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**DISTRICT II**

June 15, 2016

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

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2015AP789-CRNM      State of Wisconsin v. Heath Engle (L.C. # 2013CF252)

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

Heath Engle appeals from a judgment of conviction entered upon his guilty plea to taking and driving a motor vehicle without the owner's consent (OMVWOC). Engle's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Engle received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Engle was charged with taking and driving a motor vehicle without the owner's consent contrary to WIS. STAT. § 943.23(2), a Class H felony.<sup>2</sup> The complaint alleged that after Engle expressed interest in a truck parked outside with a "For Sale" sign, the vehicle was discovered missing and reported stolen. Engle was found driving the truck in Michigan, and eventually admitted stealing the vehicle. After the trial court denied his motions to suppress, Engle pled to the charge pursuant to a plea agreement which required the State to cap its recommendation at two and one-half years of initial confinement followed by one and one-half years of extended supervision, with the defense free to argue sentence. The trial court imposed the four-year bifurcated sentence recommended by the State.

The no-merit report addresses whether Engle's conviction violated his rights against double jeopardy, whether the trial court properly denied Engle's suppression motions, whether Engle's plea was freely, voluntarily and knowingly entered, whether the trial court erroneously exercised its sentencing discretion, and whether the DNA and victim/witness surcharges were properly ordered. Having conducted an independent review of the record, we conclude that these issues have no arguable merit.

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<sup>2</sup> The additional element of "taking" the vehicle distinguishes this crime from WIS. STAT. § 943.23(3), which makes it a Class I felony for a person to drive or operate a motor vehicle without the owner's consent. Both § 943.23(2) and § 943.23(3) are categories of the general crime of operating a motor vehicle without the owner's consent. *See* WIS. STAT. § 943.23.

The no-merit report first addresses whether Engle's Wisconsin conviction violated his right to be free from double jeopardy. According to the no-merit report, after Michigan police officers discovered Engle in possession of the stolen truck, he was charged with and convicted of receiving or concealing stolen property in violation of MICH. COMP. LAWS § 750.535(7) (2013).<sup>3</sup> Engle's guilty plea in the instant case forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights.<sup>4</sup> *State v. Kelty*, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. We are satisfied that the no-merit report properly analyzes this issue as without arguable merit and will not discuss it further.

The no-merit report next addresses whether the trial court properly determined that the Michigan officers had reasonable suspicion to stop Engle. The evidence at the suppression hearing was that police received a report that a person had pumped gas at a nearby station and drove off without paying. The report described the vehicle as a white, full-size Dodge pickup truck with red lettering and possibly Wisconsin plates. Five to seven minutes later and about one to two miles from the gas station, the officer located a white, full-size Dodge pickup truck with red lettering and Michigan plates. The officer stopped the truck to further investigate whether it was involved in the gas drive-off. The officer asked Engle for identification and was provided a

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<sup>3</sup> According to the no-merit report, the Michigan statute provides: "A person shall not buy, receive, possess, conceal, or aid in the concealment of a stolen motor vehicle knowing, or having reason to know, that the motor vehicle is stolen, embezzled, or converted."

<sup>4</sup> This issue was not raised in the trial court. Where a potential issue is forfeited, it may be reviewed within the rubric of the ineffective assistance of trial counsel. *State v. Carprue*, 2004 WI 111, ¶47, 274 Wis. 2d 656, 683 N.W.2d 31. We are satisfied that the no-merit report properly analyzes the double jeopardy issue as without arguable merit, and therefore, trial counsel's failure to raise this issue was not ineffective. *State v. Wheat*, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441 ("Trial counsel's failure to bring a meritless motion does not constitute deficient performance.").

Wisconsin State ID, not a driver's license. During the encounter, the officer was provided a description of the suspect driver. Engle matched the description in terms of his age, clothing, and facial hair. The officer also learned that the truck's plates were registered to a different vehicle and that the truck had been reported stolen. Additionally, the officer discovered that Engle had active warrants from other states. The trial court properly ruled that the initial stop was supported by reasonable suspicion and that subsequent information justified the continued investigative detention. There is no arguably meritorious challenge to the legality of the traffic stop which led to Engle's arrest.

The no-merit report also addresses whether the trial court properly denied Engle's motion to suppress statements. Having independently reviewed the record, we are satisfied that the no-merit report properly analyzes this issue as without arguable merit. Prior to his arrest, Engle was not in custody and did not admit the truck was stolen. The officer testified that after Engle's arrest, he was provided his *Miranda*<sup>5</sup> warnings, stated he understood them, and agreed to speak with law enforcement. Only then did Engle admit to stealing the truck. Though the statement was not recorded, the trial court credited the officer's testimony. The trial court properly ruled that Engle's statements did not run afoul of *Miranda* and were voluntarily made.

We also agree with the no-merit report's conclusion that there is no arguably meritorious challenge to the plea-taking procedures in this case. The trial court engaged in an appropriate plea colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1)(a), *State v. Bangert*, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and *State v.*

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<sup>5</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

*Hampton*, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14. Additionally, the trial court ascertained that Engle reviewed, understood and signed the completed plea questionnaire form. See *State v. Hoppe*, 2009 WI 41, ¶¶30-32, 42, 317 Wis. 2d 161, 765 N.W.2d 794 (although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant’s understanding and knowledge at the time the plea is taken). The court both recited the constitutional rights waived by a guilty plea and ascertained that Engle reviewed and understood the constitutional rights portion of the signed plea form. With the parties’ consent, the court relied on the complaint and determined it established a factual basis for the convictions.<sup>6</sup> Any challenge to the plea-taking procedures in this case would be without arguable merit.

Finally, we consider whether there is any arguably meritorious challenge to the trial court’s exercise of discretion at sentencing. See *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (it is a well-settled principle of law that sentencing is committed to the trial court’s sound discretion and our review is limited to determining whether the court erroneously exercised that discretion). We are satisfied that the no-merit report properly analyzes this issue as without merit and will not discuss it further. Additionally, we conclude that the trial court properly exercised its discretion in imposing the \$250 DNA analysis surcharge. See WIS. STAT.

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<sup>6</sup> Although the trial court recited the elements for operating a motor vehicle without the owner’s consent without reference to the “taking” element, it informed Engle of the correct penalty for his offense of conviction. Additionally, the criminal complaint and information clearly set forth the nature of the charge to which Engle pled, namely, that he “did intentionally take and drive” the truck. The parties agreed that the trial court could rely on the criminal complaint for a factual basis, and the complaint, including Engle’s own statements, established that Engle in fact took and drove the truck without the owner’s permission. Nothing in the record suggests there is any arguable merit to a plea withdrawal motion.

§ 973.046(1g) (2011-12); *State v. Cherry*, 2008 WI App 80, ¶5, 312 Wis. 2d 203, 752 N.W.2d 393. Citing to Engle’s growing criminal record in multiple states, the court determined there was a need for Engle’s DNA profile to be accessible to law enforcement across jurisdictions. Further, the four-year sentence imposed is well within the six-year maximum and is not unduly harsh or excessive. *See State v. Daniels*, 117 Wis. 2d 9, 22, 343 N.W.2d 411 (Ct. App. 1983) (“A sentence well within the limits of the maximum sentence is not so disproportionate to the offense committed as to shock the public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.”).<sup>7</sup>

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to represent Engle further in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Andrew J. Jarmuz is relieved from further representing Heath Engle. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*

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<sup>7</sup> In terms of the \$92.00 victim-witness surcharge, the no-merit report correctly states that the surcharge is mandatory under WIS. STAT. § 973.045 (1).