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April 19, 2017

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

2016AP2221-CRNM State of Wisconsin v. Traveon D. Robinson (L.C. # 2014CF105)

Before Brennan, P.J., Kessler and Brash, JJ.

Traveon D. Robinson pled guilty to possession with intent to deliver not less than fifteen grams of cocaine and not more than forty grams of cocaine. The circuit court imposed a forty-eight-month term of imprisonment bifurcated as eighteen months of initial confinement and thirty months of extended supervision. Robinson appeals.

Appellate counsel, Attorney Thomas K. Voss, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2015-16).[1] Robinson did not file a response. Upon our review of the no-merit report and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, police officers approached a Milwaukee residence on January 3, 2014, and made contact with Robinson. When the officers entered the residence, they saw suspected marijuana, and Robinson admitted he had smoked marijuana earlier that day. After obtaining a search warrant, police found thirty packages containing a total of 14.18 grams of crack cocaine, another package containing 5.90 grams of powder cocaine, a revolver, and a semiautomatic pistol.

The State charged Robinson with one count of possession with intent to deliver not less than fifteen grams of cocaine and not more than forty grams of cocaine. *See* WIS. STAT. § 961.41(1m)(cm)3. Robinson moved to suppress the evidence found in his home, but the circuit court denied the motion after an evidentiary hearing. Robinson then decided to resolve the charge with a plea bargain.

We first consider whether Robinson could pursue an arguably meritorious challenge to his guilty plea. At the start of the plea proceeding, the State described the terms of the parties' plea bargain. Robinson would plead guilty as charged in the complaint and original information. In exchange, the State would recommend an evenly bifurcated six-year term of imprisonment

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

and would forgo additional charges alleged in an amended information. Robinson, by counsel, agreed that the State correctly recited the terms of the parties' agreement.

The circuit court reviewed the elements of the crime on the record. Robinson said that he understood the elements. The circuit court explained to Robinson that, upon conviction, he faced twenty-five years of imprisonment and a $100,000 fine. *See* WIS. STAT. §§ 961.41(1m)(cm)3., 939.50(3)(d). The circuit court told Robinson it could impose the maximum statutory penalties if it chose to do so and that it was not bound by the terms of the plea bargain or by any sentencing recommendations. Robinson said he understood. He assured the circuit court that he had not been promised anything outside the terms of the plea bargain to induce his guilty plea and that he had not been threatened.

The circuit court warned Robinson, as required by WIS. STAT. § 971.08(1)(c), that if he was not a citizen of the United States of America, his guilty plea exposed him to the risks of deportation, exclusion from admission to this country, and denial of naturalization. Robinson said he understood.

The record contains a signed plea questionnaire and waiver of rights form with attachments. Robinson confirmed that he reviewed the documents with his trial counsel and that he understood them. The plea questionnaire reflects that Robinson was thirty-five years old at the time of his plea and had a high school diploma. The questionnaire further reflects that Robinson understood the charge he faced, the rights he waived by pleading guilty, and the penalties that the circuit court could impose. A signed addendum to the form reflects Robinson's acknowledgment that by pleading guilty he would give up his rights to raise defenses, to challenge the sufficiency of the complaint, and to seek suppression of evidence.

The circuit court told Robinson that by pleading guilty he would give up the constitutional rights listed on the plea questionnaire, and the circuit court reviewed those rights on the record. Robinson said he understood. The circuit court further explained that by pleading guilty, Robinson would give up his available defenses to the charge. Robinson again said he understood.

A plea colloquy must include an inquiry sufficient to satisfy the circuit court that the defendant committed the crime charged. *See* WIS. STAT. § 971.08(1)(b). Robinson told the circuit court that the facts alleged in the criminal complaint were true, and he expressly admitted that he knowingly possessed more than fifteen grams of cocaine with intent to deliver that cocaine. Additionally, his trial counsel agreed that the circuit court could rely on the facts alleged in the criminal complaint. The circuit court properly found a factual basis for the guilty plea. *See* ***State v. Black***, 2001 WI 31, ¶13, 242 Wis. 2d 126, 624 N.W.2d 363.

The record reflects that Robinson entered his guilty plea knowingly, intelligently, and voluntarily. *See* WIS. STAT. § 971.08 and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986); *see also* ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794 (completed plea questionnaire and waiver of rights form helps to ensure a knowing, intelligent,

and voluntary plea). The record reflects no basis for an arguably meritorious challenge to the validity of the plea.[2]

A defendant who enters a valid guilty plea forfeits all nonjurisdictional defects and defenses to the criminal charge other than challenges to suppression rulings. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10). Accordingly, we next consider whether Robinson could pursue an arguably meritorious claim that the circuit court should have granted his suppression motion.

Robinson moved to suppress the evidence found in his home on the grounds that police allegedly entered the residence without his consent and subsequently obtained a search warrant based on tainted evidence wrongfully obtained pursuant to the illegal entry. The circuit court conducted a hearing on his motion.

At the suppression hearing, Milwaukee Police Officer Joel Susler testified that he and his partner had information that J.W., a person for whom they had an arrest warrant, could be found at 2128 North 52nd Street, in Milwaukee, Wisconsin. When Susler knocked on that door, a person subsequently identified as Robinson answered and motioned to the officers to come inside. Upon entering the residence, Susler saw marijuana in plain view on a decorative half-

[2] The court is aware of a pending appeal in which a convicted defendant argues he is entitled to withdraw his guilty pleas because the circuit court did not advise him during the plea colloquy that, pursuant to WIS. STAT. § 973.046(1r), he faced multiple mandatory DNA surcharges. *See* ***State v. Odom***, No. 2015AP2525-CR, *cert. denied* (WI Jan. 9, 2017). We have therefore considered whether Robinson could pursue an arguably meritorious challenge to his guilty plea because the circuit court did not advise him that he was subject to a single mandatory $250 DNA surcharge. *See* ***State v. Sutton***, 2006 WI App 118, ¶15, 294 Wis. 2d 330, 718 N.W.2d 146 (stating that the circuit court is required during a plea colloquy to "advise the accused of the 'range of punishments' associated with the crime") (citation omitted). We conclude that such a challenge is not available to Robinson. A single $250 DNA surcharge does not constitute punishment. ***State v. Scruggs***, 2015 WI App 88, ¶19, 365 Wis. 2d 568, 872 N.W.2d 146, *aff'd*, 2017 WI 15, ¶49, __ Wis. 2d __, __ N.W.2d __.

wall in the living room, and he observed that "the whole place reeked like ... smoked burnt marijuana." Robinson told the officers that he had just smoked some marijuana and that "it's medicinal." The officers arrested Robinson.

Susler testified that he next conducted a protective sweep of the home to look for third parties. In one of the bedrooms, Susler observed an ashtray "full of marijuana cigar remnants," and he also observed some materials used to package cocaine. Susler and his partner then "froze" the scene and called for additional police assistance. Susler testified that his partner subsequently obtained a search warrant and returned with it to the residence, and Susler identified the search warrant and application in the courtroom. Finally, Susler testified that he executed the search warrant and found multiple bags of cocaine and two firearms.

Robinson also testified. He denied giving the officers permission to enter the home and said the officers had simply walked past him when he opened the door.

At the conclusion of the hearing, the circuit court determined that Susler was credible and Robinson was not credible. It went on to find that the police entered Robinson's home with consent, smelled marijuana, and saw it in plain view. The circuit court further determined that the search warrant was valid. The circuit court therefore concluded that all of the evidence seized in the home was admissible and denied Robinson's suppression motion.

Our independent review of the record satisfies us that a challenge to the circuit court's decision would lack arguable merit. The Fourth Amendment to the U.S. Constitution generally prohibits warrantless entry by police into a person's home, *see* ***Illinois v. Rodriguez***, 497 U.S. 177, 181 (1990), but the prohibition is inapplicable when the police enter the home with voluntary consent from a person with authority over the premises, *see* ***id.*** "To determine if the

consent exception is satisfied, [courts] review, first, whether consent was given in fact by words, gestures, or conduct; and, second, whether the consent given was voluntary." ***State v. Artic***, 2010 WI 83, ¶30, 327 Wis. 2d 392, 786 N.W.2d 430.

In this case, the circuit court believed Susler's testimony describing the officers' encounter with Robinson at the threshold of his home. Credibility determinations lie with the circuit court and we will not disturb them. *See* ***State v. Peppertree Resort Villas Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. Given Susler's testimony and the circuit court's credibility assessment, no arguably meritorious basis exists to challenge the finding that Robinson consented to the police entry. *See* ***Artic***, 327 Wis. 2d 392, ¶30 (stating that whether an individual gave consent is a question of historical fact and we will uphold the circuit court's determination of the issue unless the finding is contrary to the great weight and clear preponderance of the evidence). Our independent review further satisfies us that no arguably meritorious basis exists to assert that the consent was involuntary. *See* ***State v. Phillips***, 218 Wis. 2d 180, 195, 577 N.W.2d 794 (1998) (stating that a reviewing court independently applies constitutional principles to the facts as found to determine whether the constitutional standard of voluntariness is satisfied).

The circuit court also believed that Susler smelled marijuana upon entering the home and that he saw marijuana in plain view. When objects fall within the plain view of an officer who is lawfully in a position to see them, the State may introduce those objects as evidence. *See* ***State v. Edgeberg***, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994). The same rule of admissibility applies to odors that an officer can smell while lawfully in a position to smell them. *See* ***State v. Richardson***, 156 Wis. 2d 128, 149, 456 N.W.2d 830 (1990). Accordingly, no

arguably meritorious basis exists to suppress the marijuana or the marijuana odor that supported Robinson's arrest. *See* ***State v. Mitchell,*** 167 Wis. 2d 672, 684, 482 N.W.2d 364 (1992).

The circuit court ruled that the police unlawfully conducted a protective sweep of the home following Robinson's arrest. Assuming without deciding that the circuit court was correct in so ruling, its conclusion does not constitute an arguably meritorious basis for further proceedings. "[W]here an application for a warrant contains both tainted and untainted evidence, the issued warrant is valid if the untainted evidence is sufficient to support a finding of probable cause to issue the warrant." ***State v. Carroll***, 2010 WI 8, ¶44, 322 Wis. 2d 299, 778 N.W.2d 1. As the circuit court explained and the search warrant application confirms, the police applied for a search warrant here relying in part on the odor of marijuana immediately evident when the officers entered the home and on the marijuana Susler lawfully observed in plain view in the living room. The odor of marijuana alone is sufficient to provide probable cause for a search warrant. *See* ***State v. Hughes***, 2000 WI 24, ¶22, 233 Wis. 2d 280, 607 N.W.2d 621. The warrant therefore was valid, and no basis exists to suppress the cocaine and firearms that police found when executing that warrant. Further pursuit of this issue would lack arguable merit.

We next consider whether Robinson can pursue an arguably meritorious challenge to his sentence. Sentencing lies within the circuit court's discretion, and our review is limited to determining if the circuit court erroneously exercised its discretion. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. "When the exercise of discretion has been demonstrated, we follow a consistent and strong policy against interference with the discretion of the [circuit] court in passing sentence." ***State v. Stenzel***, 2004 WI App 181, ¶7, 276 Wis. 2d 224, 688 N.W.2d 20.

The circuit court must "specify the objectives of the sentence on the record. These objectives include, but are not limited to, the protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others." ***Gallion***, 270 Wis. 2d 535, ¶40. In seeking to fulfill the sentencing objectives, the circuit court must consider the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court may also consider a wide range of other factors concerning the defendant, the offense, and the community. *See* ***id.*** The circuit court has discretion to determine both the factors that it believes are relevant in imposing sentence and the weight to assign to each relevant factor. ***Stenzel***, 276 Wis. 2d 224, ¶16.

The record here reflects an appropriate exercise of sentencing discretion. The circuit court indicated that punishment, rehabilitation, and deterrence were the primary sentencing goals, and the circuit court discussed the factors it deemed relevant to those goals.

The circuit court viewed the offense as one of intermediate severity given the amount of cocaine at issue and the two loaded guns found in the home. The circuit court considered Robinson's character, crediting Robinson with cooperating during the search and praising him for working regularly at a fast food restaurant. The circuit court acknowledged that he had a high school diploma and described him as "quite capable," but the court lamented that despite his abilities, he was "supplementing his income with illegal drug dealing."

The circuit court put the greatest weight on the need to protect the public, pointing out the danger posed by armed drug dealing and observing that the paraphernalia in Robinson's home indicated that he was "manufacturing crack from powder base." The court found that Robinson

was engaged in "significant" drug distribution and went on to discuss the risks this posed to drug users and to the community at large.

The circuit court considered but rejected a probationary disposition. *Cf.* ***Gallion***, 270 Wis. 2d 535, ¶25 (circuit court should consider probation as the first sentencing alternative). The circuit court determined that probation would not sufficiently punish Robinson and that failure to imprison him would undermine the goal of deterrence because "people ... should know that prison is the likely resting place" for people who are engaged in drug manufacturing and distribution.

The circuit court identified the factors that it considered in fashioning Robinson's sentence. The factors are proper and relevant. A challenge to the circuit court's exercise of sentencing discretion would lack arguable merit.

We last conclude Robinson could not mount an arguably meritorious claim that the circuit court erred by denying him eligibility for the substance abuse program and the challenge incarceration program. Both prison programs offer substance abuse treatment, and an inmate who successfully completes either program may convert his or her remaining initial confinement time to extended supervision time. *See* WIS. STAT. §§ 302.045(1), 302.045(3m)(b), 302.05(1)(am), 302.05(3)(c)2. A circuit court exercises its discretion when determining a defendant's eligibility for these programs, and we will sustain the circuit court's conclusions if they are supported by the record and the overall sentencing rationale. *See* ***State v. Owens***, 2006

WI App 75, ¶¶7-9, 291 Wis. 2d 229, 713 N.W.2d 187; WIS. STAT. § 973.01(3g)-(3m).[3] In this case, the circuit court reasonably exercised discretion, concluding that eligibility for the treatment programs would reduce the length of initial confinement the court deemed necessary to punish Robinson and would thwart the goal of deterrence. Further pursuit of this issue would lack arguable merit.

Based on our independent review of the record, no other issues warrant discussion. We conclude that any further 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.

IT IS FURTHER ORDERED that Attorney Thomas K. Voss is relieved of any further representation of Traveon D. Robinson on appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited under WIS. STAT. RULE 809.23(3)(b).

Diane M. Fremgen
Clerk of Court of Appeals

[3] The Wisconsin substance abuse program was formerly known as the earned release program. Effective August 3, 2011, the legislature renamed the program. *See* 2011 Wis. Act 38, § 19; WIS. STAT. § 991.11. The program is identified by both names in the current version of the Wisconsin Statutes. *See* WIS. STAT. §§ 302.05; 973.01(3g).