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September 12, 2018

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

2017AP528-CRNM State of Wisconsin v. James L. Kirk (L.C. # 2014CF54)

Before Lundsten, P.J., Sherman and Blanchard, 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).

James Kirk appeals a judgment convicting him, after a jury trial, of eight felony counts and one misdemeanor. He also appeals an order denying his postconviction motion. Attorney

Paul Bonneson has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967), concluding that no arguably meritorious issues exist for appeal. The no-merit report addresses the sufficiency of the evidence to support the jury's verdicts, whether there was probable cause for the search warrant, whether police violated Kirk's constitutional rights in executing the search warrant as a no-knock warrant, and whether the circuit court erroneously exercised its sentencing discretion. Kirk filed a response to the report in which he raises multiple issues that we will discuss below, and Bonneson filed a supplemental no-merit report. Upon our independent review of the record and the submissions from Attorney Bonneson and Kirk, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Kirk was charged with possession with intent to deliver THC, manufacture/delivery of THC, possession of heroin with intent to deliver, maintaining a drug trafficking place, possession of cocaine, possession of narcotic drugs, two counts of possession of a firearm by a felon, and possession of drug paraphernalia, all as a repeater. The criminal complaint in this case was filed after police executed a warrant for the search of Kirk's residence and discovered marijuana, cocaine, heroin, drug paraphernalia, and two guns. Before trial, Kirk moved to suppress the evidence obtained as a result of the search, arguing that the affidavit in support of the search warrant failed to establish probable cause. The circuit court denied the suppression motion after a hearing. The case proceeded to a jury trial, and the jury returned guilty verdicts on all counts. Kirk was sentenced to a total of ten years of initial confinement and five years of extended supervision, plus ten years of probation consecutive. Kirk filed a postconviction motion for a

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

new trial, arguing that the evidence found as a result of the search warrant should have been suppressed because the warrant did not state on its face that it was a no-knock warrant but police nonetheless entered the premises without knocking or announcing themselves. Kirk argued that his trial counsel was ineffective for failing to raise the no-knock issue. The circuit court denied the postconviction motion, and this no-merit appeal follows.

Turning first to the sufficiency of the evidence, our independent review of the record satisfies us that the no-merit report correctly identifies the evidence that satisfies the elements of the crimes, and we have nothing to add to that discussion. However, we note that the no-merit report fails to discuss the voluntariness of Kirk's written statement given to police and, therefore, we include a discussion of that issue here.

At trial, the State placed into evidence a written statement from Kirk in which Kirk admitted to nearly all of the elements of the crimes charged. The statement was read to the jury by Officer Aaron Dillhoff, the interrogating officer. In the statement, Kirk admitted that he lived in and paid rent for the residence that was searched. He also admitted to selling "weed and heroin" to support himself and to being addicted to heroin. Kirk further admitted to growing and selling marijuana.

On the first day of trial, prior to jury selection, the circuit court conducted a ***Miranda-Goodchild***[2] hearing to ascertain the voluntariness of Kirk's written statement. After the court heard testimony from Officer Dillhoff, Kirk's trial counsel moved to suppress the statement. The

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966); *see* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 133 N.W.2d 753 (1965).

court denied the suppression motion, determining that Kirk understood his rights and that he knowingly, freely, and voluntarily waived them. We are satisfied that there would be no arguable merit to challenging the determination on appeal. In order to find a defendant's statement involuntary, "there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***State v. Clappes***, 136 Wis. 2d 222, 239, 401 N.W.2d 759 (1987). There is no evidence of any such practices here.

Officer Dillhoff testified that, prior to asking Kirk any questions, he read Kirk his ***Miranda*** rights. Kirk verbally acknowledged that he understood his rights, and Dillhoff testified that Kirk was lucid and coherent and did not appear to be in any physical pain. Dillhoff testified that, although Kirk told Dillhoff that he used narcotics every day, Kirk did not appear to be under the influence of anything to the point where he did not understand what was going on or that he was not coherent. There is no evidence in the record or in the submissions from Kirk and Attorney Bonneson that Kirk was forced, coerced, or threatened into making a statement. Accordingly, we are satisfied that there would be no arguable merit to challenging the voluntariness of Kirk's written statement.

In a related argument, Kirk asserts in his response that his counsel should have filed a postconviction motion challenging the circuit court's decision to allow the prosecution, over defense counsel's objection, to provide copies of his written statement to the jury, so that jurors could follow along with Dillhoff's reading of the statement. However, Kirk does not explain how denying the request for written copies for the jurors would have made any difference. Kirk does not challenge the truth or voluntariness of the statement, and the record reflects that the jurors' copies of the statement were returned to the court bailiff after Dillhoff read the statement aloud. We conclude that any postconviction motion challenging the circuit court's decision to

permit the jury to temporarily review written copies of Kirk's statement would be without arguable merit.

We turn next to the issue of whether there would be arguable merit to challenging the circuit court's denial of Kirk's motion to suppress evidence obtained as a result of the search warrant. Kirk argued in the suppression motion, and argues again in his no-merit response, that the warrant was invalid on the grounds of misrepresentation or omission of a critical fact in the affidavit submitted by a police officer to obtain the warrant. *See* ***Franks v. Delaware***, 438 U.S. 154, 171-72 (1978) (if there is substantial evidence to support a finding of a deliberate falsehood or reckless disregard for the truth in the affidavit for a search warrant, and the exclusion of false statements would undermine the existence of probable cause, a warrant is invalid). Specifically, Kirk alleges that the affidavit failed to disclose that a key source of information, informant Alexia Bruntzel, had been arrested with drugs on her person and, therefore, may have had a motive to make a false statement to police. For the reasons stated below, we agree with no-merit counsel's conclusion that this issue is without arguable merit.

First, an examination of the four corners of the search warrant affidavit reveals that the affidavit does state that Bruntzel had been arrested on an outstanding warrant, and it reveals her involvement in drug transactions. In addition, the affidavit included other assertions supporting the conclusion that the information from Bruntzel was reliable. Bruntzel gave specific facts regarding the times she bought drugs at Kirk's house, the amount of money she spent, the drugs she saw, and the location of the drugs within the house. Bruntzel also admitted to buying heroin. Statements against penal interest support the reliability of an informant. ***State ex rel. Bena v. Honorable John J. Crosetto***, 73 Wis. 2d 261, 267, 243 N.W.2d 442 (1976). Additionally, Bruntzel's assertion that she recently had seen eight to ten grams of heroin in Kirk's house, as

well as large quantities of marijuana in the basement, was consistent with information provided by another informant who reported seeing approximately ten grams of heroin at Kirk's house and several pounds of marijuana in the basement. In light of all of the above, we are satisfied that the circuit court properly denied Kirk's suppression motion, such that any assertion to the contrary on appeal is without arguable merit.

We turn next to Kirk's argument, made both in his postconviction motion and again in the no-merit response, that the search warrant was invalid because it did not state on its face that it was a no-knock warrant, yet was executed as a no-knock warrant.[3] Kirk argued in his postconviction motion that his trial counsel was ineffective for failing to raise the issue in a suppression motion. The circuit court denied Kirk's postconviction motion after a ***Machner***[4] hearing. Counsel asserts in the no-merit report that any challenge to this ruling would be without arguable merit. For the reasons discussed below, we agree.

In ***State v. Henderson***, 2001 WI 97, 245 Wis. 2d 345, 629 N.W.2d 613, the Wisconsin Supreme Court recognized certain fundamental principles regarding judicial review of a no-knock warrant:

> 1) the rule of announcement is a requirement of the Fourth Amendment's reasonableness clause, not its warrant clause; 2) the validity of a no-knock execution of a search warrant is subject to after-the-fact judicial review for constitutional reasonableness, which is determined by reference to the circumstances as they

[3] The affidavit in support of the search warrant requested a "No Knock search warrant." However, the search warrant signed by the court commissioner did not state on its face that it was a no-knock warrant. Police executed the search warrant at Kirk's home without knocking or announcing themselves.

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

> existed at the time of the entry; and 3) the manner in which a search warrant is executed is not subject to the requirements of the warrant clause and therefore does not require prior judicial authorization.

Id., ¶29.

In ***Henderson***, as in this case, police had requested no-knock authorization for a search warrant, but the warrant itself neither granted nor denied it. *See* ***id.***, ¶2. The police nonetheless executed the warrant without knocking and announcing. ***Id.*** The Wisconsin Supreme Court upheld the execution of the search warrant, concluding that the facts showed that compliance with the rule of announcement would have endangered officer safety and risked the destruction of evidence. *See* ***id.***, ¶¶38-41.

The same is true in this case. Police Officer Ryan Pfeffer averred in the warrant affidavit that he knew from training and experience that subjects dealing narcotics are often armed with weapons, and that he believed there was a high propensity for narcotics to be destroyed or discarded in this case. Pfeffer participated in executing the warrant, and he testified at the ***Machner*** hearing that, due to the likely location of the drugs within Kirk's residence, as well as the size and layout of the house, he was concerned that heroin could be flushed down the toilet if the police knocked and announced themselves. We are satisfied, given these facts, that it was reasonable under the circumstances to suspect that Kirk might destroy evidence or that officer safety may have been at risk. Accordingly, any argument that Kirk's trial counsel was ineffective for failing to challenge the no-knock execution of the warrant is without merit.

Kirk argues in his response to the no-merit report that the circuit court lacked jurisdiction because of "lies" in the criminal complaint. This argument is without merit. The jury is the ultimate arbiter of the credibility of witnesses. ***State v. Norman***, 2003 WI 72, ¶68, 262 Wis. 2d

506, 664 N.W.2d 97. The jury had the opportunity to weigh the credibility of the witnesses at trial and determine whether the credible evidence supported the charges in the complaint. We will not disturb that determination on appeal. *See* ***State v. Turner***, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983).

Kirk also alleges that there was prosecutorial misconduct and judicial bias that deprived him of a full and fair trial. However, his assertions are conclusory in nature, and our own review of the record reveals nothing that would give rise to an arguably meritorious claim of prosecutorial misconduct or judicial bias.

Our review of the transcripts discloses no other issues of arguable merit with respect to events prior to sentencing. There is no basis to challenge jury selection. Evidentiary objections throughout the trial were properly ruled on and no potentially objectionable testimony was elicited. The circuit court conducted a proper colloquy with Kirk about his waiver of the right to testify. The jury instructions accurately conveyed the applicable law and burden of proof. No improper arguments were made to the jury.

Turning to sentencing, the no-merit report also addresses whether the circuit court erroneously exercised its sentencing discretion. Kirk was convicted of two Class F felonies, three class G felonies, three Class I felonies, and one misdemeanor, all as repeaters. He faced potential maximum imprisonment terms totaling over 100 years. *See* WIS. STAT. §§ 939.50(3)(e), (f), (g), and (i); 961.573(1); 961.48(1)(b); 939.62 (all 2013-14). The court imposed a sentence of ten years of initial confinement and five years of extended supervision on Count 3, possession of heroin with intent to deliver. For all other counts, the court withheld

sentence and placed Kirk on a total of ten years of probation consecutive to the sentence on Count 3.

The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result that was well below the maximum penalty permissible by law. We agree with counsel that there would be no arguable merit to arguing that Kirk's sentence was unduly harsh or the product of an erroneous exercise of discretion.

Our review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Paul Bonneson is relieved of further representation of James Kirk in this matter. *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