OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III

February 7, 2017

To:

Hon. John A. Damon
Circuit Court Judge
Trempealeau Co. Courthouse
36245 Main St.
Whitehall, WI 54773

Michelle Weisenberger
Clerk of Circuit Court
Trempealeau Co. Courthouse
36245 Main St.
Whitehall, WI 54773

Susan E. Alesia
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Taavi McMahon
District Attorney
P.O. Box 67
Whitehall, WI 54773

Steven D. Phillips
Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Amanda M. Butts 599606
Taycheedah Corr. Inst.
P.O. Box 3100
Fond du Lac, WI 54936-3100

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

2015AP2234-CRNM State v. Amanda M. Butts (L. C. No. 2013CF82)

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

Counsel for Amanda Butts has filed a no-merit report concluding no grounds exist to challenge Butts's convictions for first-degree reckless homicide and physical abuse of a child. Butts was informed of her right to file a response to the no-merit report and has not responded. Upon our independent review of the record 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 judgment of conviction. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

The State charged Butts with first-degree reckless homicide, recklessly causing the death of another; physical abuse of a child by recklessly causing great bodily harm; physical abuse of a child by intentionally causing bodily harm; and distributing schedule II narcotics to a minor, all four counts as a repeater. The charges arose from the death of twenty-two-month-old Alexis Behlke, the daughter of Butts's then-boyfriend. The State alleged that while Behlke was in Butts's care, she suffered blunt force trauma to her head, torso, and extremities, as well as fractures to her left arm. Although a medical doctor opined that none of these injuries in isolation were capable of causing Behlke's death, "their distribution and number [was] strongly consistent with assaultive, inflicted injury." Blood and gastric fluid samples taken from Behlke reflected concentrations of Oxycodone that exceeded a therapeutic range and the medical examiner opined Behlke died from "an acute intoxication due to the combined effects of oxycodone, diphenhydramine and amitriptyline." Behlke's older siblings, then five- and six-years old, reported seeing Butts throw Behlke on the floor and seeing Behlke throw up a pill. The six-year old also reported seeing Butts push a pill into Behlke's throat.

Butts initially pleaded not guilty by reason of mental disease or defect (NGI), but ultimately withdrew that plea after two medical examinations failed to support it. The circuit court denied Butts's pretrial motion to suppress statements she made to police. Pursuant to a plea agreement, the State filed an amended information charging Butts with first-degree reckless

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

homicide, causing death by delivery of a controlled substance; and physical abuse of a child by intentionally causing bodily harm, both counts as a repeater. In exchange for Butts's guilty plea to the first-degree reckless homicide charge and her no contest plea to the physical abuse of a child charge, the State agreed to cap its sentence recommendation at twenty-five years' initial confinement and ten years' extended supervision. Out of a maximum possible fifty-six-year sentence, the court imposed concurrent sentences resulting in a total of thirty years' initial confinement followed by ten years' extended supervision. Butts's postconviction motion to vacate DNA surcharges was granted.

The record discloses no arguable basis for withdrawing Butts's guilty and no contest pleas. The court's plea colloquy, as supplemented by a comprehensive plea questionnaire and waiver of rights form that Butts completed, informed Butts of the elements of the offenses, the penalties that could be imposed, and the constitutional rights she waived by entering her pleas. The court confirmed Butts'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 found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Butts committed the crimes charged. The court also confirmed that medications Butts was taking did not interfere with her ability to understand the proceedings. Although the circuit court failed to advise Butts of the deportation consequences of her pleas, as mandated by WIS. STAT. § 971.08(1)(c), the no-merit report indicates Butts is a United States citizen not subject to deportation. Any challenge to the plea on this basis would therefore lack arguable merit. 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). A valid no contest or guilty plea constitutes a waiver of all non-jurisdictional defects and defenses except for the suppression of

evidence. *See* ***State v. Kazee***, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995); *see also* WIS. STAT. § 971.31(10).

Any challenge to the denial of Butts's pretrial suppression motion would lack arguable merit. Butts moved to suppress statements she made to law enforcement, claiming that her interrogation violated her Fifth and Sixth Amendment rights to counsel and her statements should also be suppressed as involuntary. At a ***Miranda-Goodchild***[2] hearing, Osseo Police Investigator Bryan Lee recounted that he and Trempealeau County Sheriff's Detective Paul Loesel had a couple of conversations with Butts in the days following Behlke's death. A month later, Butts agreed to talk to Lee and Loesel in an unmarked squad car at her mother's home, but only spoke to the officers for five minutes before leaving for a family picnic. Later that day, Butts called Lee to tell him that her attorney did not want her talking to the officers anymore.

The following day, Lee and Loesel, along with Osseo Police Chief Timothy Wilson and Jackson County Sheriff's Detective Kelly Bakken, went to the residence of Behlke's father to speak to both him and Butts. Lee and Loesel approached the front door, while the other officers remained in the driveway, some distance behind them. Lee and Loesel were in plain clothes and although all four officers were armed, their firearms were holstered. Butts answered the door and when Lee asked if Butts would speak to them, she declined, reiterating that her attorney did not want her speaking with them anymore. When Lee asked if she had retained counsel on a pending CHIPS matter, Butts replied she had hired counsel for "everything this is regarding."

[2] A circuit court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored, and also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

Lee and Loesel testified that they decided to arrest Butts and consequently summoned the other officers from the driveway. An officer informed Butts she was under arrest and grabbed Butts's forearm. Butts began to yell "no" and resisted efforts to arrest her. As she resisted, she repeatedly asked officers why she was being arrested.

Once outside the residence and handcuffed, Butts asked the officers, "Well, can you guys talk to me please?" Lee replied, "You don't want to talk to us." Loesel then informed Butts that she would be transported to the police station, and "if we get to the office and you wanna talk to us, we'll talk to you then," adding that Butts "need[ed] a little time to relax." The officers made an audio recording of the encounter with Butts.

Lee testified that at the station, Butts was "very calm," her handcuffs were removed, and she was escorted to an interview room. Lee read Butts her ***Miranda*** rights, and Butts waived those rights. Loesel testified that nobody spoke to Butts about the criminal charges between her arrest and the administration of ***Miranda*** rights. Butts was then questioned for approximately one hour and forty minutes. During that time, Butts did not refuse to answer questions and did not ask for an attorney. Butts never asked for a break, never asked to terminate the interview, and never complained of hunger or thirst.

In turn, Butts testified that she dropped out of high school in the middle of tenth grade, at age seventeen, and indicated she has a learning disability. Butts also testified that when Lee and Loesel approached her at the residence, she felt she was under arrest "because there were both of them there and just the way they were acting towards" her. She believed the officers' "attitude was different, like it was more meaningful and like just direct towards me." Butts conceded that

after she was handcuffed, she asked the officers why they would not talk to her, even though she intended to talk with her attorney.

To the extent there was any conflicting testimony, 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 the motion hearing testimony, the circuit court found the officers' testimony credible, noting it was consistent with the audio recording of the encounter at the residence. The court further found that Butts was not in custody until she was told she was under arrest. Additionally, the court found that despite her failure to complete high school, Butts understood and waived her ***Miranda*** rights. There is sufficient evidence in the record to support the court's credibility determination and other factual findings.

Butts claimed that because she had retained counsel, her Sixth Amendment right to counsel was violated by the interrogation in counsel's absence. The Sixth Amendment right to counsel, however, does not attach until adversary judicial proceedings are initiated—that is, when a warrant is issued or a complaint filed. ***State v. Hornung***, 229 Wis. 2d 469, 476, 600 N.W.2d 264 (Ct. App. 1999). Butts was arrested without a warrant, and the criminal charges were filed against her four days after she was interrogated. Even assuming Butts had a Sixth Amendment right to counsel when she was interrogated, she unequivocally waived that right. *See* ***Montejo v. Louisiana***, 556 U.S. 778 (2009); ***State v. Delebreau***, 2015 WI 55, ¶61, 362 Wis. 2d 542, 864 N.W.2d 852 (each holding that waiver of ***Miranda*** rights is sufficient to waive Sixth Amendment right to counsel, and such waiver is not presumed invalid where defendant is already represented by counsel).

Butts alternatively claimed she invoked her Fifth Amendment right to counsel to terminate questioning both the day before the interrogation and, again, immediately before her arrest. A suspect, however, may not anticipatorily invoke his or her ***Miranda*** rights in a context other than custodial interrogation. ***McNeil v. Wisconsin***, 501 U.S. 171, 182 n.3 (1991). Butts was not in custody either the day before her arrest or in the moments before her arrest. "Custody" in the ***Miranda*** context means "a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." ***California v. Beheler***, 463 U.S. 1121, 1125 (1983) (per curiam). The test is an objective one, focusing not on the subjective beliefs of either the suspect or the officers, but on whether a reasonable person in the suspect's position would have considered herself to be in custody. ***Thompson v. Keohane***, 516 U.S. 99, 112 (1995); ***Stansbury v. California***, 511 U.S. 318, 323 (1994).

The custody determination is made in light of the totality of the circumstances, and the relevant factors include the suspect's "freedom to leave; the purpose, place and length of the interrogation; and the degree of restraint." ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23. With the exception of the presence of four officers outside the residence, none of the other factors indicative of custody were present here until Butts was told she was under arrest. No weapons were drawn; Butts had not been handcuffed or frisked; and she had not been ordered to leave the residence. We agree with counsel's conclusion that there is no arguable merit to the contention that the mere presence of the officers effectively restrained Butts to the same degree as a formal arrest, particularly where she was standing in the doorway of the home and voluntarily talking to the officers. Moreover, after being placed under arrest, Butts asked why she was being arrested and implored the officers to talk to her. Officers are permitted to resume an interrogation when the suspect initiates conversation with them. ***Edwards v.***

Arizona, 451 U.S. 477, 484-85 (1981). Thus, even if we assumed Butts validly invoked her ***Miranda*** rights prior to being taken into custody, the officers were permitted to resume the interrogation when she initiated further conversation with them.

Butts also claimed her statements during the interrogation should be suppressed as involuntary. "A defendant's statements are voluntary if they are the product of a free and unconstrained will, reflecting deliberateness of choice, as opposed to the result of a conspicuously unequal confrontation in which the pressures brought to bear on the defendant by representatives of the State exceeded the defendant's ability to resist." ***State v. Hoppe***, 2003 WI 43, ¶36, 261 Wis. 2d 294, 661 N.W.2d 407. Coercive or improper police conduct is a necessary prerequisite for a finding of involuntariness. ***Id.***, ¶37. The determination of a statement's voluntariness is made based on the totality of the circumstances, "balancing ... the personal characteristics of the defendant against the pressures imposed upon the defendant by law enforcement officers." ***Id.***, ¶38. Nothing in the record suggests coercive or improper police conduct during the interrogation. There is, therefore, no arguable merit to challenge the voluntariness of Butts's statements. Any challenge to the circuit court's denial of Butts's suppression motion would lack arguable merit.

Following the circuit court's denial of the suppression motion, Butts filed a supplemental suppression motion, attaching a police report by Detective Bakken that contradicted the testimony of officers Lee and Loesel as to whether they intended to arrest Butts when they went to the residence. Because Butts entered her guilty and no contest pleas before the supplemental

motion was decided, the issue is not preserved for appellate review.[3] In any event, there is no arguable merit to any claim that the officers' undisclosed intent to arrest Butts has any bearing on whether the admission of her statements violated her constitutional rights. *See* ***Berkemer v. McCarty***, 468 U.S. 420, 442 (1984) (police officer's unarticulated plan to arrest suspect has no bearing on the question whether a suspect was in custody at a particular time).

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; Butts's character; the need to protect the public; and the mitigating factors Butts raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that Butts'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 record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

[3] WISCONSIN STAT. § 971.31(10) provides that an order denying a motion to suppress evidence may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty or no contest. Because Butts's supplemental suppression motion was never decided, the statute is inapplicable.

IT IS FURTHER ORDERED that attorney Steven D. Phillips is relieved of further representing Butts in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals