



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 IV

April 8, 2019

To:

Hon. Nicholas McNamara
Circuit Court Judge
Branch 5
215 S. Hamilton St.
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Awais Khaleel
Assistant District Attorney
Room 3000
215 S. Hamilton St.
Madison, WI 53703

Patricia Sommer
Sommer Law Office, LLC
509 Nova Way
Madison, WI 53704

Matthew Brown
2822 Assford Ln., Apt. 6
Madison, WI 53713

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

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

2019AP101-CRNM State of Wisconsin v. Matthew Brown (L.C. # 2015CT633)

Before Lundsten, P.J.¹

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 Patricia Sommer, appointed counsel for Matthew Brown, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 and *Anders*

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

v. California, 386 U.S. 738 (1967). Brown was sent a copy of the report but has not filed a response. Upon consideration of the report and an independent review of the record, I conclude that there is no arguable merit to any issue that could be raised on appeal.

Brown was initially stopped by a police officer for failing to stop at a stop sign. Subsequent investigation led to a charge against Brown for operating a motor vehicle while intoxicated as a second offense. Brown pled guilty to the charge. Prior to sentencing, Brown moved for plea withdrawal. The circuit court denied the motion, and sentenced Brown to four months of jail time.

The no-merit report addresses whether counsel was ineffective by failing to file a motion to suppress based on an unconstitutional traffic stop. I agree that there is no arguable merit to this issue. The record does not contain facts to support a conclusion that such a motion had any merit. Thus, there is no basis to argue that Brown could show deficient performance or prejudice. See *State v. Maloney*, 2005 WI 74, ¶37, 281 Wis. 2d 595, 698 N.W.2d 583 (“Counsel does not render deficient performance for failing to bring a suppression motion that would have been denied.”); *State v. Wirts*, 176 Wis. 2d 174, 187, 500 N.W.2d 317 (Ct. App. 1993) (“A showing of prejudice requires more than speculation.”).

The no-merit report addresses whether the circuit court erroneously exercised its discretion in denying Brown’s request for plea withdrawal prior to sentencing. For the following reasons, I agree with counsel that there is no arguable merit to this issue.

“The defendant has the burden to prove by a preponderance of the evidence that [there is] a fair and just reason” for plea withdrawal prior to sentencing. *State v. Jenkins*, 2007 WI 96, ¶32, 303 Wis. 2d 157, 736 N.W.2d 24. “The reason must be something other than the desire to

have a trial, or belated misgivings about the plea.” *Id.* (citations omitted). In addressing the defendant’s request, the circuit court must “take a liberal, rather than a rigid, view of the reasons given for plea withdrawal.” *Id.*, ¶31 (quoted source omitted). “Nonetheless, ‘[w]hether a defendant’s reason adequately explains his or her change of heart is up to the discretion of the circuit court.’” *Id.* (quoted source omitted).

Here, Brown’s plea withdrawal motion and supporting affidavit alleged that Brown believed (incorrectly) that he did not enter a guilty plea, and that Brown did not understand that his guilty plea would prevent him from later challenging the traffic stop. I will assume, without deciding, that this alleged lack of understanding, if proven, would have provided a fair and just reason for plea withdrawal. However, Brown neither offered evidence to support his allegations nor provided any additional allegations explaining the reason for his alleged misunderstanding. Further, nothing in the existing record suggests a reason for Brown’s alleged misunderstanding. Under the circumstances, there would be no merit to arguing that the circuit court erred in concluding that Brown failed to meet his burden of proof and in denying plea withdrawal.²

The no-merit report addresses whether there is some other arguable basis for plea withdrawal. I agree with counsel that there is not. The plea colloquy sufficiently complied with the requirements of WIS. STAT. § 971.08 and *State v. Brown*, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, and the record reveals no other arguable ground for plea withdrawal.

² During oral arguments on Brown’s plea withdrawal motion, Brown’s attorney asserted that Brown might have been confused by conversations about appeal rights between Brown and Brown’s previous attorney. However, the motion hearing attorney admitted that he was merely speculating that such conversations could have been a source of confusion. Thus, the attorney’s assertion adds nothing to Brown’s motion allegations.

The no-merit report addresses whether the circuit court erroneously exercised its discretion at sentencing. I agree with counsel that there is no arguable merit to this issue. The total sentence was within the maximum allowed, and the circuit court discussed the required sentencing factors along with other relevant factors. *See State v. Gallion*, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197.

This court's review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Patricia Sommer is relieved of any further representation of Matthew Brown 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