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

2015AP1890-CRNM State of Wisconsin v. Christopher Joel Berry (L.C. # 2014CF89)

Before Kloppenburg, P.J., Higginbotham and Blanchard, JJ.

J. Dennis Thornton, counsel for Christopher Berry, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] concluding that no arguably meritorious grounds exist for challenging Berry's judgment of conviction, entered after he pled guilty to possession of a firearm by a felon and maintaining a drug trafficking place as a party to a crime, while armed. *See* WIS. STAT. §§ 941.29(2)(a), 961.42(1), 939.05, and 939.63(1)(b). Berry has filed two responses arguing that the circuit court improperly denied his suppression motion and that his

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

trial counsel's handling of the motion constituted ineffective assistance of counsel. Thornton has filed a supplemental no-merit report responding to Berry's arguments. Based upon the no-merit report, responses, and supplemental no-merit report, as well as 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, the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

The no-merit report addresses whether there is any basis for challenging the sufficiency of the complaint or the court's compliance with applicable time limits. We agree with counsel's analysis of those issues and conclude that they would be without arguable merit on appeal. In addition, we see no arguable basis for plea withdrawal. In order to withdraw a plea after sentencing, a defendant must either show that the plea colloquy was defective in a manner that resulted in the defendant actually entering an unknowing plea, or demonstrate some other manifest injustice such as coercion, the lack of a factual basis to support the charge, ineffective assistance of counsel, or failure by the prosecutor to fulfill the plea agreement. ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); ***State v. Krieger***, 163 Wis. 2d 241, 249-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). There is no indication of any such defect here.

The circuit court conducted a standard plea colloquy, inquiring into Berry's ability to understand the proceedings and the voluntariness of his plea decisions, and further exploring Berry's understanding of the nature of the charges, the penalty ranges and other direct consequences of the pleas, and the constitutional rights being waived. *See* WIS. STAT. § 971.08; ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794; and ***Bangert***, 131 Wis. 2d at 266-72. No agreement was made between the parties as to sentencing recommendations, and the court made sure Berry understood that it would not be bound by any sentencing

recommendations. In addition, Berry provided the court with a signed plea questionnaire. Berry indicated to the court that he understood the information explained on that form, and is not now claiming otherwise. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d627 (Ct. App. 1987). The court confirmed with Berry that the complaint provided a sufficient factual basis for the pleas. Berry has not alleged any other facts that would give rise to a manifest injustice. Therefore, his pleas were valid and operated to waive all nonjurisdictional defects and defenses, aside from any suppression ruling. ***State v. Kelty***, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10).

In his response to counsel's no-merit report, Berry argues that the circuit court improperly denied his motion to suppress evidence obtained pursuant to a search of his residence, and that his trial counsel was ineffective because he failed to frame the issues in the way that Berry now frames them. We start our analysis of the suppression issues by noting that Berry does not challenge the legality of the traffic stop, and nothing in the record or the no-merit materials before us suggests that such a challenge would have any arguable merit. Rather, Berry focuses on the search of his residence that occurred after the traffic stop, after Berry was arrested and taken into custody for a probation violation.

The rules of community supervision that Berry signed included the following term: "You shall make yourself available for searches or tests ordered by your agent including but not limited to urinalysis, breathalyzer, DNA collection and blood samples or search of residence or any property under your control." Berry does not dispute that probation agent Dan Isaacson was authorized to conduct a probation search of his residence. However, he argues that, because police officers entered his residence before Isaacson did, the State cannot argue that the search was merely a probation search, as opposed to a police search. Berry also zeroes in on the fact

that, when Isaacson made his search of the basement, Officer Martez Ball made a comment that Isaacson should be sure to check the ceiling tiles. Berry argues that these facts support a conclusion that Isaacson was acting as a stalking horse for police, thereby making the search a warrantless police search and not a probation search.

The circuit court concluded that the search conducted by Isaacson was a valid probation search. "[W]hether a search is a police or probation search is a question of constitutional fact reviewed according to a two-step process. First, we review the circuit court's findings of historical fact under the clearly erroneous standard. Second, we review the circuit court's determination of constitutional fact *de novo*." ***State v. Hajicek***, 2001 WI 3, ¶2, 240 Wis. 2d 349, 620 N.W.2d 781. If a search is determined to be a probation search, the next inquiry is to determine whether the probation officer had "reasonable grounds" to believe that the probationer had contraband. ***Id.***, ¶3.

Here, we are satisfied that the historical facts found by the circuit court are not clearly erroneous. The court found that, while Officer Ball did advise or suggest that Isaacson check the ceiling tiles, Officer Ball did not *direct* Isaacson to do so. The record supports this finding. Isaacson's testimony from the suppression motion hearing reflects that police officers did, as Berry asserts, enter the residence before Isaacson did, in order to secure it. However, testimony from Officer Ball reflects that Isaacson was the one in control of the search: "[Isaacson] did inform me that, you know, the search was, you know, his to perform … no police officers were participating in the search, but that I could accompany him, essentially, for protection." Isaacson confirmed in his own testimony that he, and not police officers, searched Berry's bedroom, basement, and kitchen. Regarding Officer Ball's comment to Isaacson about checking the ceiling tiles, Isaacson testified, "He didn't direct me. He gave me advice." Isaacson also testified

that, based on his seventeen years of experience doing these types of searches, he would have checked the ceiling tiles anyway, even if Officer Ball had not said anything. The circuit court found Isaacson's testimony to be credible. "When required to make a finding of fact, the [circuit] court determines the credibility of the witnesses and the weight to be given to their testimony and its determination will not be disturbed by this court on appeal where more than one inference may be drawn from the evidence." ***State v. Turner***, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983).

Based on the historical facts discussed above, we are satisfied that there would be no arguable merit to challenging the circuit court's finding of constitutional fact that the search conducted by Isaacson was a probation search and not a police search. We also are satisfied that Isaacson had reasonable grounds to believe that Christopher Berry had contraband. During the traffic stop that led to Berry's arrest, the rear driver's-side passenger, Joshua Berry, admitted that he had a firearm, and Officer Ball retrieved the firearm from Joshua Berry's waistband. Officer Ball conducted a "wanted check" on Joshua Berry and the other occupants of the vehicle, including Christopher Berry. Officer Ball then made contact with Isaacson. Isaacson came to the scene and directed Officer Ball to take Christopher Berry into custody for violation of probation. When Christopher Berry was searched incident to his arrest, approximately $27,000 in cash was found on his person. In light of these facts, we are satisfied that Isaacson had reasonable grounds to believe that Berry had contraband, such that his decision to conduct a probation search of Berry's residence was also reasonable. *See* ***State v. Flakes***, 140 Wis. 2d 411, 425, 410 N.W.2d 614 (Ct. App. 1987) (a probation officer may search a probationer's residence without a warrant if he has reasonable grounds to believe that the probationer has contraband). Any argument to the contrary would be without arguable merit on appeal.

After Isaacson concluded the probation search, police officers continued searching the residence. Berry's live-in girlfriend, Mariana Herrera, consented to the search. Berry argues in the no-merit report response that Herrera's consent was involuntary. Berry does not dispute that Herrera, who paid rent for the residence, had authority to permit the search. Rather, Berry argues that Herrera, who was pregnant at the time, had been illegally "seized" by police at the time she gave her consent. We agree with counsel that this argument is without arguable merit.

Although warrantless searches are "per se" unreasonable, they are subject to a few limited exceptions, one of which is valid third-party consent. ***State v. Kieffer***, 217 Wis. 2d 531, 541, 577 N.W.2d 352 (1998). "The test for voluntariness asks whether consent was given in the 'absence of actual coercive, improper police practices designed to overcome the resistance of a defendant.'" ***State v. Giebel***, 2006 WI App 239, ¶12, 297 Wis. 2d 446, 724 N.W.2d 402 (quoted source omitted). No single factor is dispositive in making this determination but, "[r]ather, we examine the totality of the circumstances and place special emphasis on the circumstances surrounding the consent and the characteristics of the [person giving consent]." ***Id.***

Nothing in the record or in Berry's no-merit responses gives rise to a meritorious argument that the consent given by Herrera to Officer William Esqueda was involuntary. Officer Esqueda testified at the suppression motion hearing that his intent was to talk to Herrera and explain why police officers and a probation agent were at her residence that night. Officer Esqueda was dressed in plain clothes but was wearing his badge, and had a concealed weapon but never produced it. Officer Esqueda explained to Herrera that Berry had been stopped in a vehicle and that the officers were investigating. There were other people with Herrera at the residence, including children. According to Officer Esqueda's testimony, he accompanied Herrera, who was pregnant, to a separate room because he did not want her to be "upset in front

of the other people because of her condition." Herrera sat down on a loveseat and Officer Esqueda sat down on a chair facing her and asked her questions about how long she had lived at the residence, how long she had been dating Berry, and whether there were any guns or drugs in the residence. Herrera replied that there were no guns or drugs. Officer Esqueda testified that Herrera calmed down as time went by. Officer Esqueda asked for consent to search the residence, and Herrera gave consent verbally, and then signed a consent form after it was read to her. The circuit court found Officer Esqueda's testimony to be credible, and we will not disturb that finding on appeal. *See* ***Turner***, 114 Wis. 2d at 550. In sum, we agree with counsel's assessment that there would be no arguable merit to a claim that Herrera's consent was involuntary.

Turning to Berry's related argument that his trial counsel was ineffective for failing to challenge the voluntariness of Herrera's consent, we note that the record reflects that counsel did, in fact, raise that issue in the circuit court. Berry appears to disagree with the way the argument was framed. However, because we have concluded that the issue is without arguable merit on appeal, Berry cannot prove that he was prejudiced by his counsel's handling of the issue. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (To establish ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that the deficient performance resulted in prejudice to the defense.).

A challenge to Berry's sentences would also lack arguable merit. Our review of a sentencing determination begins with a "presumption that the [circuit] court acted reasonably," and it is the defendant's burden to "show some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The court imposed five years of initial confinement and four years and six months of

extended supervision on the felon in possession of a firearm count, and two years of initial confinement and two years of extended supervision for keeping a drug trafficking place, as a repeater, consecutive to the felon in possession of a firearm sentence and to any other sentence Berry was serving. The components of the bifurcated sentences imposed were within the applicable penalty ranges. *See* WIS. STAT. §§ 941.29(2)(a) (classifying felon in possession of a firearm as a Class G felony); 961.42(2) (classifying maintaining a drug trafficking place, as a second or subsequent offense, as a Class I felony); 973.01(2)(b)7. and (d)4. (providing maximum terms of five years of initial confinement and five years of extended supervision for a Class G felony); 973.01(2)(b)9. and (d)6. (providing maximum terms of one and a half years of initial confinement and two years of extended supervision for a Class I felony); 939.62(1)(b) (increasing maximum term of imprisonment for offense otherwise punishable by one to ten years by four additional years for habitual criminality). In imposing this sentence, the court considered the seriousness of the offense, Berry's character, and the need to protect the public and deter further criminal behavior. Under these circumstances, it cannot reasonably be argued that Berry'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).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that J. Dennis Thornton is relieved of any further representation of Christopher Berry in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals