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 I

May 8, 2018

To:

Hon. Stephanie Rothstein
Circuit Court Judge
Criminal Justice Facility
949 North 9th Street
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Michael J. Backes
Law Offices of Michael J. Backes
P.O. Box 11048
Shorewood, WI 53211

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

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

Daven D. Dodson 605133
Columbia Corr. Inst.
P.O. Box 900
Portage, WI 53901-0900

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

2016AP1678-CRNM State of Wisconsin v. Daven D. Dodson (L.C. # 2014CF3969)

Before Kessler, Brash and Dugan, 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).

Daven D. Dodson pled guilty to first-degree reckless homicide. *See* WIS. STAT. § 940.02(1) (2013-14).[1] The circuit court imposed a forty-five-year term of imprisonment

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

bifurcated as thirty years of initial confinement and fifteen years of extended supervision. The circuit court also ordered Dodson to pay restitution in the amount of $3465. Dodson appeals.

Appellate counsel, Attorney Michael J. Backes, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Dodson did not file a response. At our request, Attorney Backes filed a supplemental no-merit report addressing issues related to Dodson's pretrial suppression motions. Upon our review of the no-merit reports and the record, we conclude that no arguably meritorious issues exist for an appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

The criminal complaint reflects that on September 3, 2014, Joel Dammann and his companion, J.Q., purchased heroin from Dodson in a hotel parking lot. When Dammann and J.Q. drove out of the lot, Dodson drove after them, eventually pulling alongside their vehicle and complaining about the amount of money he had received. Dammann attempted to get away from Dodson, but shots rang out. Dammann lost control of his car, which crashed into a concrete structure on the roadside. Dammann died, and an autopsy revealed the cause of death was a gunshot wound to the back of the head.

The State charged Dodson with first-degree reckless homicide by use of a dangerous weapon, first-degree recklessly endangering safety by use of a dangerous weapon, and possession of a firearm by a person previously adjudicated delinquent for an act that would be a felony if committed by an adult. Dodson disputed the charges for some time but eventually decided to resolve them with a plea bargain. He pled guilty to an amended charge of first-degree reckless homicide, and the remaining charges were dismissed and read in for sentencing purposes.

Appellate counsel's original no-merit report addressed whether Dodson entered a knowing, intelligent, and voluntary plea to the charge of first-degree reckless homicide and whether the circuit court properly exercised its sentencing discretion. Upon our independent review of the record and the report, we conclude that appellate counsel sufficiently explains why further pursuit of these issues would lack arguable merit. We discuss them no further.

Appellate counsel did not address the circuit court's order requiring Dodson to pay restitution. Our review of the record discloses that at sentencing Dodson stipulated to the amount of restitution ordered. *See* WIS. STAT. § 973.20(13)(c). Therefore, he could not mount an arguably meritorious challenge to the order. *See* ***State v. Leighton***, 2000 WI App 156, ¶56, 237 Wis. 2d 709, 616 N.W.2d 126.

Appellate counsel's no-merit report also did not address either the circuit court's order denying a motion to suppress a lineup identification of Dodson or the circuit court's order denying a motion to suppress Dodson's custodial statements. We asked appellate counsel to address those matters in a supplemental no-merit report.[2] Appellate counsel complied and explained why he believed that further pursuit of the suppression issues would lack arguable merit. We agree, but conclude that some further discussion of the matters is warranted.

Appellate review of an order denying a motion to suppress presents a question of constitutional fact. ***State v. Iverson***, 2015 WI 101, ¶17, 365 Wis. 2d 302, 871 N.W.2d 661.

[2] Pursuant to WIS. STAT. § 971.30(10), in an appeal from a judgment of conviction, we may review a circuit court's order denying a motion to suppress evidence notwithstanding the defendant's guilty plea.

Accordingly, we accept the circuit court's factual findings unless they are clearly erroneous, and we independently apply constitutional principles to those facts. ***Id.***, ¶18.

We turn first to the lineup in which J.Q. selected Dodson as the drug dealer who subsequently shot Dammann. To suppress an identification, a defendant has the initial burden of demonstrating that the procedure was impermissibly suggestive. *See* ***State v. Drew***, 2007 WI App 213, ¶13, 305 Wis. 2d 641, 740 N.W.2d 404. If the defendant makes such a showing, the State must demonstrate that the identification was nonetheless reliable. *See* ***id.*** Here, Dodson alleged that the identification was unduly suggestive because the five men who served as "fillers" during the procedure did not sufficiently resemble him.

During the hearing, the circuit court examined the photographs of all six men who participated in the lineup and found that all had similar physical features and all were in the same age range. The circuit court further found that any differences in height among the men were insignificant because J.Q. viewed the men one at a time. The record supports the circuit court's factual findings. We agree with the circuit court's legal conclusion that Dodson failed to show an unnecessarily suggestive procedure. "The police authorities are required to make every effort reasonable under the circumstances to conduct a fair and balanced presentation of alternative possibilities for identification. The police are not required to conduct a search for identical twins in age, height, weight or facial features." ***Wright v. State***, 46 Wis. 2d 75, 86, 175 N.W.2d 646 (1970). We are satisfied that no arguably meritorious basis exists for further pursuit of this issue.

We next consider the motion seeking suppression of the statements Dodson made on each of the three occasions when he spoke to police while in custody. In response to the motion, the circuit court conducted a ***Miranda-Goodchild*** hearing. *See* ***Miranda v. Arizona***, 384 U.S. 436

(1966); ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965). At such a hearing, the State is required to show by a preponderance of the evidence that the defendant received and understood the warnings required by ***Miranda*** and that the defendant's admissions were voluntary. *See* ***State v. Jiles***, 2003 WI 66, ¶¶25-26, 262 Wis. 2d 457, 663 N.W.2d 798.

Detective Brent Hart testified that he met with Dodson on September 4, 2014, in an interrogation room at the Greenfield Police Department. The interview was recorded, and the recording was entered as an exhibit at the hearing. The State played a portion of the recording in the courtroom, and Dodson did not dispute that the recording showed Hart reading the ***Miranda*** warnings to Dodson. "'[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of ***Miranda*** are rare.'" ***State v. Ward***, 2009 WI 60, ¶61, 318 Wis. 2d 301, 767 N.W.2d 236 (citations omitted).

Here, the circuit court found that Hart did not threaten or coerce Dodson in any way. The circuit court also found that the mental health problems that Dodson alleged in the motion proceedings did not "manifest themselves during the interrogation, nor [was there] any evidence that those mental health issues impaired the defendant's ability to receive information, process information, or make a knowing decision based on the information received." The circuit court went on to find that the interview ended when Hart "felt everyone was fatigued." The circuit court's factual findings are supported by the record. *See* ***State v. Woods***, 117 Wis. 2d 701, 714-15, 345 N.W.2d 457 (1984). We agree with the circuit court's legal conclusion that Dodson voluntarily made statements to police on September 4, 2014. *See* ***State v. Clappes***, 136 Wis. 2d 222, 235, 401 N.W.2d 759 (1987). Further pursuit of a challenge to the admissibility of Dodson's September 4, 2014 statements would lack arguable merit.

Hart testified that he resumed questioning Dodson on September 5, 2014, and a second officer, identified as Detective Fletcher, also participated. Hart testified that the first thirty to fifty minutes of this interview were not recorded due to an equipment malfunction. Pursuant to WIS. STAT. § 972.115(2)(a), an equipment malfunction is not a basis for suppressing a custodial statement in a felony criminal case. *See* ***State v. Moore***, 2015 WI 54, ¶¶85-87, 363 Wis. 2d 376, 864 N.W.2d 827.

The circuit court found that during the unrecorded portion of the interview, police again advised Dodson of his ***Miranda*** rights, and he again agreed to speak to the officers.[3] The circuit court further found that Dodson was coherent and responsive in the interview and that he was not menaced or coerced. These findings are supported by Hart's testimony. *See* ***Woods***, 117 Wis. 2d at 714-15. The court's factual findings concerning the circumstances of the second interview are not clearly erroneous. *See* ***id.*** In light of those findings, we agree with the circuit court's legal conclusion that Dodson's statements during the second interview, like those during the first interview, were voluntarily given. *See* ***Clappes***, 136 Wis. 2d at 235. There is no merit to further pursuit of this issue.

The circuit court found that the second interview ended because Dodson invoked his right to silence. "[T]he admissibility of statements obtained after the person in custody has decided to remain silent depends under ***Miranda*** on whether his 'right to cut off questioning' was

[3] As we have seen, Dodson acknowledged that before police first questioned him on September 4, 2014, he received the warnings required by ***Miranda v. Arizona***, 384 U.S. 436 (1966). Therefore, even if he had not received a second set of such warnings before questioning resumed on September 5, 2015, the lack of such duplicative warnings would not demonstrate an arguably meritorious basis to suppress the statements he gave during that session. *See* ***State v. Cydzik***, 60 Wis. 2d 683, 691 & n.14, 211 N.W.2d 421 (1973) (***Miranda*** warnings sufficient when given three days before confession).

'scrupulously honored.'" ***Michigan v. Mosely***, 423 U.S. 96, 104 (1975). ***Mosley*** outlines a five-factor framework for analyzing whether a defendant's invocation of his right to silence was scrupulously honored: (1) whether police promptly terminated the original interrogation when the suspect invoked the right to silence; (2) whether the interrogation was resumed after a significant period of time; (3) whether the suspect received ***Miranda*** warnings at the outset of the second or subsequent interrogation; (4) whether a different officer resumed the questioning; and (5) whether the later interrogation was limited to a crime that was not the subject of the earlier interrogation. *See* ***State v. Bean***, 2011 WI App 129, ¶28, 337 Wis. 2d 406, 804 N.W.2d 696. The presence or absence of the ***Mosley*** factors, however, '"is not exclusively controlling and these factors do not establish a test which can be 'woodenly' applied.'" ***Bean***, 337 Wis. 2d 406, ¶29 (citation omitted). The ultimate question of whether the defendant's right to remain silent was scrupulously honored turns on the facts of the case. ***Id.***

The State presented testimony from Detective Gregory Hoppe about his interaction with Dodson after the second interrogation ended. The circuit court believed Hoppe, determining that he "testified candidly" about the circumstances of his interaction with Dodson. We defer to the circuit court's credibility determinations when we review a suppression motion. *See* ***State v. Owens***, 148 Wis. 2d 922, 930-31, 436 N.W.2d 869 (1989).

The circuit court found that Hoppe, who had not previously participated in interrogating Dodson, encountered him on September 5, 2014, sitting in an open holding area of the municipal jail waiting to return to a cell after concluding his second interview with police. The circuit court further found that Dodson initiated a conversation with Hoppe, asking the detective about the charges Dodson faced and about his status. The circuit court next found that Hoppe responded to

Dodson's questions and comments but did not question Dodson. The circuit court concluded that Dodson's statements to Hoppe were voluntary.

In light of the circuit court's findings and conclusions, Dodson cannot pursue an arguably meritorious claim that the statements he made to Hoppe should be suppressed, because the totality of the circumstances shows that the police scrupulously honored Dodson's right to silence. The police promptly ceased questioning Dodson and brought him to a holding area after he invoked his right to silence following the second interrogation session. *See* ***Bean***, 337 Wis. 2d 406, ¶28. Dodson nonetheless subsequently initiated a conversation with Hoppe, who had not participated in Dodson's custodial interrogations. *See* ***id.*** Police are entitled to respond when a suspect initiates a conversation. *See* ***State v. Hambly***, 2008 WI 10, ¶¶79, 89, 307 Wis. 2d 98, 745 N.W.2d 48. Although Hoppe did not reread the ***Miranda*** warnings to Dodson, Hoppe's testimony showed that Hoppe was not engaged in an interrogation requiring such warnings. *See* ***Rhode Island v. Innis***, 446 U.S. 291, 300-02 (1980) (holding that ***Miranda*** warnings are unnecessary unless the officer is engaged in an interaction that the officer knows or should know is "reasonably likely to elicit an incriminating response" from a suspect). Rather, the circuit court found that Dodson, by initiating the conversation with Hoppe, chose to "engage in a conversation with Hoppe," and that Dodson voluntarily waived the right to silence he had previously invoked. *See* ***Wright***, 46 Wis. 2d at 88 ("An individual in custody who has claimed the right to remain silent under ***Miranda*** has the right to change his mind and to decide to volunteer a statement."). Accordingly, Dodson's statements to Hoppe were admissible. *See* ***Bean***, 337 Wis. 2d 406, ¶¶31-32 (absent something in the record showing that police used overbearing or coercive tactics after defendant invoked the right to silence, that right was not

violated during a subsequent encounter with police). Further pursuit of this issue would lack arguable merit.

We last consider an additional issue that is not addressed in the no-merit reports, namely, whether trial counsel had a conflict of interest in this matter. The issue arose when Dodson's trial counsel, an assistant state public defender, advised the circuit court that another assistant state public defender represented Ahman Love, one of the men who served as a filler in Dodson's lineup. The circuit court concluded that no conflict existed.

"A defendant is entitled to a new trial if he can demonstrate by clear and convincing evidence that the lawyer representing him at trial 'actively represented a conflicting interest.'" ***State v. Foster***, 152 Wis. 2d 386, 392, 448 N.W.2d 298 (Ct. App. 1989) (citation omitted). A lawyer has an actual conflict of interest, however, "only when the lawyer's advocacy is somehow adversely affected by the competing loyalties." *See* ***id.*** at 393. Here, the circuit court determined that Love's case was wholly unconnected to Dodson's case, and therefore the charges in and of themselves did not give rise to competing loyalties. Additionally, the circuit court questioned Dodson about the circumstances of the lineup, and he told the circuit court that he never spoke to the other men in the lineup and did not know their names. Accordingly, the record does not suggest any basis on which Love's lawyer might have offered Love as a witness against Dodson. The record also fails to suggest any other way that the assistant state public defenders who represented Dodson and Love could have done something '"that would have benefited one and

harmed the other.'" *See* ***id.*** at 394 (citation omitted).[4] Under these circumstances, further proceedings based on an alleged conflict of interest arising from public defender representation of both Love and Dodson 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 Michael J. Backes is relieved of any further representation of Daven D. Dodson on appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals

[4] We observe that electronic docket entries, of which we may take judicial notice, *see* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522, show that Love was arrested in June 2014—several months before Dammann was shot—and that Love was in custody throughout the month of September 2014. *See* ***State v. Love***, Milwaukee Cty. Case No. 2014CF2596. Accordingly, Dodson could not make a colorable argument at Love's expense that Love rather than Dodson was responsible for Dammann's death on September 3, 2014.