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

2014AP1609-CRNM State of Wisconsin v. Matthew J. Rogstad (L.C. # 2013CF151)

Before Kloppenburg, P.J., Sherman, and Blanchard, JJ.

Matthew J. Rogstad appeals a judgment convicting him, after entry of a guilty plea, of operating a motor vehicle while intoxicated (OWI), fifth or sixth offense. Attorney Daniel J. Chapman has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32 (2013-14);[1] *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses the effectiveness of counsel at a suppression hearing, the

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

suppression ruling, and sentencing. Rogstad filed a response. Upon reviewing the entire record, as well as the no-merit report and Rogstad's response, we conclude that there are no arguably meritorious appellate issues.

Rogstad was arrested for OWI after police responded to a report of a car in a ditch. When police arrived, the car was not running and Rogstad was in the driver's seat. Rogstad initially denied driving but admitted driving when a second officer spoke with him. Additional facts will be stated below when we consider the suppression issue.

The Plea

We first address a matter not addressed in the no-merit report—the validity of Rogstad's guilty plea.[2] A meritorious challenge to the validity of the guilty plea could not be raised. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective and resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-52 & n.6, 471 N.W.2d 599 (Ct. App. 1991).

Rogstad pled guilty to OWI, sixth offense. Rogstad and the State presented a joint sentencing recommendation to the court—an imposed and stayed sentence of three years of

[2] Whether a motion to withdraw a guilty or no-contest plea would be arguably meritorious is considered in virtually every no-merit appeal from a judgment of conviction entered pursuant to a defendant's plea. Attorney Chapman should include a discussion of the validity of a guilty or no contest plea when appropriate in future no-merit appeals.

initial confinement and three years of extended supervision, and a three-year term of probation with one year in the county jail. The parties also agreed that Rogstad could ask for a reduction in jail time if he successfully completed a designated treatment program while incarcerated. Rogstad agreed that the plea agreement had been accurately set forth by counsel.

A signed plea questionnaire is in the record. Rogstad assured the court that he had read the form with his attorney and understood it contents. Rogstad told the court that no threats or promises had been made in exchange for his plea. When the court asked Rogstad if he was satisfied with his attorney, Rogstad complained about a prior attorney and the Public Defender's office. Rogstad assured the court, however, that he was satisfied with the representation of the attorney representing him at the plea hearing. The court explained the various constitutional rights that were being waived by the plea, and Rogstad confirmed that he understood he was giving up each right. The court advised Rogstad that it was not bound by the parties' sentencing recommendation and could impose the maximum sentence if appropriate. Rogstad said he understood and still wanted to plead guilty. Rogstad agreed that the criminal complaint and testimony from the preliminary hearing constituted a sufficient factual basis for his plea. Rogstad agreed that he had five prior OWI convictions, and his attorney told the court that none of those convictions were subject to collateral attack. The court explained the elements that the State would have to prove at trial, and Rogstad told the court he understood. The plea colloquy shows that the court complied with the requirements of WIS. STAT. § 971.08 and ***Bangert***.

Suppression

A guilty plea does not waive appellate review of a suppression motion, WIS. STAT. § 971.31(10), and we next address the denial of Rogstad's suppression motion and the several suppression-related matters raised in Rogstad's response.

When reviewing a circuit court's denial of a motion to suppress evidence, this court will uphold the circuit court's findings of fact unless they are clearly erroneous. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. Applying the facts to the constitutional standards is a question of a law, which is subject to de novo review. ***State v. Guzman***, 166 Wis. 2d 577, 586, 480 N.W.2d 446 (1992).

Rogstad moved to suppress statements he made to the two officers at the scene. At the suppression hearing, Deputy Ryan Hulback testified that he responded to a report of a vehicle in a ditch. When he arrived, Rogstad was sitting in the driver's seat and the car was not running. Rogstad told Hulback he was there to remove the car from the ditch for his sister. Rogstad admitted to having consumed three beers. Rogstad denied driving the car. Hulback testified that Rogstad "appeared highly intoxicated," with "a strong odor of intoxicants" and "red, glossy, bloodshot eyes." When Hulback asked for his driver's license, Rogstad went to the trunk to look for it, and had "a hard time with balance" and "was stumbling around as he was walking." Hulback remained outside the car and did not draw his weapon. Hulback talked with Rogstad for less than five minutes before returning to his squad car. Rogstad never said he did not want to talk with Hulback. Hulback testified that neither he nor his squad car were equipped with any recording cameras.

Deputy Jason Hickok testified that he talked with Rogstad after Hulback returned to his squad car. Rogstad told Hickok that he had been driving when he saw an old friend who flagged him down. When Rogstad pulled over, he ended up in the ditch. Rogstad said he had been fishing and had consumed three beers. Rogstad's speech was slurred, his eyes were bloodshot, and Hickok smelled a strong odor of intoxicants. Hickok did not draw his weapon and Rogstad was not handcuffed. Rogstad did not ask for an attorney or tell Hickok he did not want to talk with him. Hickok talked with Rogstad for about three to four minutes. Hickok's squad car was equipped with a video camera but Hickok had not yet turned it on for the day.

The circuit court found that Rogstad was being interrogated by the officers but the interrogation was not custodial. The court found that the officers' questioning of Rogstad for the "incredibly brief time" of eight to nine minutes did "not implicate custody." The officers were authorized to detain Rogstad on a highway when they had reasonable suspicion that a crime had been committed. The court found that no weapons had been drawn or handcuffs used, and there were no indicia of coercion. The court rejected Rogstad's argument that the officers had engaged in a "tag team effort" to take advantage of Rogstad. The court held that intoxication did not render Rogstad's statements involuntary.

An appellate challenge to the circuit court's denial of the suppression motion would lack arguable merit. The initial stop was proper. Rogstad was sitting in a car in a ditch. The deputies were justified in speaking to Rogstad to ascertain how the car came to be in the ditch. *See* ***State v. Young***, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729 (a law enforcement officer may conduct an investigatory stop if the officer has a reasonable suspicion that an unlawful activity has been committed, is being committed, or is about to be committed). "[W]hen a police officer observes lawful but suspicious conduct, if a reasonable inference of unlawful conduct can be

objectively discerned, notwithstanding the existence of other innocent inferences that could be drawn, police officers have the right to temporarily detain the individual for the purpose of inquiry." ***State v. Waldner***, 206 Wis. 2d 51, 60, 556 N.W.2d 681 (1996).

Protections under ***Miranda***[3] apply only to custodial interrogations. ***State v. Hassel***, 2005 WI App 80, ¶9, 280 Wis. 2d 637, 696 N.W.2d 270. A police officer may ask general questions as part of an investigation into possible criminal wrongdoing. *See* ***State v. Boggess***, 110 Wis. 2d 309, 317, 328 N.W.2d 878 (Ct. App. 1982) (***Miranda*** rule does not apply to general on-the-scene questions that are investigatory in nature). As part of that initial investigation into whether a crime had been committed, the deputies were entitled to ask Rogstad if he had been driving. A challenge to the court's suppression ruling would lack arguable merit.[4]

Ineffective Assistance of Counsel

In his no-merit report, Attorney Chapman discusses whether Rogstad's counsel was ineffective at the suppression hearing because he did not request sequestration of the witnesses. Rogstad also discusses that issue in his response.

To establish ineffective assistance of counsel, Rogstad must show that his counsel's performance was deficient and that the deficiency caused him prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Rogstad cannot meet that standard. Under WIS. STAT.

[3] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

[4] Rogstad contends that the deputies' questioning of him was required to be recorded under WIS. STAT. § 968.073 (declaring a state policy that custodial interrogations of persons suspected of committing a felony be recorded). That statute applies only to custodial interrogations. It is not pertinent to a roadside investigatory stop.

§ 906.15(1), a party may request that witnesses be excluded from the courtroom "so that they cannot hear the testimony of other witnesses." The State, however, may designate an officer to remain in the courtroom. Section 906.15(2)(b). We agree with counsel's conclusion that a sequestration request would not have prevented the deputies from hearing each other's testimony because the State could have named one officer to be the court officer under that statute.[5] Therefore, counsel was not ineffective.

We next address Rogstad's other assertions of ineffective counsel related to the suppression hearing. He argues that his attorney did not adequately prepare for the hearing and that the attorney should have met with Rogstad beforehand "to plan a strategy" for conveying Rogstad's version of "how he came to be the only occupant" of the car. However, the only issue before the court at the suppression hearing was the constitutionality of the deputies' investigation and questioning. The back story of how the car got into the ditch or whether, in fact, Rogstad was driving, would not have been relevant.[6] Therefore, the claimed inadequate preparation cannot have prejudiced Rogstad.

Rogstad faults his attorney for not calling him to testify at the suppression hearing. Rogstad states that his attorney explained the decision as a "tactical" one to prevent the State from being able to cross-examine Rogstad. Rogstad argues that counsel's decision was ineffective because his suppression testimony could not have been used against him at trial,

[5] In his response, Rogstad asserts that the deputy who had escorted him from the jail could have been designated. The statute reserves the choice of designated officer to the State's attorney, not to the defendant.

[6] The limited issues before the court at the suppression hearing also defeat Rogstad's claim that his attorney was ineffective for not delving into Deputy Hickok's work history.

relying on ***Simmons v. United States***, 390 U.S. 377 (1968). Rogstad is mistaken. In ***State v. Schultz***, 152 Wis. 2d 408, 418-26, 448 N.W.2d 424 (1989), the supreme court discussed ***Simmons*** at length and rejected the view that a defendant's testimony at a suppression hearing was "compelled testimony" such that it cannot be used for any purpose at a subsequent trial. ***Id.***, at 422. Thus, counsel's concern that Rogstad not provide testimony that might be used against him at trial was well founded and cannot be said to be ineffective.

Rogstad also claims his attorney was ineffective outside the context of the suppression hearing. Rogstad argues that his attorney was ineffective because he did not subpoena alibi witnesses for trial or submit jury instructions. But, because Rogstad pled guilty, his attorney's trial preparation is immaterial. Rogstad argues that his attorney was ineffective for not arguing that the evidence was insufficient to convict. But, Rogstad pled guilty and admitted that a factual basis existed for the convictions. Rogstad argues that his attorney was ineffective for not ensuring that Rogstad was given a speedy trial. But, any violation of Rogstad's right to a speedy trial was waived when Rogstad pled guilty. *See* ***Edwards v. State***, 51 Wis. 2d 231, 235, 186 N.W.2d 193 (1971). Rogstad argues that his attorney was ineffective for not collaterally attacking a prior OWI conviction. However, counsel did successfully attack one of Rogstad's prior convictions and the State amended the charge from a seventh offense OWI to a sixth offense. Moreover, during the colloquy, Rogstad admitted that five prior OWI convictions could "legally be counted."

Sentencing

We next consider whether an appellate challenge to the sentence would have arguable merit. On appeal, this court's review of sentencing is limited to determining if discretion was

erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion." ***Id.*** When the exercise of discretion has been demonstrated, we follow "a consistent and strong policy against interference with the discretion of the trial court in passing sentence." ***Id.***, ¶18 (quoting ***McCleary v. State***, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971)). "[S]entencing decisions of the circuit court are generally afforded a strong presumption of reasonability because the circuit court is best suited to consider the relevant factors and demeanor of the convicted defendant." ***Id.*** (quoting ***State v. Borrell***, 167 Wis. 2d 749, 781, 482 N.W.2d 883 (1992)). The "sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant." ***Id.***, ¶23 (quoting ***McCleary***, 49 Wis. 2d at 276).

"Circuit courts are required to 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." ***Id.***, ¶40. Also, under truth-in-sentencing, the legislature has mandated that the court shall consider the protection of the public, the gravity of the offense, the rehabilitative needs of the defendant, and other aggravating or mitigating factors. ***Id.***, ¶40 n.10.

In this case, the court sentenced Rogstad to two years of initial confinement and two years of extended supervision, to run consecutively to another sentence. The court rejected the parties' joint sentencing recommendation because of Rogstad's history of failure on probation. The court considered Rogstad's character, his prior criminal and juvenile record, and his need for treatment. The court stated that probation would put the community at risk and a consecutive

sentence was warranted because this was a "separate offense" and "the public deserves the protection that [a consecutive sentence] carries with it." The court properly exercised sentencing discretion and an appellate challenge to the sentence would lack arguable merit.

Other Claimed Circuit Court Error

In his response, Rogstad asserts that the circuit court erred when it did not respond to Rogstad's pro se submissions. Rogstad was represented by an attorney. There is no right to hybrid representation at trial. ***Moore v. State***, 83 Wis. 2d 285, 297-302, 265 N.W.2d 540 (1978), *cert. denied* 439 U.S. 956 (1978). The circuit court did not err.[7] Rogstad asserts that the court denied him a speedy trial. As noted above, Rogstad's plea waived that claim. *See* ***Edwards***, 51 Wis. 2d at 235. Rogstad asserts that the court did not support its suppression ruling with any law. Rogstad is wrong. Rogstad asserts that the court should have inquired into the effectiveness of counsel after Rogstad complained about the representation in his pro se filings. The court was not obligated to respond to Rogstad's submissions. More importantly, during the plea colloquy, Rogstad assured the court that he was satisfied with the representation given by his current attorney.

Upon our independent review of the record, we have found no arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

[7] On at least one occasion, the circuit court forwarded copies of Rogstad's filing to the district attorney and to Rogstad's attorney. Rogstad's contention that the court should not have done so is meritless.

Therefore,

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

IT IS FURTHER ORDERED that Daniel J. Chapman is relieved of any further representation of Rogstad in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals