker. However, the court's ruling came after it heard Tucker's complaints about trial counsel. The court found that Tucker's complaint that counsel had not provided a video that was not available and that counsel had only provided Tucker with black and white pictures from the warrant execution was not significant. The court stated, "your claim beyond that, about … potential deficiencies, is so vague, and ambiguous, and nebulous as to be unpersuasive." The court set the next plea hearing out three months in response to Tucker's hesitation to proceed with his plea to the drug charges and Tucker's complaint that he had only seen very little of his attorney. Setting the hearing out three months gave Tucker the very thing he asked for at the initial plea hearing—time to consider whether to enter his no-contest plea. When Tucker was asked for his pleas at the subsequent hearing he expressed no hesitation, no dissatisfaction with counsel, no desire to examine Durr's statement. By his no-contest plea, Tucker forfeited the right to claim ineffective assistance of counsel. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294

Wis. 2d 62, 716 N.W.2d 886 (a guilty or no-contest plea forfeits the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights).

The final potential issue discussed in the no-merit report is whether the sentence was the result of an erroneous exercise of discretion. We agree that this potential issue has no arguable merit. The sentence was a demonstrably proper exercise of discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Also, the $500 in DNA surcharges for the two drug convictions was proper under WIS. STAT. § 973.046(1r), because those crimes occurred after the effective date of the change in the law making DNA surcharges mandatory.

Tucker's response raises concerns about sentencing. First, he suggests it was an erroneous exercise of discretion to give him more time than other co-actors in the same case. "A mere disparity between the sentences of codefendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation." *See* ***State v. Toliver***, 187 Wis. 2d 346, 362, 523 N.W.2d 113 (Ct. App. 1994). In light of the sentencing court's consideration of Tucker's lengthy criminal history and the assessment of Tucker's character, the sentence was based on individual circumstances and a claim of disparity lacks arguable merit. Next, Tucker complains that his sentence exceeds that recommended by the presentence investigation report (PSI). The sentencing court is not bound by any sentencing recommendations, either defense counsel's or the PSI, as long as it properly explains its sentence. ***State v. Jones***, No. 2004AP1988-CR, unpublished slip op ¶12 (WI App Apr. 12, 2005). Here the court properly explained its sentence. Tucker also complains that although he specifically asked trial counsel to read at sentencing a letter sent to counsel by Tucker's father and talk about schooling Tucker did while in jail, counsel failed to do so. Both of the deficiencies were known to Tucker when he made his own allocution during sentencing.

Tucker said nothing about them. A defendant forfeits a claim when he proceeds to sentencing after the basis for the claim of error is known to the defendant. ***State v. Smith***, 153 Wis. 2d 739, 741, 451 N.W.2d 794 (Ct. App. 1989). "He chose which road he would walk down and is not to be returned to the fork or crossing so he can try the other one." ***Farrar v. State***, 52 Wis. 2d 651, 662, 191 N.W.2d 214 (1971). No issue of arguable merit exists regarding sentencing.

One additional point raised in Tucker's response is a suggestion that the judge who presided over Tucker's preliminary hearing in the drug case overcharged Tucker. Tucker claims that in a meeting with the prosecutors only two drug charges were contemplated. He then states that the judge who presided at the preliminary hearing, and who also signed the search warrant, "chose to charge me with 5 charges." A judge makes no decision about charging. Tucker's suggested issue lacks merit.

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 Tucker further in these appeals.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Jeffrey A. Mann is relieved from further representing Chad W. Tucker in these appeals. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals