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February 28, 2019

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

2018AP529-CRNM State of Wisconsin v. Stanley R. Scott (L.C. # 2016CF151)

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

Attorney Andrew R. Hinkel, appointed counsel for Stanley R. Scott, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2017-18);[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

would be arguable merit to a challenge to the circuit court's decision denying Scott's suppression motions, or to a challenge to Scott's plea or sentencing. Scott was sent a copy of the report, and has filed a response. Upon independently reviewing the entire record, as well as the no-merit report and response, we agree with counsel that there are no issues of arguable merit. We affirm.

In May 2016, Scott was charged with possession of more than forty grams of cocaine with intent to deliver, as a second or subsequent offense. The charge was based on a traffic stop and the subsequent searches of a car that Scott was driving that uncovered 250 grams of cocaine. Scott's counsel filed a brief arguing for suppression based on lack of reasonable suspicion for the stop. Scott also filed pro se motions to dismiss, arguing that the evidence should be suppressed because the stop and search were unconstitutional and that the State had suppressed video evidence from police squad cameras. After an evidentiary hearing, the circuit court denied the suppression motion. Scott's subsequent counsel filed a motion to suppress evidence obtained by a search of cell phones located within the vehicle, arguing that the affidavit in support of the search warrant was insufficient. However, Scott then reached a plea agreement with the State and withdrew his challenge to the cell phone evidence. Pursuant to the plea agreement, Scott entered an ***Alford***[2] plea to the charged offense, and the parties jointly recommended a sentence of three years of initial confinement and seven years of extended supervision. The court followed the joint sentencing recommendation.

First, the no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's decision denying Scott's suppression motion. We agree with counsel that

[2] *See* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

this issue lacks arguable merit. The evidence at the suppression hearing, which the court found credible, established the following: that police had reasonable suspicion to stop Scott's vehicle for a traffic violation, *see* ***State v. Houghton***, 2015 WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143; that police conducted a dog sniff during the stop while police were verifying an outstanding arrest warrant for Scott, which was permissible because it did not extend the duration of the stop, *see* ***Illinois v. Caballes***, 543 U.S. 405, 407-10 (2005); and that the positive alert by the dog provided probable cause to conduct the search, *see* ***State v. Miller***, 2002 WI App 150, ¶¶12-15, 256 Wis. 2d 80, 647 N.W.2d 348. We agree that it would be wholly frivolous to challenge the constitutionality of the police actions in conducting the stop and search of the vehicle.

Next, the no-merit report addresses whether there would be arguable merit to a challenge to Scott's plea. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as ineffective assistance of counsel, a plea that was not knowing, intelligent, and voluntary, or lack of a factual basis to support the plea. ***State v. Krieger***, 163 Wis. 2d 241, 250-51 & n.6, 471 N.W.2d 599 (Ct. App. 1991). Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Scott signed, satisfied the court's mandatory duties to personally address Scott and determine information such as Scott's understanding of the nature of the charge and the range of punishments he faced, the constitutional rights he waived by entering a plea, and the direct consequences of the plea. *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794. The criminal complaint provided a factual basis for the plea. There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Scott's plea would lack arguable merit.

Scott argues in his no-merit response that he is entitled to withdraw his ***Alford*** plea. He contends that his plea was not voluntary because he was pressured to confess to a crime he did not commit. He argues that he was threatened by defense counsel, the prosecutor, and the police to enter a plea, citing the suppression hearing transcript. He argues that, at the hearing, he informed the court that he felt pressured to confess to a crime he knew nothing about, that the prosecutor had informed defense counsel that the police needed a body to go with the drugs, and that his defense counsel told him that, if he did not enter a plea, he would have to go before a jury of twelve white people and that he would get convicted. Scott points out that, after he made those allegations, neither the prosecutor, defense counsel, nor police denied the allegations. Instead, the court reiterated that the matters before the court were whether there had been a discovery violation and whether evidence should be suppressed, and asked Scott whether he wanted to continue with his current counsel. Scott contends that his judgment was then clouded and he entered an involuntary plea. However, after Scott stated his concerns as to feeling pressured, the court reassured Scott that he would receive a fair trial with an impartial jury if he wished to go to trial. Additionally, following the suppression hearing, Scott's counsel was allowed to withdraw, and Scott was represented by two subsequent attorneys before deciding to enter an ***Alford*** plea. Moreover, because Scott entered an ***Alford*** plea, Scott did not admit to committing the crime. *See* ***State v. Garcia***, 192 Wis. 2d 845, 851 n.1, 856, 532 N.W.2d 111 (1995) ("An ***Alford*** plea is a guilty plea where a defendant pleads guilty to a charge but either protests his innocence or does not admit to having committed the crime."). The strong evidence of Scott's guilt, alleged in the criminal complaint and at the suppression hearing, supported Scott's ***Alford*** plea. *See* ***id.*** at 856-58.

Scott appears to argue that inconsistencies between allegations in the complaint and testimony at the suppression hearing weakened the evidence against him. Scott does not detail any inconsistencies. Our review of the record reveals that, despite any inconsistencies, the evidence against Scott was strong and supported the ***Alford*** plea.

Scott also appears to contend that the complaint was insufficient to support the plea because, Scott contends, the complaint did not establish that Scott knowingly possessed the cocaine found in the vehicle he was driving. We disagree. The facts set forth in the complaint, including that Scott was the driver and sole occupant of the vehicle in which 250 grams of cocaine was located, were sufficient to support Scott's ***Alford*** plea to possession of cocaine with intent to deliver.

Next, Scott contends that his due process rights were violated during proceedings in the circuit court. He contends that his second attorney was allowed to withdraw without notice to Scott or a hearing. However, Scott's third counsel made an appearance on Scott's behalf less than two weeks after Scott's second counsel withdrew, and no proceedings were held in the interim. We discern no arguable merit to further proceedings on this issue.

Scott also contends that he was entitled to a hearing to challenge false statements in the complaint and in the search warrants for the car and cell phones. He cites an affidavit he filed in the circuit court as setting forth what he views as false statements by police. However, none of the factual disputes Scott raises in his no-merit response or in the affidavit he filed in the circuit court would support a non-frivolous challenge to the complaint or the search warrants. We conclude that further proceedings on this issue would be wholly frivolous.

Scott also contends that he was denied his right to present a defense because he was prevented from introducing evidence that one of the officers who testified at the suppression hearing committed perjury by testifying that she did not take part in the search of the vehicle. Our review of the record and the no-merit response does not reveal why it would have been relevant to Scott's defense to show that the officer participated in the search contrary to her testimony. We discern no arguable merit to further proceedings on this issue.

Scott also argues that his due process rights were violated when the court continued the suppression hearing to a second day. Scott contends that the continuation allowed the State to investigate, which he argues unfairly prejudiced the defense. However, Scott does not explain how he was unfairly prejudiced by the continuation of the suppression hearing to a second day. We discern no arguable merit to a claim that Scott's due process rights were violated when the court continued the suppression hearing to a second day.

Next, Scott contends that he was denied the effective assistance of trial counsel. He contends that each of his four successive attorneys performed deficiently and that their deficient performance prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984). Specifically, Scott faults his first counsel for pressuring Scott to enter a plea, pursuing the wrong suppression issues, failing to support a bail motion with case law, failing to object to continuation of the suppression hearing, failing to submit video evidence to contradict the officer's testimony that she did not participate in the search of the vehicle, and for taking a different position than Scott regarding an investigative report. He faults his second counsel for failing to file motions, failing to meet deadlines, and moving to withdraw without notice to Scott. He faults his third counsel for making arguments without supporting legal standards. He faults his fourth counsel for failing to file motions challenging the criminal complaint and the search

warrants. However, nothing in Scott's no-merit response or the record supports a non-frivolous claim that Scott was denied the effective assistance of counsel. *See* ***id.*** (claim of ineffective assistance of counsel must show that counsel's performance was deficient and also that the deficient performance prejudiced the defense). Scott was represented by counsel throughout the circuit court proceedings, and counsel fully litigated Scott's suppression motion and negotiated a favorable plea on Scott's behalf. Additionally, Scott does not explain why he would not have entered a plea, but rather would have insisted on going to trial, absent the alleged deficient performance of any of his counsel. *See* ***Hill v. Lockhart***, 474 U.S. 52, 58-59 (1985). As set forth above, Scott's decision to enter an ***Alford*** plea was made after the circuit court properly denied Scott's suppression motion and was supported by the strong evidence against him. Moreover, at the plea hearing, Scott stated that he was entering his plea with the knowledge that he was waiving any other constitutional challenges to police conduct in obtaining the evidence against him. We conclude that nothing in Scott's no-merit response or the record would support a non-frivolous claim of ineffective assistance of counsel.

Scott also contends that the prosecutor engaged in misconduct. First, he appears to contend that the prosecutor did not thoroughly investigate this case and filed the charge knowing it was not supported. However, those bald assertions do not establish that further proceedings on this issue would have arguable merit. Scott also contends that the prosecutor sent a memorandum to police instructing them to provide false testimony that the police cars involved in the traffic stop were not equipped with video cameras. However, that memorandum does not support Scott's argument. Rather, the memorandum from the prosecutor directed police to explain whether their squad cars were equipped with video cameras at the time of the search in this case. Scott cites police policy that police squad cars are to be equipped with video cameras,

apparently contending that material evidence was suppressed by the prosecutor. However, the issue of whether any additional video of the traffic stop existed was fully litigated in the circuit court, and the court found that all of the video evidence had been turned over to the defense. We conclude that further proceedings on this issue would lack arguable merit.

Lastly, the no-merit report addresses whether there would be arguable merit to a challenge to Scott's sentence. We agree with counsel that this issue lacks arguable merit. Because Scott affirmatively agreed to join a recommendation for the sentence he received, Scott may not challenge that sentence on appeal. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 517, 451 N.W.2d 759 (Ct. App. 1989). We discern no basis to challenge the sentence imposed by the circuit court.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Andrew R. Hinkel is relieved of any further representation of Stanley R. Scott 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