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December 8, 2015

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

2015AP223-CRNM State of Wisconsin v. Jeffrey James Salituro (L.C. # 2013CM969)

Before Sherman, J.[1]

Jeffrey James Salituro pled guilty to misdemeanor carrying a concealed weapon. *See* WIS. STAT. § 941.23(2) (2013-14). The court stayed sentence and placed Salituro on probation for six months. Salituro's appellate counsel, Stephen M. Compton, has filed a no-merit report under WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Upon consideration of the report and an independent review of the record, this court concludes there is

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

no arguable merit to any issue that could be raised on appeal. However, assessment of a $200 DNA surcharge was improper. *See* ***State v. Elward***, 2015 WI App 51, ¶7, 363 Wis. 2d 628, 866 N.W.2d 756 (holding that the mandatory DNA surcharge under WIS. STAT. § 973.046(1r) for misdemeanor crimes committed before January 1, 2014, but sentenced after that date and before April 1, 2015, is an unconstitutional ex post facto punishment). Therefore, the judgment of conviction is modified to vacate the DNA surcharge, and summarily affirmed as modified. *See* WIS. STAT. RULE 809.21.

Counsel addresses three potential appellate issues in his no-merit report—suppression, the plea colloquy, and sentencing. We agree with counsel's assessment that there is no arguable merit to any of those issues.

Salituro was arrested after Kenosha police officer Tyler Cochran observed him and two others standing in front of a concrete wall located on private property. Salituro appeared to be spray-painting on the wall. Cochran activated his squad's lights and approached the group. Salituro had a drawstring backpack over one shoulder and Cochran asked Salituro if he could look inside the backpack. Salituro said "no," and then "made a quick movement going towards the backpack like he was going to go inside the backpack." Cochran then grabbed the backpack and looked inside. A gun was inside the backpack, and Salituro told Cochran that he did not have a concealed-carry permit. Cochran testified that the area was not well lit, and the area was "fairly high crime" with numerous shots fired and weapons reports. Cochran testified that he was afraid that Salituro may have a weapon in his backpack and he was outnumbered one to three.

The Fourth Amendment to the United States Constitution and article I, section 11 of the Wisconsin Constitution both require that all searches and seizures be reasonable. ***State v. Ziedonis***, 2005 WI App 249, ¶13, 287 Wis. 2d 831, 707 N.W.2d 565. "'The essential question is whether the action of the law enforcement officer was reasonable under all the facts and circumstances present.'" ***State v. Richardson***, 156 Wis. 2d 128, 139-40, 456 N.W.2d 830 (1990) (quoted source omitted). A police officer "may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." ***Terry v. Ohio***, 392 U.S. 1, 22 (1968). The standard is objective—do the facts available to the officer at the moment of the seizure warrant a man of reasonable caution to believe that the seizure was appropriate. *See* ***id.*** at 21-22.

An investigatory stop is constitutional if a law enforcement officer, in light of his or her training and experience, has a reasonable suspicion that an unlawful activity has been committed, is being committed, or is about to be committed. *See* ***State v. Young***, 2006 WI 98, ¶20, 294 Wis. 2d 1, 717 N.W.2d 729. The officer must have more than an "inchoate and unparticularized suspicion or 'hunch.'" ***State v. Post***, 2007 WI 60, ¶10, 301 Wis. 2d 1, 733 N.W.2d 634 (quoted source and quotation marks omitted). The standard of reasonable suspicion is met when "those facts known to the officer at the time of the stop [are] taken together with any rational inferences, and considered under the totality of the circumstances." ***State v. Washington***, 2005 WI App 123, ¶16, 284 Wis. 2d 456, 700 N.W.2d 305.

When Cochran seized the backpack, he had observed behavior that suggested Salituro was vandalizing private property. The initial investigatory stop was justified. When Salituro made a quick movement to reach into the backpack, Cochran reasonably believed that a weapon may be inside the backpack and, therefore, his grabbing of the backpack was justified. An

appellate challenge to the trial court's denial of the suppression motion would lack arguable merit.

Salituro pled guilty to misdemeanor carrying a concealed weapon. In exchange for a guilty plea, the State agreed to recommend one year of probation with no jail time. The court conducted a standard plea colloquy, inquiring into Salituro's ability to understand the proceedings and the voluntariness of his decision to plead guilty. The court ascertained that Salituro understood the elements of the crime and the constitutional rights being waived by a guilty plea. The court explained the potential penalty and confirmed that Salituro knew that it was not bound by the terms of any plea agreement. Salituro read and signed a plea questionnaire and told the court he had read the questionnaire and he understood it. Salituro agreed that the facts alleged in the criminal complaint constituted an adequate factual basis for the plea. The record shows that Salituro's plea satisfied the requirements set forth in WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 389 N.W.2d 12 (1986). An appellate challenge to the plea would lack arguable merit.

A challenge to Salituro's sentence would also lack arguable merit. This court will uphold a sentence unless the circuit court misused its discretion. ***State v. J.E.B.***, 161 Wis. 2d 655, 661, 469 N.W.2d 192 (Ct. App. 1991). We presume the circuit court acted reasonably, and the defendant must show that the court relied upon an unreasonable or unjustifiable basis for its sentence. ***Id.*** Public policy strongly disfavors appellate court interference with the sentencing discretion of the trial court. ***State v. Teynor***, 141 Wis. 2d 187, 219, 414 N.W.2d 76 (Ct. App. 1987). In imposing sentence, a trial court should consider the gravity of the offense, the defendant's character, and the need to protect the public. ***State v. Borrell***, 167 Wis. 2d 749, 773,

482 N.W.2d 883 (1992). The weight given to each of the sentencing factors is within the court's discretion. ***J.E.B.***, 161 Wis. 2d at 662.

In this case, the court placed Salituro on probation for six months. The court considered the nature of the offense and a prior ordinance violation for the same offense. The court identified the factors that it considered in fashioning the sentence. The factors were proper and relevant. The court properly exercised sentencing discretion and an appeal on that basis would lack arguable merit.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is modified to vacate the DNA surcharge and, as modified, the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Stephen M. Compton is relieved of any further representation of Salituro in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals