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October 17, 2019

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Chad A. Stites
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You are hereby notified that the Court has entered the following opinion and order:

2018AP1541-CRNM State of Wisconsin v. Chad A. Stites (L.C. # 2016CF179)

Before Fitzpatrick, P.J., Blanchard and Nashold, 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 Vicki Zick, appointed counsel for Chad Stites, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32;[1] ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether there would be arguable merit

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

to claims that: (1) the circuit court erred by denying Stites's pretrial motions; (2) Stites's plea was invalid; or (3) the circuit court erred at sentencing. Stites was sent a copy of the report, but has not filed a response. Upon independently reviewing the entire record, as well as the no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Stites was charged with operating while intoxicated (OWI) and operating with a prohibited alcohol concentration, both as a fifth offense and as a repeater. Pursuant to a plea agreement, Stites entered an ***Alford*** plea[2] to OWI, fifth offense, without the repeater enhancer. The court sentenced Stites to two years of initial confinement and three years of extended supervision, consecutive to any other sentence previously imposed.

The no-merit report addresses whether the circuit court erred by denying Stites's pretrial motions to suppress evidence, to dismiss the repeater enhancer, to dismiss based on a speedy trial violation, for retesting of his blood sample, and for modified jury instructions. However, Stites's ***Alford*** plea functioned to forfeit review of all of the circuit court's pretrial rulings, except for suppression rulings.[3] *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10); *see also* ***Hatcher v. State***, 83 Wis. 2d 559, 563-65, 266 N.W.2d

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

[3] The no-merit report addresses some, but not all, of Stites's pretrial motions and the circuit court's rulings. We do not separately address each of Stites's pretrial motions. As stated, Stites's ***Alford*** plea forfeited review of the court's rulings as to any non-suppression issues raised and ruled upon prior to Stites's entry of his plea. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; WIS. STAT. § 971.31(10); *see also* ***Hatcher v. State***, 83 Wis. 2d 559, 563-65, 266 N.W.2d 320 (1978).

320 (1978). Accordingly, we discuss only whether there would be arguable merit to a challenge to the circuit court's rulings as to Stites's suppression motions.[4]

Stites moved to suppress his blood test results, arguing that the police failed to honor Stites's request for an alternative testing of his blood and failed to read him the informing the accused form. Following an evidentiary hearing, the circuit court found the testifying officer credible, that Stites was read the informing the accused form, and that Stites did not request an alternative testing of his blood. We agree that a challenge to the circuit court's decision to deny the suppression motion would lack arguable merit.

Stites also moved to suppress statements he made after his arrest and the results of his preliminary breath test, on grounds that the arresting officers failed to warn Stites as required under ***Miranda v. Arizona***, 384 U.S. 436 (1966).[5] After an evidentiary hearing, the circuit court found that the officers had not elicited any statements from Stites. *See* ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980) (***Miranda*** warnings required only if the defendant was subjected to "interrogation," that is, police statements that are "reasonably likely to elicit an incriminating response from the suspect" (footnotes omitted)). We conclude that it would be wholly frivolous to challenge the circuit court's ruling.

[4] The no-merit report also addresses whether there would be arguable merit to a claim that the arresting officer lacked probable cause to arrest Stites. Counsel concludes that the officer's testimony at the two suppression hearings established probable cause for the arrest. However, Stites did not argue lack of probable cause to arrest at the suppression hearings. That argument was therefore not properly preserved for review. *See* WIS. STAT. § 971.31(10). In any event, we agree with counsel's assessment that there would be no arguable merit to a claim that the arresting officer lacked probable cause. *See* ***State v. Kasian***, 207 Wis. 2d 611, 621, 558 N.W.2d 687 (Ct. App. 1996) (probable cause to arrest for OWI refers to that quantum of evidence that would lead a reasonable police officer to believe the defendant was driving while intoxicated).

[5] The no-merit report does not address this issue.

The no-merit report concludes that there would be no arguable merit to a claim that Stites's plea was not validly entered. A post-sentencing motion for plea withdrawal must establish that plea withdrawal is necessary to correct a manifest injustice, such as a plea that was not knowing, intelligent, and voluntary. ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906. Here, the circuit court conducted a plea colloquy that, together with the plea questionnaire that Stites signed, satisfied the court's mandatory duties to personally address Stites and determine information such as Stites'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.[6] *See* ***State v. Hoppe***, 2009 WI 41, ¶¶18, 30, 317 Wis. 2d 161, 765 N.W.2d 794.

The no-merit report addresses whether there would be arguable merit to a claim that Stites's plea was unknowingly entered based on the circuit court advising Stites that he could

[6] As the no-merit report notes, the circuit court failed to alert Stites to the possibility that an attorney may discover defenses not apparent to Stites or that an attorney would be appointed for him if he was unable to afford one. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. However, the record as a whole includes Stites's waiver of his right to counsel, including a colloquy and a signed waiver, and thus it would be wholly frivolous to argue that Stites did not understand that information.

Additionally, we note that Stites checked both boxes on the plea questionnaire that he did and did not understand the charge to which he was pleading, and that, during the plea colloquy, Stites made statements that appeared to contradict his affirmation that he understood the elements of OWI. However, the circuit court clarified that Stites understood the elements of OWI but that he disagreed that he should be strictly liable because, he asserted, his ignition interlock device did not prevent him from starting his car. Accordingly, it would be wholly frivolous to argue that Stites's plea was unknowing based on a lack of understanding of the elements of OWI.

still appeal after entering his plea.[7] The following exchange occurred between the court and Stites during the plea colloquy:

> DEFENDANT STITES: … Am I still able to appeal my case or no?
>
> THE COURT: You still have the right to appeal any rulings that I made that you think are wrong.
>
> DEFENDANT STITES: Oh, well, I am more concerned with my Speedy Trial rights.
>
> THE COURT: Well, you still have the right to appeal. That's a broad statement. Okay. *I'm not in a position to give you legal advice as to whether you have good grounds to appeal or whether there might be problems with an appeal*, but as a general rule --
>
> DEFENDANT STITES: I understand, Your Honor.

(Emphasis added.) Thus, the court clarified that it could not give Stites advice as to whether he would have grounds to appeal or whether there would be any problems pursuing particular issues on appeal. Stites confirmed that he understood. Accordingly, it would be wholly frivolous to argue that Stites's plea was unknowing based on the circuit court's statements as to Stites's appeal rights.

[7] The no-merit report concludes that, as a matter of law, Stites is entitled to plea withdrawal based on the circuit court's comment as to Stites's right to appeal. *See* ***State v. Riekkoff***, 112 Wis. 2d 119, 128, 332 N.W.2d 744 (1983) (defendant entitled to plea withdrawal when plea was entered under misapprehension that evidentiary ruling would be appealable). Counsel then states that it would be against Stites's interest to withdraw his plea because Stites has already served his sentence and plea withdrawal would expose him to a potential ten-year sentence. Counsel states that, as Stites's advocate, she cannot pursue an issue that is not in Stites's best interest. However, that is not the standard counsel must apply in a no-merit appeal. Counsel's obligation is to determine whether there are any issues of arguable merit to pursue and, if so, whether counsel's client wishes to pursue them. *See* WIS. STAT. RULE 809.32(1). However, as explained in this opinion, we conclude that it would be wholly frivolous to argue that Stites's plea was unknowing based on the circuit court's statements as to Stites's appeal rights.

The no-merit report also addresses whether the circuit court erred by denying Stites standby counsel. As an initial matter, we address whether there would be arguable merit to a challenge to Stites's waiver of his right to counsel that would support a non-frivolous motion for plea withdrawal. *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (denial of the right to effective assistance of counsel is a manifest injustice warranting plea withdrawal). Before a circuit court may allow a defendant to proceed pro se, "the circuit court must ensure that the defendant (1) has knowingly, intelligently, and voluntarily waived the right to counsel, and (2) is competent to proceed pro se."[8] ***State v. Imani***, 2010 WI 66, ¶21, 326 Wis. 2d 179, 786 N.W.2d 40. To establish a valid waiver of counsel, the circuit court must conduct a colloquy that ensures that the defendant: (1) has made a deliberate choice to proceed without counsel; (2) is aware of the difficulties and disadvantages of proceeding pro se; (3) is aware of the seriousness of the charge or charges; and (4) is aware of the range of penalties. ***Id.***, ¶23. Here, the circuit court conducted a colloquy with Stites that satisfied the court's obligations before accepting Stites's waiver of the right to counsel. We therefore conclude that a challenge to Stites's waiver of his right to counsel would lack arguable merit. We also agree with counsel's assessment that there would be no arguable merit to any issues based on the court denying Stites's request for standby counsel. *See* ***Douglas Cty. v. Edwards***, 137 Wis. 2d 65, 78-79, 403 N.W.2d 438 (1987) (no constitutional right to standby counsel; whether to appoint standby counsel is discretionary decision based on the needs of trial court, not defendant).

[8] Stites's prior counsel had raised the issue of Stites's competency, but Stites refused to participate in the evaluation ordered by the court. The court subsequently determined that Stites was competent to proceed and competent to represent himself, based on the court's observations and communications with Stites. It would be wholly frivolous to challenge the court's findings as to competency. *See* ***State v. Weber***, 146 Wis. 2d 817, 826, 433 N.W.2d 583 (Ct. App. 1988) (in the context of a competency determination we defer to the circuit court's assessment of a defendant's demeanor).

There is no indication of any other basis for plea withdrawal. Accordingly, we agree with counsel's assessment that a challenge to Stites's plea would lack arguable merit.

We also note that Stites moved to withdraw his plea immediately after sentencing. Stites's stated reason was that he did not know the dangers and disadvantages of proceeding pro se. The court denied the motion, noting the colloquy the court had with Stites before Stites waived his right to counsel and the suspect timing of the request. We conclude that it would be wholly frivolous to argue that the circuit court erroneously exercised its discretion by denying Stites's request to withdraw his plea.

The no-merit report also addresses whether there would be arguable merit to a challenge to Stites's sentence. We agree with counsel that this issue lacks arguable merit. Our review of a sentence determination begins "with the presumption that the trial court acted reasonably, and the defendant must show some unreasonable or unjustifiable basis in the record for the sentence complained of." ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). Here, the circuit court explained that it considered facts pertinent to the standard sentencing factors and objectives, including the seriousness of the offense, Stites's character, and the need to protect the public. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46 & nn.11-12, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence imposed was within the maximum allowed by law and, given the facts of this case, there would be no arguable merit to a claim that the sentence was unduly harsh or excessive. *See* ***State v. Stenzel***, 2004 WI App 181, ¶21, 276 Wis. 2d 224, 688 N.W.2d 20 (a sentence is unduly harsh or excessive "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances'" (quoted source omitted)).

The no-merit report addresses whether there would be arguable merit to a challenge to the circuit court's imposing the sentence in this case consecutively to Stites's revocation sentence. Counsel notes that, under WIS. STAT. § 973.15(8), the circuit court was not authorized to stay the sentence in this case. We agree with counsel that it would be wholly frivolous to argue that § 973.15(8) required the court to impose Stites's sentence in this case concurrently to his revocation sentence. *See* § 973.15(2)(a) (court has the authority to impose sentences concurrently or consecutively).

Additionally, the court granted Stites 271 days of sentence credit for the time that Stites was in custody after completing his revocation sentence and until his sentencing in this case.[9] We discern no other 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 of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

[9] Stites argued at sentencing that he should be awarded credit for the time he served prior to revocation. Stites did not dispute the State's assertion that he already received credit for that time in the revocation case, but argued he should nonetheless receive credit. A challenge to the circuit court's sentence credit decision on this basis would lack arguable merit. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 423 N.W.2d 533 (1988) (prohibiting dual credit for consecutive sentences).

IT IS FURTHER ORDERED that Attorney Vicki Zick is relieved of any further representation of Chad Stites 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