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

2015AP2595-CRNM State of Wisconsin v. Denord Seals (L.C. #2011CF2390)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Denord[1] Seals appeals from a judgment convicting him of being a felon in possession of a firearm contrary to WIS. STAT. § 941.29(2)(a) (2011-12) and possessing heroin with intent to

[1] Certain record items spell Seals's first name as Denard.

deliver contrary to WIS. STAT. § 961.41(1m)(d)4. (2011-12). Seals also appeals from an order denying his postconviction motion seeking reconsideration of the denial of his motion to suppress due to ineffective assistance of trial counsel. Seals's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[2] and ***Anders v. California***, 386 U.S. 738 (1967). Seals filed a response to counsel's no-merit report, and counsel filed a supplemental no-merit report. Upon consideration of the report, Seals's response, counsel's supplemental no-merit report, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment and order because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Seals's guilty pleas were knowingly, voluntarily, and intelligently entered; (2) whether the circuit court erred when it denied a motion to suppress evidence found in Seals's home pursuant to a search warrant; and (3) whether the circuit court misused its sentencing discretion. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of his guilty pleas, Seals answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. Additionally, the plea questionnaire and waiver of rights form Seals signed is competent evidence of knowing and voluntary pleas. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may

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

not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. The record discloses that Seals's guilty pleas were knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Seals's guilty pleas.

With regard to the sentences, the record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197 (citation omitted). The court adequately discussed the facts and factors relevant to sentencing Seals to the following concurrent terms to be served consecutively to any sentence in another case: two years of initial confinement and three years of extended supervision for possessing a firearm and four years of initial confinement and four years of extended supervision for possessing heroin with intent to deliver. In fashioning the sentences, the court considered the seriousness of the offenses, the large amount of heroin involved, the impact on the community of heroin dealing, and Seals's prior offenses and violations while on supervision in the community. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The weight of the sentencing factors was within the circuit court's discretion. ***State v. Stenzel***, 2004 WI App 181, ¶16, 276 Wis. 2d 224, 688 N.W.2d 20. The sentences complied with WIS. STAT. § 973.01 relating to the imposition of a bifurcated sentence of confinement and extended supervision. The court stated reasons for declaring Seals ineligible for either the Challenge Incarceration Program or the Substance Abuse Program. Sec. 973.01(3g), (3m) (2011-12). The $250 DNA surcharge was imposed in an appropriate exercise of discretion.

WIS. STAT. § 973.046(1g) (2011-12); ***State v. Cherry***, 2008 WI App 80, ¶¶8-9, 312 Wis. 2d 203, 752 N.W.2d 393. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

Both the no-merit report and Seals's response address whether evidence should have been suppressed. We review whether the record reveals a claim with arguable merit that the search warrant was not supported by probable cause, whether the controlled substance detecting canine was lawfully present on Seals's property, whether Seals's wife consented to the law enforcement officers' request to enter the home to determine whether anyone else was in the home in preparation for obtaining a search warrant, and whether trial counsel was ineffective for not pursuing a ***Franks***[3] motion challenging the law enforcement officer's affidavit in support of the search warrant. We conclude that all of the foregoing lack arguable merit for appeal.

Seals litigated a motion to suppress evidence located during the execution of a search warrant on his home on the grounds that the search warrant was not supported by probable cause. After an evidentiary hearing, the circuit court made the following findings. Seals's wife contacted law enforcement to report that Seals was engaging in drug transactions. During a stop of Seals's vehicle, a controlled substance detecting canine alerted to the presence of controlled substances. Law enforcement officers then went to Seals's home before applying for a search warrant. A canine accompanying the law enforcement officers sniffed the exterior of the home and alerted to the presence of controlled substances. Law enforcement officers asked Seals's

[3] ***Franks v. Delaware***, 438 U.S. 154 (1978). A ***Franks*** motion alleges that an affidavit in support of a search warrant application contained deliberately or recklessly false information. ***State v. Mann***, 123 Wis. 2d 375, 384, 367 N.W.2d 209 (1985).

wife, who was on the property at the time, if she would consent to a search of the home. Making a credibility determination, the circuit court found that although Seals's wife denied the officers' request to search the home, she did consent to let the officers walk through the home to insure that no other occupants were present prior to the issuance of the search warrant. During that walk through, which included the canine, officers saw drugs in plain view on the dining room table.[4] The affidavit in support of the search warrant alleged the existence of a drug investigation involving the storage of narcotics at Seals's home, the canine's alert on the home's exterior, Seals's wife's consent to a walk through of the home, and the drugs seen in plain view on the dining room table. The circuit court concluded that the search warrant was supported by probable cause and declined to suppress most of the evidence found during the execution of the search warrant.[5]

On appeal, Seals attempts to relitigate the circuit court's findings of fact. The court's findings will be upheld unless they are clearly erroneous. ***State v. Gralinski***, 2007 WI App 233, ¶13, 306 Wis. 2d 101, 743 N.W.2d 448. Our review of the record confirms that the court's findings are not clearly erroneous. Therefore, we accept those findings, and we do not discuss Seals's specific challenges to the circuit court's findings of fact.

[4] The officers who walked through the home saw a firearm in plain view on a bedside table. However, the search warrant affidavit did not mention the presence of this firearm.

[5] During the walk through, drugs were also found partially concealed in a vase. The circuit court suppressed the drugs found in the vase because the manner in which the officer found the drugs constituted a search to which Seals's wife's did not consent. The court found that even after striking the allegation about the drugs in the vase, the affidavit in support of the search warrant was still supported by probable cause based on the drugs in plain view on the dining room table and the canine's alert on the home's exterior.

We turn to the legal issues presented by the canine's sniff of the home's exterior. We conclude that the canine's sniff of the home's exterior was not a basis to challenge the search warrant or suppress evidence found in the home. The canine's sniff occurred prior to the United States Supreme Court's decision in ***Florida v. Jardines***, 569 U.S. 1 (2013). In ***Jardines***, the Court held that a canine's sniff of the exterior of a home is a search for Fourth Amendment purposes. ***Id.*** at 11-12. However, the court in ***State v. Scull***, 2015 WI 22, ¶4, 361 Wis. 2d 288, 862 N.W.2d 562, applied the good faith exception to the exclusionary rule to a pre-***Jardines*** canine sniff of a home exterior.

In ***Scull*** law enforcement received a tip that Scull was distributing drugs; law enforcement took a canine to Scull's residence. ***Scull***, 361 Wis. 2d 288, ¶¶6-7. The officer walked the canine to a side entrance and then to the front door where the canine alerted to the presence of contraband. ***Id.***, ¶8. A search warrant then issued based in part upon the results of the canine's sniff of the residence's exterior. ***Id.***, ¶¶9-12. Scull moved to suppress the evidence found at his residence pursuant to the search warrant because the warrant was unlawfully obtained as a result of the canine sniff, which was an unlawful warrantless search. ***Id.***, ¶13. As stated, the ***Scull*** court applied a good faith exception to the exclusionary rule to this pre-***Jardines*** canine sniff of the exterior of Scull's home. ***Scull***, 361 Wis. 2d 288, ¶46.

On reconsideration of its decision denying Seals's motion to suppress, the circuit court noted that even though the warrantless canine sniff would have been a search under ***Jardines***, the ***Scull*** good faith exception applied.

In his response[6] to counsel's no-merit report, Seals attempts to avoid the application of ***Scull*** by arguing that law enforcement officers brought the canine onto his property before his wife came out of the home. We see no meaningful distinction between Seals's case and ***Scull***. Regardless of whether the canine sniff of the exterior of the home occurred before or after Seals's wife exited the home and encountered law enforcement officers, ***Scull*** applies. The canine's alert did not invalidate the search warrant.

The officers' pre-search warrant walk through of the home also did not provide a basis to suppress evidence found in the home. As discussed, the circuit court found that Seals's wife consented to the officers' entry for the purpose of securing the home for the forthcoming execution of a search warrant. During the officers' walk through the house, they found in plain view what appeared to be drugs in an open box on the dining room table.

Application of the plain view doctrine requires that "the evidence must be in plain view, the officer must have a lawful right of access to the object itself, and the object's incriminating character must be immediately apparent" owing to "probable cause to believe the item in plain view was evidence or contraband." ***State v. Guy***, 172 Wis. 2d 86, 101, 492 N.W.2d 311 (1992). Objects falling within the plain view of an officer who is lawfully in a position to see them may be seized and introduced as evidence. ***State v. Edgeberg***, 188 Wis. 2d 339, 345, 524 N.W.2d 911 (Ct. App. 1994). The requirements of plain view are satisfied in this case. The officers were in the home with consent, and the drugs on the dining room table were in plain view.

[6] In his response, Seals discusses photographs of his home. He contends the photographs are relevant to this appeal. Given that we discern no arguable merit to a challenge to either the search warrant or the pre-warrant entry of law enforcement officers into his home, we need not consider the photographs and what they may or may not depict.

Given the findings of fact in the record, we conclude that the search warrant was supported by probable cause. Probable cause exists if the warrant issuing judge was "apprised of sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched." ***Gralinski***, 306 Wis. 2d 101, ¶14 (citation omitted). Whether probable cause exists depends upon a common sense test and is determined made based on the totality of the circumstances in the individual case. ***Id.***, ¶15.

The affidavit in support of the search warrant averred the drug investigation of Seals, Seals's wife's permission to walk through the home, the canine's alert on the home's exterior, and the presence of drugs in plain view on the dining room table. The affidavit supports a common sense determination of probable cause. Based on this record, there was no basis to suppress evidence found in the home. A challenge to the circuit court's order denying Seals's motion to suppress would lack arguable merit for appeal.

We agree that there would be no arguable merit to a challenge to the circuit court's postconviction determination that trial counsel was not ineffective for failing to litigate a ***Franks*** challenge to the search warrant affidavit. Trial counsel's performance is not deficient if counsel fails to file a motion that would not have succeeded. *See* ***State v. Wheat***, 2002 WI App 153, ¶14, 256 Wis. 2d 270, 647 N.W.2d 441 (counsel's failure to raise a legal challenge is not deficient if the challenge would have been rejected).

A ***Franks*** challenge alleges that an affidavit in support of a search warrant application contained deliberately or recklessly false information. ***State v. Mann***, 123 Wis. 2d 375, 384, 367 N.W.2d 209 (1985). A ***Franks*** challenge leads to suppression of evidence if the false

information was necessary to a probable cause determination and if that information were set aside, there would be an insufficient basis to find probable cause. ***Mann***, 123 Wis. 2d at 384. We agree with the circuit court that such a motion would not have been successful. We have already held that the search warrant affidavit established probable cause. Seals cannot establish that a ***Franks*** challenge to the search warrant affidavit would have yielded the suppression of any evidence. Therefore, we conclude that no issue with arguable merit is present in relation to counsel's failure to litigate a ***Franks*** motion.

In addition to the issues discussed above, we have independently reviewed the record. Our independent review of the record did not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction and postconviction order, and we relieve Attorney Paul Bonneson of further representation of Seals in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Paul Bonneson is relieved of further representation of Denord Seals in this matter.

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

Sheila T. Reiff
Clerk of Court of Appeals