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March 23, 2016

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

2014AP1796-CRNM State of Wisconsin v. Edwin Marcel Cross (L.C. #2012CF4956)

Before Lundsten, Higginbotham, and Blanchard, JJ.

Edwin Cross appeals a judgment of conviction entered upon his guilty plea to one count of possession of a firearm by a felon as a repeater, contrary to WIS. STAT. §§ 941.29(2)(a), 939.50(3)(g), and 939.62(1)(a) (2011-12).[1] Attorney Randall Paulson filed a no-merit report seeking to withdraw as appellate counsel.[2] *See* ***Anders v. California***, 386 U.S. 738, 744 (1967); WIS. STAT. RULE 809.32; ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90,

[1] All further references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Attorney Leon W. Todd, III, has replaced Attorney Paulson as appellate counsel in this matter.

403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). Counsel's no-merit report addresses the suppression motion that the circuit court denied prior to the entry of the plea, the validity of the plea, and the sentence. Cross did not file a response to the no-merit report. Upon our review of the record and the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues.

BACKGROUND

Cross, a convicted felon prohibited from possessing firearms, was connected to a loaded .40 caliber firearm by way of his thumbprint on the magazine. Police found the gun during a search, pursuant to a warrant, of Cross' apartment, where he lived with his girlfriend, A.H., and their three-year-old son. Prior to obtaining the search warrant, police executed a warrantless entry to the apartment due to concerns that were based on Cross' actions when he was arrested during a traffic stop.

Those earlier actions involved the following. Earlier that day, officers conducting surveillance of Cross as part of a drug investigation had seen him leave his apartment in his car with his son. They had followed Cross, pulled him over, and arrested him on an active warrant. Because Cross had his son with him, police did not place Cross in handcuffs when they put him in the squad car. The arresting officer testified that when Cross was in custody after his arrest, the officer noticed that an open flip phone Cross had hanging around his neck on a lanyard was showing "a call in progress where the phone was connected to another phone" even though Cross was not speaking into the phone. The officer testified, "After he refused to close that phone [and end the call], I went to reach for the phone to close it myself, and that's when he picked up the phone and yelled, 'Baby, baby, they got me on the freeway.'" The officer then testified, "I asked

him who that was, and he told me that it was [A.H.]. And it was the baby's mother from 1125 North Callahan, Apartment 103."

The officer testified that he then left the scene immediately to return to Cross' apartment, calling for an officer with a drug-sniffing dog to meet him at the apartment. Police were admitted to the locked lobby by another resident who told police he did not live at the target address. The dog was walked past other apartment doors without alerting and alerted only at Cross' door. An officer testified that he knocked, announced that it was the police. He heard a woman inside ask "Who is it?" and observed by the peephole on the door that a person inside had approached the door and then retreated inside without opening the door. He then kicked in the door and entered. A.H., the woman present, refused to consent to a search. Police testified that they secured the apartment and, after a sweep of the rooms to see if anyone else was present, sought and obtained a search warrant.

DISCUSSION

1. Suppression motion

Cross sought to suppress the evidence obtained in the search, namely the gun, on the grounds that the warrantless entry to the apartment violated the constitution and that the gun recovered from the apartment could therefore not be used as evidence against him. *See* ***State v. Scull***, 2015 WI 22, ¶20, 361 Wis. 2d 288, 862 N.W.2d 562 ("Under the exclusionary rule, evidence obtained in violation of the Fourth Amendment is generally inadmissible in court proceedings.").

When a defendant moves to suppress evidence, the circuit court "considers the evidence, makes findings of evidentiary or historical fact, and then resolves the issue by applying

constitutional principles to those historical facts." ***State v. Griffith***, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. A reviewing court examines the circuit court's findings of historical fact under the clearly erroneous standard, and then review[s] de novo the application of constitutional principles to those facts. ***State v. Eason***, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625; ***State v. Matejka***, 2001 WI 5, ¶16, 241 Wis. 2d 52, 621 N.W.2d 891. The circuit court is the "ultimate arbiter" for credibility determinations when acting as a fact-finder, and we will defer to its resolution of discrepancies or disputes in the testimony and its determinations of what weight to give to particular testimony. ***Johnson v. Merta***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); *see also* WIS. STAT. § 805.17(2) ("due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses"). Credibility determinations are not overturned on appeal unless the testimony upon which they are based is "inherently or patently incredible or in conflict with the uniform course of nature or with fully established or conceded facts." ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269.

This case requires consideration of the exigent circumstances exception to the general rule that "warrantless searches are per se unreasonable under the fourth amendment, subject to a few carefully delineated exceptions." *See* ***State v. Boggess***, 115 Wis. 2d 443, 449, 340 N.W.2d 516 (1983).

> It is the law that in certain exigent circumstances, an officer's warrantless intrusion may be justified. The exigent circumstances doctrine justifies a warrantless search or seizure if "a police officer, under the facts as they were known at the time, would reasonably believe that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of the suspect's escape."

State v. Kirby, 2014 WI App 74, ¶17, 355 Wis. 2d 423, 851 N.W.2d 796 (quoted source omitted). "The government bears the burden of showing that the warrantless entry was both supported by probable cause and justified by exigent circumstances." ***State v. Robinson***, 2010 WI 80, ¶24, 327 Wis. 2d 302, 786 N.W.2d 463.

The State argued that, because police had seen Cross leave the apartment, police had other evidence that he was involved in drug dealing, police had heard Cross alert his girlfriend at that residence that he had been arrested, and the drug-sniffing dog alerted at the apartment door, police had probable cause to suspect that there were drugs in the apartment. The State argued that Cross' shouted warning on the phone and his girlfriend's refusal to allow entry to police after verbally responding to them provided a reasonable basis to fear the imminent destruction of evidence, which created an exigent circumstance justifying warrantless entry to the apartment. Search warrants that had been executed earlier that day at two units in a duplex to which Cross was connected yielded evidence of drug dealing. There was testimony that it is common in drug investigations for a suspect to alert co-actors at other locations when police arrive in order to interfere with the investigation. As summarized above, the officer testified that the phone hanging from Cross' neck was connected to a call even though Cross was not speaking into it and that such a call reasonably appeared to function like a silent alarm at a bank to notify co-conspirators of an arrest. When Cross was forced to end the call, he yelled in a frantic manner, "Baby, baby, they got me on the freeway." Once police arrived at the apartment, the testimony showed, a drug-sniffing dog indicated the presence of contraband. A woman responded verbally to police but did not open the door. The circuit court made findings of fact and credibility determinations as to the testimony of the two officers and A.H., and specifically rejected A.H.'s testimony as not credible. The circuit court found that probable cause and exigent circumstances

existed to justify the warrantless entry. We conclude that in light of the credibility determinations made by the circuit court, the role those determinations played in the denial of the suppression motion, and the evidence in this record, there is no arguable merit to a challenge to the circuit court's denial of Cross' motion to suppress evidence.

2. Plea withdrawal

A plea may be withdrawn after sentencing only when the defendant can demonstrate by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice, such as evidence that the plea was coerced, uninformed, or unsupported by a factual basis, that counsel provided ineffective assistance, or that the prosecutor failed to fulfill the plea agreement. *See* ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication that there is arguable merit to a claim of such defect here.

The circuit court conducted a colloquy during the plea hearing in which the court explored with Cross his understanding of the charges against him. The court confirmed directly with Cross that he acknowledged and understood the constitutional rights he would be waiving. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The court also stated the maximum penalties Cross was facing for each of the offenses, including a repeater enhancer pursuant to WIS. STAT. § 939.62(1)(a). Cross confirmed that he understood the penalties he was facing. The court inquired into Cross' ability to understand the proceedings and the voluntariness of his decision. The court was presented with a plea questionnaire signed by Cross. The court ascertained on the record that Cross had gone over the plea questionnaire with counsel and understood it. The court explained to Cross the direct consequences of his plea.

The State offered the criminal complaint to establish a factual basis for the plea and answered "yes" when the court asked if everything alleged in the complaint is "true." *See* WIS. STAT. § 971.08(1)(b). There is therefore no arguable merit to a challenge to the validity of Cross' plea.

3. Sentencing

To prevail in a challenge to a sentence, "the defendant must show some unreasonable or unjustifiable basis in the record for the sentence." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). "There is a strong public policy against interfering with the sentencing discretion of the circuit court, and sentences are afforded the presumption that the circuit court acted reasonably." ***State v. Kuechler***, 2003 WI App 245, ¶7, 268 Wis. 2d 192, 673 N.W.2d 335. An appellate court affirms if the record shows that the circuit court examined the facts and stated its reasons for the sentence imposed, using a demonstrated rational process. ***Id.***, ¶8.

The record shows that the trial court considered the standard sentencing factors and explained their application to this case. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. At the sentencing hearing, the court considered the gravity of the offenses, Cross' character, his rehabilitative needs, his prior criminal record, and the safety needs of the community. Cross was afforded the opportunity to address the court prior to sentencing, and he did so.

Cross faced a maximum potential penalty of twelve years' imprisonment. *See* WIS. STAT. §§ 941.29(2), 939.62(1)(a), 939.50, 973.01(2)(b)7. The court imposed a sentence of five years of initial confinement and four years of extended supervision. The sentence imposed was within the applicable penalty ranges. The circuit court noted the aggravating factor of Cross' history of

involvement in the drug trade as evidenced by prior drug-related convictions dating to 2007. Cross had three prior state drug-related convictions and was awaiting sentencing on two federal drug convictions. Accordingly, on this record there is no arguable merit to a challenge to Cross' sentence.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that Attorney Leon Todd is relieved of any further representation of Edwin Cross in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals