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September 29, 2016

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

2015AP2374-CRNM State of Wisconsin v. Alveria Rogers (L.C. # 2013CF1041)

Before Kessler, Brennan and Brash, JJ.

Alveria Rogers appeals from a judgment of conviction, entered upon a jury's verdict, on possession with intent to deliver three to ten grams of heroin. Appellate counsel, James Rebholz, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS.

STAT. RULE 809.32 (2013-14).[1] Rogers was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and counsel's report, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment.

BACKGROUND

Milwaukee police officer Zebdee Wilson received information from a confidential informant about a black male selling drugs out of a black, four-door Kia with no license plates in a McDonald's parking lot on West Capitol Drive. Wilson went to the location and found a car matching the informant's description. He observed a black male behind the wheel. A second subject got into the back seat and Wilson observed what he suspected to be a hand-to-hand drug transaction; this method of conducting the sale was also consistent with the informant's information.

At Wilson's request, police officer Elgerith Tucker approached the Kia in a marked squad car. He spoke with the driver, identified him as Rogers, and determined that Rogers was on probation. Wilson approached and, with Rogers' consent, conducted a pat down of Rogers' outer clothing. Wilson felt what he thought was a plastic baggie with something hard in Rogers' pants leg. Rogers stated it was "bags," which Wilson knew to be slang for heroin packaged in aluminum folds.

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

Rogers was arrested. The officers recovered $314 cash and a cell phone from him at the scene. At the police station, Rogers removed from his pants a clear plastic sandwich bag with twenty-seven aluminum foil folds. The contents of the folds were subjected to a field test, which was positive for opiates. The weight of the drugs was approximately 3.6 grams. Rogers was charged with possession with intent to deliver a controlled substance (schedule I or II narcotic) as a second or subsequent offense. Prior to trial, the charge was amended to possession with intent to deliver three to ten grams of heroin.

Prior to trial, Rogers moved to suppress the drugs. He asserted a "factual disagreement … as to the issue of consent" for the pat-down of his clothes. Additionally, "[d]efense counsel challenge[d] the detention of the vehicle, the detention of Mr. Rogers, his police detention and questioning and the police search" as lacking reasonable suspicion as required by ***Terry v. Ohio***, 392 U.S. 1 (1968). After a hearing, the trial court denied the motion. A jury convicted Rogers. The trial court sentenced him to eight years' imprisonment and ordered him to pay a $300 fine.

DISCUSSION

I. Motion to Suppress

Counsel discusses whether there is any arguable merit to a challenge to the trial court's denial of the suppression motion. A trial court's decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We do not reverse the trial court's factual findings unless clearly erroneous, but the application of constitutional principles to those findings is reviewed *de novo*. *See* ***id.***, ¶9.

Rogers' motion argued that officers lacked sufficient reasonable suspicion to justify an investigatory stop. *See* ***Terry***, 392 U.S. at 8. To justify a ***Terry*** stop, police must have "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." ***Id.*** at 21.

When police rely on information from an informant, we consider the quality of the information, which depends on the reliability of the source, as well as the quantity or content of the information. *See* ***State v. Miller***, 2012 WI 61, ¶31, 341 Wis. 2d 307, 815 N.W.2d 349. Quality and quantity have an inverse relationship in this review. *See* ***id.*** The relevant question for quality is whether the informant's tip "contained 'sufficient indicia of reliability,' along with other information known to police, to support reasonable suspicion for an investigatory stop." *See* ***id.***, ¶32 (citation omitted). Information from an entirely anonymous source requires information police can corroborate. *See* ***id.***, ¶¶33, 37.

Rogers also disputed Wilson's claim that he consented to the pat down search. Consent is a well-established exception to the Fourth Amendment's warrant requirement. *See* ***State v. Wallace***, 2002 WI App 61, ¶17, 251 Wis. 2d 625, 642 N.W.2d 549. Consent must be given freely, without duress or coercion. *See* ***id.*** The State must show consent was voluntary by clear and convincing evidence. *See* ***id.*** We consider whether consent was voluntary based on the totality of the circumstances. *See* ***id.***

Officers Wilson and Tucker both testified at the suppression hearing. Rogers did not. Wilson testified that the informant, who had just finished using heroin, was stopped in a parking lot and could have been charged with possession of drug paraphernalia. In exchange for not referring the charge to the district attorney, the informant agreed to call the person from whom

he had purchased his heroin. Wilson listened over the speakerphone as the call was placed and a new buy was set up for the McDonald's parking lot. The informant described for Wilson the dealer's vehicle and that the drug deal would happen by the buyer getting into the dealer's car for the handoff.

When Wilson approached Rogers after the uniformed officers arrived, Wilson explained his suspicions to Rogers. Wilson testified that Rogers told him there was no drug dealing going on and Wilson could search. When Rogers was asked if he had any illegal controlled substances in the car or on his person, Rogers said, according to Wilson's testimony, "No, go ahead, you can check." Tucker's testimony clarified that although the informant had no track record for providing information to police, the informant was not anonymous, gave his information face-to-face with police, and had made statements against his own penal interests when providing his tip.

Based on the officers' testimony, the trial court denied the motion to suppress. It concluded that Wilson's testimony was credible and the informant had given reasonable and articulable suspicion for the stop. The trial court also concluded that there had been no threats or promises, and Rogers had consented to the pat down. The trial court further noted that, when Rogers identified the suspicious object in his pants as "bags," Wilson knew that referred to a controlled substance. Thus, there was also probable cause for the arrest. We discern no clear error in the trial court's factual findings, and we agree that they support reasonable suspicion and consent. There is no arguable merit to a challenge to the denial of the suppression motion.

II. Sufficiency of the Evidence

Counsel addresses whether sufficient evidence supported the jury's verdict. We view the evidence in the light most favorable to the verdict. *See* ***State v. Poellinger***, 153 Wis. 2d 493,

504, 451 N.W.2d 752 (1990). The "'jury verdict will be overturned only if, viewing the evidence most favorably to the state and the conviction, it is inherently or patently incredible, or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt.'" *See* ***State v. Alles***, 106 Wis. 2d 368, 376-77, 316 N.W.2d 378 (1982) (citation and emphasis omitted). Moreover, the jury is the sole arbiter of the credibility of witnesses, and it alone is charged with the duty of weighing the evidence. *See* ***Poellinger***, 153 Wis. 2d at 506.

To prove possession with intent to deliver heroin, the State had to show that Rogers (1) knowingly possessed a controlled substance; (2) that substance was heroin; (3) Rogers knew the substance was heroin; and (4) Rogers intended to deliver the heroin. *See* WIS JI—CRIMINAL 6035. Wilson's trial testimony was consistent with his suppression hearing testimony, establishing Rogers' possession of a substance. An analyst from the State Crime Laboratory testified that he identified the substance as heroin and that it weighed over three grams.

Rogers, who also testified at trial, conceded that he knew the substance was heroin, but asserted that it was for his own personal use. He testified that he could use over twenty folds in a day. To counter that assertion, the State called a detective to testify. The detective, a sixteen-year force veteran who had been involved in "several hundred" heroin investigations, testified that in his experience, individuals use one to five folds for personal use, but five is pretty high. Twenty-seven folds, he opined, was too much for one person to use and would be a quantity meant for sale or distribution.

If the jury rejected Rogers' testimony that the heroin was for his personal use, there is sufficient evidence supporting the conviction. As we defer to the jury's credibility decisions,

there is no arguable merit to a challenge to the sufficiency of the evidence supporting the jury's verdict.

III. Sentencing

A. Fine and Imprisonment

Counsel discusses whether the trial court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the trial court's discretion. *See* ***Ziegler***, 289 Wis. 2d 594, ¶23.

Our review of the sentencing transcript satisfies us that the trial court properly exercised its discretion in setting a term of imprisonment. It explained why probation was not appropriate and identified punishment and community protection as key objectives. It noted the aggravating element of being on probation or supervision at the time when Rogers committed this offense, when he should have been working on his rehabilitation. In short, the circuit court considered no improper factors when imposing a sentence of five years' initial confinement and three years' extended supervision.

Counsel does not address the trial court's imposition of a $300 fine. Typically, the trial court should explain why a fine is being imposed and must examine a defendant's ability to pay the fine over the course of the sentence. *See* ***State v. Ramel***, 2007 WI App 271, ¶¶13, 15, 306 Wis. 2d 654, 743 N.W.2d 502. However, we conclude the fine in this case was properly imposed. The fine is roughly equal to the $314 police recovered from Rogers at the time of his arrest. The trial court said it did not believe Rogers' claim that the money had come from a tax refund, noting "that's also an amount of money that could have been gained from sales." Given the trial court's sentencing objectives and related comments, and the apparent expectation that the fine would be paid by forfeiting the recovered funds, we conclude there is no basis for challenging the imposition of the fine.

The maximum possible sentence Rogers could have received was fifteen years' imprisonment and a $50,000 fine. The sentence totaling eight years' imprisonment and a $300 fine is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449, and is not so excessive so as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There would be no arguable merit to a challenge to the sentencing court's discretion regarding the term of imprisonment or the fine.

B. DNA Surcharge

Rogers' offense was committed in March 2013; he was sentenced on January 17, 2014. On January 1, 2014, the $250 DNA surcharge that had been discretionary for most felony convictions, *see* WIS. STAT. § 973.046(1g) (2011-12), became mandatory for each felony

conviction, *see* 2013 Wis. Act 20, §§ 2355, 9426(1)(am). The $250 surcharge in this case was imposed as mandatory.[2]

Rogers, who has at least one prior felony conviction for which he may have previously paid the surcharge, moved the trial court to vacate the mandatory surcharge as an *ex post facto* violation. The trial court denied the motion, concluding the matter was controlled by ***State v. Scruggs***, 2015 WI App 88, 365 Wis. 2d 568, 872 N.W.2d 146, *review granted* (WI Mar. 7, 2016) (No. 2014AP2981). The trial court explained that ***Scruggs*** "held that the mandatory imposition of a single $250 DNA surcharge does not violate the *ex post facto* clauses of the United States and Wisconsin Constitutions."

Whether an *ex post facto* violation exists is a question of law we review *de novo*. *See* ***id.***, ¶6. A defendant has the burden of establishing an *ex post facto* violation beyond a reasonable doubt. *See* ***id.*** One type of *ex post facto* law is one which makes the punishment for a crime more burdensome after its commission. *See* ***State v. Thiel***, 188 Wis. 2d 695, 700, 524 N.W.2d 641 (1994). ***Scruggs*** concluded that the amendment making the DNA surcharge mandatory was not intended to be punitive, "but rather an administrative charge to pay for the collection" of DNA samples, "along with the expenditures needed to administer the DNA data bank." ***Id.***, 365 Wis. 2d 568, ¶13. On this record, Rogers cannot establish an *ex post facto* violation beyond a reasonable doubt.

[2] The judgment of conviction says that Rogers is to "provide DNA analysis and pay the surcharge, if not already done." But that is not what the trial court ordered. In fact, the trial court never expressly mentions DNA at all in its sentencing comments. Rather, it ordered Rogers to pay "all applicable court costs and mandatory surcharges and assessment[s]."

However, even if he could, the remedy would not be to vacate the surcharge but instead to consider whether the DNA surcharge can be imposed as an exercise of discretion, as that was the law in effect at the time Rogers committed his offense. The same factors that justify a term of imprisonment may also justify the surcharge. *See* ***State v. Ziller***, 2011 WI App 164, ¶¶11-13, 338 Wis. 2d 151, 807 N.W.2d 241. That is the case here. *See* ***State v. Pharr***, 115 Wis. 2d 334, 347, 340 N.W.2d 498 (1983) (this court may search record for reasons to support a discretionary decision).

In particular, the trial court noted that Rogers was still on some form of supervision when he committed the current offense, and it expressed disapproval that Rogers continued to be involved in criminal misconduct. The trial court also noted heroin posed a serious danger to the community because it frequently led to other crimes committed by addicts seeking to support their habits. Rogers' ongoing criminal behavior and continuing danger to the community through his repeated drug-dealing is a reasonable basis to have him help offset the ongoing costs of maintaining the DNA data bank, even if he has paid the surcharge before. *See* ***Ziller***, 338 Wis. 2d 151, ¶12 (defendant has burden to show imposition of surcharge was unreasonable). There is no arguable merit to a challenge to the imposition of the DNA surcharge in this case.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney James Rebholz is relieved of further representation of Rogers in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals