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December 22, 2015

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

2014AP212-CRNM State of Wisconsin v. Quantell Jarmar Collier
2014AP213-CRNM (L. C. Nos. 2012CF1237; 2012CF6217)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Quantell Collier has filed a no-merit report concluding no grounds exist to challenge Collier's convictions for felony bail jumping and possession with intent to deliver between fifteen and forty grams of cocaine, the latter count as a second or subsequent offense. Collier has filed a response challenging the denial of his pretrial suppression motion and the effectiveness of his trial counsel. Upon our independent review of the records as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue

that could be raised on appeal. Therefore, we summarily affirm the judgments of conviction. *See* WIS. STAT. RULE 809.21.[1]

In Milwaukee County Circuit Court case No. 2012CF1237, the State charged Collier with obstructing an officer; possession with the intent to deliver between fifteen and forty grams of cocaine, as a second or subsequent offense; and misdemeanor bail jumping as a repeater. In Milwaukee County Circuit Court case No. 2012CF6217, the State charged Collier with felony bail jumping and possession of Tetrahydrocannabinol, the latter count as a second or subsequent offense. The circuit court denied Collier's pretrial motion to suppress evidence. In exchange for his guilty pleas to the cocaine possession and felony bail jumping charges, the State agreed to dismiss and read in the remaining charges from the two cases and not to make a sentence recommendation to the court. Out of a maximum possible thirty-seven-year sentence, the court imposed consecutive sentences totaling nine years and two months, consisting of three years and two months' initial confinement followed by six years' extended supervision.

The no-merit report and Collier's response question whether there is any basis for challenging the denial of Collier's pretrial suppression motion. Any challenge to the denial of the suppression motion would lack arguable merit. Collier moved to suppress the fruits of what he claimed was an illegal stop and search of his person. An officer may stop an individual if the officer has reasonable suspicion, in light of his or her training and experience, that the individual is or has been violating the law. *See* ***Terry v. Ohio***, 392 U.S. 1, 20-22, 30 (1968). Further, an officer may perform an investigatory stop of a vehicle based on reasonable suspicion of a

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

noncriminal traffic violation. ***State v. Colstad***, 2003 WI App 25, ¶11, 260 Wis. 2d 406, 659 N.W.2d 394.

Here, officers testified at the suppression motion hearing that at approximately 6:00 p.m. on March 13, 2012, they observed an individual standing in a Milwaukee street next to a car parked approximately three feet from the curb. As the marked squad car approached, the subject standing in the street walked back to the sidewalk and the car remained parked in the road. The officers pulled up behind the parked car and initiated emergency lights, at which point the car began to drive forward and into the traffic lane, without signaling. The officers then activated the emergency siren. The car continued forward but stopped at the next intersection, then drove through the intersection before pulling over in what was described as "a fast acceleration." Video of the stop from the squad car was consistent with the officers' testimony.

WISCONSIN STAT. § 346.54(1)(d) provides, in relevant part: "In parallel parking, a vehicle shall be parked facing in the direction of traffic with the right wheels within 12 inches of the curb or edge of the street when parked on the right side." Thus, at the time the officers initiated the squad car's emergency lights, they had reason to believe the driver, later identified as Collier, was violating a noncriminal traffic law. Based on Collier's actions following activation of the squad car's emergency lights, the officers had independent grounds to stop Collier. Any challenge to the stop would therefore lack arguable merit.

A pat-down for weapons conducted by police, commonly known as a "frisk," is a search. ***State v. Morgan***, 197 Wis. 2d 200, 208, 539 N.W.2d 887 (1995). Consequently, a frisk must satisfy the reasonableness requirement of the Fourth Amendment to the United States Constitution and article I, section 11, of the Wisconsin Constitution. Relevant to this case, a

"search authorized by consent is wholly valid" under the Fourth Amendment. *See* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 222 (1973); *see also* ***State v. Wantland***, 2014 WI 58, ¶20, 355 Wis. 2d 135, 848 N.W.2d 810. The court must determine, however, whether the defendant in fact consented and, if so, whether that consent was voluntary. ***State v. Phillips***, 218 Wis. 2d 180, 197, 577 N.W.2d 794 (1998); *see also* ***Schneckloth***, 412 U.S. at 222-23. Consent to search need not be given verbally; it may be in the form of words, gesture, or conduct. ***Phillips***, 218 Wis. 2d at 197. In turn, the test for voluntariness is whether consent to search was given in the absence of duress or coercion, either express or implied. ***Id.*** This determination is made after looking at the totality of the circumstances, considering both the circumstances surrounding the consent and the characteristics of the defendant. ***Id.*** at 198. No single criterion controls. ***Id.***

The officers testified that once Collier stopped, they approached the vehicle. Officer Joseph Szcyubialka approached the driver's side and Collier held his hand outside the window to present his identification. Szcyubialka, testified that "due to him pulling off at the accelerated speed, not pulling over right away, taking awhile to stop," the officer asked Collier if he had anything dangerous or illegal on his person and Collier replied "hell no." Collier also answered in the negative when Szcyubialka asked if Collier had anything dangerous or illegal inside the vehicle. Szcyubialka added that based on past experience with vehicles taking a while to pull over, he was "fearful that [Collier] may have been trying to secretly hide a weapon." Though Szcyubialka could not recall the exact words exchanged, Szcyubialka testified that he asked Collier for "consent to search of his person," and Collier answered affirmatively that he did not mind being searched. Collier exited the vehicle and during the pat-down, Szcyubialka felt a large bulge, "about the size of a plum," on the inside portion of Collier's left leg that, based on

the officer's training and experience, he believed was narcotics. Officer Joseph Serio likewise testified that he overheard Collier consent to the search.

During his suppression hearing testimony, Collier disputed giving his consent to the search, and he again disputes aspects of the officers' testimony in his response to the no-merit report. The circuit court, however, found the officers' testimony to be credible. The circuit court, as fact-finder, is the ultimate arbiter of witness credibility, and we must uphold its factual findings unless they are clearly erroneous. *See* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345; *see also* WIS. STAT. § 805.17(2). Based on what it deemed to be the officers' credible testimony, the court found that Collier in fact consented to be searched. There is sufficient evidence in the record to support the court's credibility determination.

Applying the test for voluntariness outlined in ***Phillips***, the record supports a determination that Collier's consent was voluntary. The court noted, based on the officer's testimony and the squad car video, that it was the briefest of exchanges between the officer and Collier before Collier exited the vehicle to be searched. There is no indication in the record that the officers used duress or coercion to entice Collier to consent. In light of the totality of the circumstances, any challenge to the voluntariness of Collier's consent would lack arguable merit.

The record discloses no arguable basis for challenging the effectiveness of Collier's trial counsel. To establish ineffective assistance of counsel, Collier must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Collier must demonstrate that "there is a

reasonable probability that, but for counsel's errors, he would not have [pled] guilty and would have insisted on going to trial." ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985). Any claim of ineffective assistance must first be raised in the trial court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

Collier contends his trial counsel was ineffective by failing to challenge the alleged amount of cocaine before permitting Collier to enter into the plea agreement. Citing language in the incident report describing the drug seized as "23.27 GM of 'CRACK' COCAINE off white chunky substance contained in 4 paper folds and 18 corner cut bags," Collier posits that the drugs were impermissibly weighed with the packaging material to meet the fifteen-gram threshold. There is no indication in the record, however, that the crack cocaine and the containers were weighed together. Any claim that counsel was ineffective in this respect therefore lacks arguable merit. Our review of the record and the no-merit report discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner*** hearing.

The record discloses no arguable basis for withdrawing Collier's guilty pleas. The court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Collier completed, informed Collier of the elements of the offenses, the penalties that could be imposed, and the constitutional rights he waived by entering guilty pleas. The court confirmed Collier's understanding that it was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and also advised Collier of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). Additionally, the court found that a sufficient factual basis existed to support the conclusion that Collier

committed the crimes charged. The record shows the pleas were knowingly, voluntarily, and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the court considered the seriousness of the offenses; Collier's character, including his criminal history; the need to protect the public; and the mitigating factors Collier raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence imposed was well below the maximum permitted by law. Under these circumstances, it cannot reasonably be argued that Collier's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the records discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgments are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Mark A. Schoenfeldt is relieved of further representing Collier in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals