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September 26, 2017

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

2016AP2028-CRNM State v. Norris T. Powell (L. C. No. 2014CF1178)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Counsel for Norris Powell has filed a no-merit report concluding no grounds exist to challenge Powell's conviction for felon in possession of a firearm, as a repeater. Powell has filed a response to the no-merit report raising several challenges to his conviction and sentence. 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 Powell with domestic abuse disorderly conduct and felon in possession of a firearm, both counts as a repeater. The charges arose from allegations that Powell phoned his ex-girlfriend, P.M., at her workplace and threatened to shoot her. Powell's friend, Antonio, later drove Powell to P.M.'s workplace. Powell then brought P.M. outside; shoved her up against a wall; and called to Antonio to bring him "his thing," which P.M. believed referred to a gun. An officer dispatched to the scene spoke to Antonio as he was sitting in a nearby car. During this conversation, the officer observed a silver lockbox sticking out from under the passenger's seat. Antonio suggested the box belonged to Powell. When asked about the box, Powell stated his gun was in the box and the officer eventually located a firearm inside.

At the outset of the criminal proceedings, the circuit court granted defense counsel's request for a competency examination. Consistent with the examining psychologist's opinion, the court found Powell competent to proceed. Powell's motion to suppress statements made to police officers was denied after a ***Miranda-Goodchild***[2] hearing. In exchange for his no-contest plea to the felon in possession of a firearm charge, the State agreed to dismiss the remaining charge outright and recommend "prison" generally. Out of a maximum possible twelve-year

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

[2] A trial 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).

sentence, the circuit court imposed a seven-year term, consisting of three years' initial confinement and four years' extended supervision.

There is no arguable merit to challenge the circuit court's competency determination. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." ***State v. Byrge***, 2000 WI 101, ¶27, 237 Wis. 2d 197, 614 N.W.2d 477. To determine legal competency, the court considers a defendant's present mental capacity to understand and assist at the time of the proceedings. ***Id.***, ¶31. A circuit court's competency determination should be reversed only when clearly erroneous. ***Id.***, ¶45.

The evaluating psychologist, Dr. Deborah Collins, submitted a report opining to a reasonable degree of professional certainty that Powell "is not presently rendered to lack substantial mental capacity to factually and rationally understand the pending proceedings or aid in his defense." Doctor Collins recounted that Powell was "alert" to the substance of the pending allegations against him and was appropriately concerned about, and familiar with the range and nature of potential penalties he faced if convicted. Powell displayed the capacity to understand "the essentials of plea options and the plea bargaining and trial processes." He also "displayed the capacity to understand the allegiances and role functions of essential court principals," including defense counsel, the prosecutor, and the judge or jury in the event of a trial. Powell did not contest the report's conclusion, and the court found Powell competent to proceed. The record supports the circuit court's determination.

The record discloses no arguable basis for challenging the denial of Powell's motion to suppress his statements to police. When reviewing a circuit court's denial of a motion to

suppress evidence, we uphold the circuit court's findings of facts unless they are clearly erroneous, but we review the circuit court's legal conclusions de novo. *See* ***State v. Lonkoski***, 2013 WI 30, ¶21, 346 Wis. 2d 523, 828 N.W.2d 552. Here, Powell moved to suppress his statements on two grounds: (1) he was in custody when initially questioned and, therefore, police should have provided ***Miranda*** warnings; and (2) his subsequent Mirandized statements were an involuntary product of a "question first, warn later" tactic.[3]

As to the first alleged ground for suppression, ***Miranda*** warnings are required when a defendant is both "in custody" and being interrogated. ***Lonkoski***, 346 Wis. 2d 523, ¶¶23-24. The test to determine custody is an objective one. ***State v. Koput***, 142 Wis. 2d 370, 378-79, 418 N.W.2d 804 (1988). The inquiry is "whether there is a formal arrest or restraint on freedom of movement of a degree associated with a formal arrest." ***State v. Leprich***, 160 Wis. 2d 472, 477, 465 N.W.2d 844 (Ct. App. 1991) (citing ***New York v. Quarles***, 467 U.S. 649, 655 (1984)). Stated another way, if "a reasonable person would not feel free to terminate the interview and leave the scene," then that person is in custody for ***Miranda*** purposes. ***State v. Martin***, 2012 WI 96, ¶33, 343 Wis. 2d 278, 816 N.W.2d 270.

The custody determination is made based on the totality of the circumstances considering many factors, including "the defendant's freedom to leave; the purpose, place, and length of the interrogation; and the degree of restraint" used by law enforcement. ***Id.***, ¶35. When determining the degree of restraint, courts consider factors like "whether the suspect is handcuffed, whether a

[3] An example of coercive police conduct that can render a statement involuntary is the "question first, warn later" tactic, whereby police first unlawfully elicit inculpatory statements without ***Miranda*** warnings, but then follow up with a second interview in which a defendant is given ***Miranda*** warnings (continued)

weapon is drawn, whether a frisk is performed, the manner in which the suspect is restrained, whether the suspect is moved to another location, whether questioning took place in a police vehicle, and the number of officers involved." ***State v. Morgan***, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23.

At the ***Miranda-Goodchild*** hearing, police officer Brandie Pie testified she was dispatched to P.M.'s workplace for a "weapons complaint." When the officer arrived, Powell was not handcuffed, but he had been patted down by two detectives who had responded to the scene but then left to investigate an unrelated matter. Another police officer, Carolyn Weiher, arrived shortly thereafter and asked Powell to wait in her squad car while she questioned P.M. Powell was not handcuffed; he was explicitly told he was not under arrest; he was allowed to keep his cell phone and other property; and he was left in the car with the windows rolled down approximately five inches. When officer Weiher left to speak with P.M., officer Pie approached Antonio as he sat in his vehicle. She then conducted a patdown of Antonio's person and noticed a silver lockbox protruding from under the passenger side seat. When asked what was in the box, Antonio responded he did not know because Powell brought the box into the vehicle. Antonio gave the officer consent to retrieve the box.

The officers then returned to Weiher's squad car and through the open door asked Powell what was in the box. Powell initially responded "my change," and then answered "my gun." Powell was then arrested, placed in handcuffs, searched, and placed back in the squad car. During his transport to the police station, the officers did not ask Powell any questions, though

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before being prompted to make the same inculpatory statements. *See* ***Missouri v. Seibert***, 542 U.S. 600, 604 (2004).

Powell asked the officers about retrieving coins he had in the lockbox. At the police station, Powell signed a consent-to-search form, the box was opened, and a firearm was found inside. Another officer subsequently read Powell his ***Miranda*** rights, and Powell signed a waiver-of-rights form and spoke openly with that officer.

The circuit court concluded Powell was not in custody until the point at which he was formally arrested. This court has held that a person who is temporarily detained and questioned in the back of a police vehicle is not necessarily in custody for ***Miranda*** purposes. *See* ***State v. Gruen***, 218 Wis. 2d 581, 598, 582 N.W.2d 728 (Ct. App. 1998). There, the defendant was asked to sit in the back of a police van while waiting for other officers to arrive, and was questioned with the van door open. ***Id.*** at 596-97. Although the defendant in ***Gruen*** had been frisked, no guns were drawn; the defendant was not handcuffed; the defendant was not detained for an unreasonable amount of time; and the defendant was asked "short, general, common-sense investigatory questions" at the scene. ***Id.*** at 598. The ***Gruen*** court ultimately determined that, under the totality of the circumstances, ***Miranda*** warnings were not required because the defendant was not "in custody." ***Id.***

Here, as in ***Gruen***, Powell was not handcuffed, no weapons were drawn, and he was questioned with the squad door open. Moreover, Powell was told he was not under arrest, he was allowed to keep his cell phone, and he could have opened the squad car door through the open window. Therefore, any claim that the circuit court erred by concluding Powell was not in custody for ***Miranda*** purposes when questioned at the scene about the lockbox contents would lack arguable merit. Because Powell was not in custody until his formal arrest, his statements made at the police station following waiver of his ***Miranda*** rights were not an involuntary product of a "question first, warn later tactic." To the extent Powell challenges the veracity of

the officers' testimony, the circuit court is the sole arbiter of witness credibility at a suppression hearing. *See* ***State v. Harrell***, 2010 WI App 132, ¶8, 329 Wis. 2d 480, 791 N.W.2d 677.

The record discloses no arguable basis for withdrawing Powell's no-contest plea. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Powell completed, informed Powell of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a no-contest plea. The circuit court confirmed that Powell understood the court 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 Powell committed the crime charged. Because the plea form indicated Powell was not currently taking a prescribed medication, the court confirmed that Powell was "thinking clearly" and could understand the proceedings. To support the repeater allegation, Powell admitted he had been convicted of three misdemeanors within the last five years, all of which remained of record and unreversed.

In his response to the no-merit report, Powell claims he thought he was pleading to the disorderly conduct charge and he entered into the plea agreement believing he would be sentenced to only thirty months. The plea colloquy, however, belies this claim. As noted above, Powell acknowledged the elements and penalties of the felon in possession of a firearm charge, and he further indicated his understanding that the circuit court could impose up to the maximum sentence and was not bound by any agreements made under the plea agreement.

Although the circuit court failed to advise Powell of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c), the no-merit report indicates counsel is unaware

of any information to support a claim that Powell is subject to deportation. In his response to the no-merit report, Powell does not dispute this statement. Any challenge to the plea based on the circuit court's failure to advise Powell of the deportation consequences would therefore lack arguable merit. The record shows the plea was knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

The record discloses no arguable basis for challenging the sentence imposed. Before imposing a sentence authorized by law, the circuit court considered the seriousness of the offense; Powell's character, including his criminal history; the need to protect the public; and the mitigating factors Powell raised. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. To the extent Powell contends it was improper for the sentencing court to consider the disorderly conduct charge that had been dismissed outright, "[a] sentencing court may consider uncharged and unproven offenses" to discern a defendant's character, regardless of whether the defendant consents to having the charge read in. ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. Indeed, the court may consider not only "uncharged and unproven offenses" but also "facts related to offenses for which the defendant has been acquitted." ***Id.***

Powell also asserts it was improper for him to be "judge[d] off [his] juvenile cases" that had nothing to do with firearms. Although the prosecutor recited that Powell had eight juvenile adjudications, the sentencing court made no reference to the juvenile adjudications when explaining the basis for the sentence imposed. In any event, "a long history of juvenile contacts can properly be considered in sentencing an adult offender." ***State v. Johnson***, 105 Wis. 2d 657, 669, 314 N.W.2d 897 (Ct. App. 1981). Any challenge to the sentence on this ground would therefore lack arguable merit.

It cannot reasonably be argued that Powell's sentence, which was well within the maximum allowed by law, is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Further, there is no arguable merit to any claim that the conditions of extended supervision were not "reasonable and appropriate" under the circumstances of this case. *See* ***State v. Koenig***, 2003 WI App 12, ¶7, 259 Wis. 2d 833, 656 N.W.2d 499. There is likewise no arguable merit to any claim that the sentencing court improperly considered the Correctional Offender Management Profiling for Alternative Sanctions (COMPAS) risk assessment. While the circuit court made a passing reference to COMPAS at sentencing, it was not "determinative" of the sentence imposed. It merely reinforced the circuit court's assessment of other, independent factors, in conformity with ***State v. Loomis***, 2016 WI 68, ¶99, 371 Wis. 2d 235, 881 N.W.2d 749. Accordingly, we conclude that further proceedings on this possible issue would lack arguable merit.

Powell also claims the prosecutor "judged" him because of another case. To the extent Powell is alleging prosecutorial misconduct, he identifies no misconduct nor does the record suggest any misconduct by the prosecutor. That the prosecutor had knowledge of Powell from a previous case does not provide an issue of arguable merit.

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.

IT IS FURTHER ORDERED that attorney Colleen Marion is relieved of further representing Powell in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals