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DISTRICT I

January 17, 2020

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

2018AP1265-CRNM State of Wisconsin v. Devenire Davon Matlock
(L.C. # 2016CF1038)

Before Kessler, Dugan and Donald, 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).

Devenire Davon Matlock appeals from a judgment, entered upon his guilty plea, convicting him of one count of possession of a firearm by a felon as a habitual criminal. He also

appeals from an order denying his postconviction motion. Appellate counsel, Kaitlin A. Lamb, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2017-18).[1] Matlock was advised of his right to file a response, but he has not responded. Upon this court's independent review of the record, as mandated by ***Anders***, and appellate counsel's report, we conclude that there are no issues of arguable merit that could be pursued on appeal. We therefore summarily affirm the judgment and order.

According to the criminal complaint, Milwaukee police officers James Filsinger and Kim Lastrilla observed a Volkswagen Jetta disregard a stop sign. The officers initiated a traffic stop, and the Jetta pulled over. As the officers exited their marked squad car, the Jetta fled. Before the Jetta drove off, Lastrilla remotely deployed a global positioning system (GPS) dart that affixed to the car. The Jetta was located about ten minutes later. The driver was still inside. Filsinger approached the Jetta, opened the driver's door, and spotted a handgun in the door panel. The driver, Matlock, subsequently admitted driving away because of the gun.

Matlock was charged with one count of possession of a firearm by a felon as a habitual criminal and one count of fleeing and eluding as a habitual criminal. Matlock moved to suppress evidence, including the gun and his subsequent admission, asserting that use of the GPS dart constituted an unlawful warrantless search. The circuit court denied the motion after a hearing.

Matlock then agreed to resolve this case through a plea. In exchange for his guilty plea to possession of a firearm as charged, the State would dismiss and read in the fleeing charge and cap its sentence recommendation at five years of initial confinement and five years of extended

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

supervision. The circuit court accepted Matlock's guilty plea and sentenced him to four years of initial confinement and four years of extended supervision.

Matlock filed a postconviction motion, re-raising the suppression issue and also alleging ineffective assistance of trial counsel for his failure to make the same suppression arguments as those made in the postconviction motion. The motion further sought to vacate the DNA surcharge, which Matlock had previously paid. The circuit court denied most of the motion but held the DNA surcharge issue in abeyance pending a decision by the supreme court in ***State v. Cox***, 2018 WI 67, 382 Wis. 2d 338, 913 N.W.2d 780. When the decision in that case was released, the circuit court[2] denied the remainder of the motion. Matlock appeals.

The first issue discussed in the no-merit report is whether "grounds exist to suppress the evidence." Matlock's pretrial motion to suppress argued that use of the GPS dart was contrary to the police department's "training and directive" and that there were no exigent circumstances present so police needed a warrant to attach the GPS. The State conceded that use of the GPS system constitutes a search and that the police had no warrant but asserted that circumstances nevertheless existed to justify the search.

The circuit court conducted a hearing at which Filsinger, Lastrilla, and Matlock testified. Filsinger testified that as he and Lastrilla exited their squad car, he observed Matlock in the Jetta's driver's seat and "you could … see the reverse lights come on as if he was putting it back

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[2] The Honorable William S. Pocan denied the suppression motion, accepted Matlock's plea, imposed sentence, and denied most of the postconviction motion. The DNA surcharge issue was denied by the Honorable David A. Hansher, resulting in the final order from which this appeal is taken. Aside from a brief discussion of the DNA surcharge issue near the end of this opinion, references to the circuit court will generally be referring to Judge Pocan's decision.

in gear. And I was getting out, I heard the engine revving. And then the vehicle accelerated away from us." Lastrilla testified that "[a]s we were walking up to [Matlock's car] … I heard the engine rev. And I deployed [the dart] as he was starting to flee from our traffic stop." Matlock testified he pulled over, put the car in park, "sat there for a moment," and then "took off." Video of the traffic stop was also played for the circuit court's review.

The circuit court concluded:

> All right. And I think that this is actually a pretty easy case from what I saw on the video and what I heard from the officers.
>
> I think it's clear here there were exigent circumstances.
>
> … I think it's clear that the officers reasonably believed that the vehicle was going to flee from them.
>
> In fact, the defendant did, in fact, flee from the officers and the vehicle by fleeing from the officers, they were getting ready to flee, there was probable cause.
>
> There was certainly insufficient time to get a warrant.
>
> And I think this is a text-book type of example of both exigent circumstances and, quite frankly, excellent police work.
>
> I mean, very quick to respond here. They saw the sign. Rather than waiting, they used a tool that the police have, and they, potentially, made the streets safer by "A", stopping this crime, but "B", not putting others at risk.
>
> So, I at the end of the day … the automobile exception does apply, exigent circumstances here.

Matlock's postconviction motion again sought suppression based on the warrantless search. He argued the automobile exception did not apply and that exigent circumstances did not exist because "[r]everse lights and revving an engine does not support that Mr. Matlock was going to flee." He also argued that, to the extent trial counsel failed to make these arguments, he was deprived of effective assistance of counsel.

The circuit court construed the postconviction motion as a request for reconsideration of the suppression ruling. It reiterated its finding from the hearing that "under the totality of the circumstances … the officers reasonably believed that the vehicle was going to flee from the traffic stop." It then expounded on its ruling, explaining:

> Even if the vehicle was not actually moving at the precise moment the GPS device was deployed, both officers testified that they could hear engine revving and made other observations that the vehicle was about to take off. Their observations were realized when the defendant did, in fact, flee from them in the vehicle. Fleeing an officer is a felony in this State. The very nature of the defendant's conduct gave the officers probable cause that a felony was about to be committed and, given the short time frame, exigent circumstances to support the use of the StarChase GPS tracking device. Consequently, the court stands by its ruling at the suppression hearing. And to the extent the defendant argues that trial counsel was ineffective for failing to raise his current legal arguments, the defendant was not prejudiced because they do not persuade the court to alter its decision in this matter.

Thus, it denied the postconviction motion.

Orders denying a motion to suppress are reviewable on appeal, notwithstanding entry of a guilty plea. *See* WIS. STAT. § 971.31(10). A circuit court's decision on a motion to suppress evidence presents a mixed question of fact and law. *See* ***State v. Casarez***, 2008 WI App 166, ¶9, 314 Wis. 2d 661, 762 N.W.2d 385. We do not reverse the circuit court's factual findings unless they are clearly erroneous, but the application of constitutional principles to those findings is reviewed *de novo*. *See* ***id.***

The United States and Wisconsin Constitutions protect citizens' right to be free from unreasonable searches. *See* ***State v. Tullberg***, 2014 WI 134, ¶29, 359 Wis. 2d 421, 857 N.W.2d 120. "[T]he Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" ***United States v. Jones***, 565

U.S. 400, 404 (2012) (footnote omitted). This means a warrant is normally required as "[a] warrantless search is considered unreasonable in most circumstances." *See* ***State v. Oberst***, 2014 WI App 58, ¶¶3, 5, 354 Wis. 2d 278, 847 N.W.2d 892.

A warrantless search may nevertheless be reasonable if it falls under an exception to the warrant requirement. *See* ***Tullberg***, 359 Wis. 2d 421, ¶30. One such exception is the exigent circumstances doctrine. *See* ***id.*** One well-recognized category of exigent circumstances is "a likelihood that the suspect will flee." ***State v. Howes***, 2017 WI 18, ¶24, 373 Wis. 2d 468, 893 N.W.2d 812 (citation omitted). Thus, a warrantless vehicle search, "if attended by exigent circumstances, is reasonable if probable cause exists that the automobile is an instrumentality of a crime or contains contraband[.]" *See* ***State v. Donovan***, 91 Wis. 2d 401, 408, 283 N.W.2d 431 (Ct. App. 1979). The test for both probable cause and exigent circumstances is objective: what officers reasonably believed at the time of the search. *See* ***Tullberg***, 359 Wis. 2d 421, ¶41.

Our review of the record, including the video of the traffic stop, satisfies us that the circuit court's factual findings, as memorialized in its oral and written rulings, are not clearly erroneous. Based on those facts, we conclude the circuit court appropriately applied Fourth Amendment principles such that there is no arguable merit to further challenge its rulings denying the suppression and postconviction motions.

The second potential issue discussed in the no-merit report is whether Matlock's plea was knowing, intelligent, and voluntary. Our review of the record—including the plea questionnaire and waiver of rights form and the plea hearing transcript—confirms that the circuit court complied with its obligations for taking a guilty plea, pursuant to WIS. STAT. § 971.08, ***State v. Bangert***, 131 Wis. 2d 246, 261-62, 389 N.W.2d 12 (1986), and subsequent cases, as collected in

State v. Brown, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906. There is no arguable merit to a claim that the circuit court failed to fulfill its obligations or that Matlock's plea was anything other than knowing, intelligent, and voluntary.

The third issue the no-merit report addresses is whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 270 Wis. 2d 535, ¶41. In seeking to fulfill the sentencing objectives, the court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider additional factors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***id.***

Our review of the record confirms that the circuit court appropriately considered relevant sentencing objectives and factors. In particular, we observe that the circuit court commented that the State's recommendation of five years' initial confinement and five years' extended supervision was "not inappropriate," but the circuit court decided to impose a slightly shorter sentence in recognition of Matlock's relatively young age. The eight-year sentence imposed, which encompassed a mandatory minimum term of confinement, was well within the fourteen-year range authorized by law. *See* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449; *see also* WIS. STAT. §§ 941.29(1m)(a), (4m)(a); 939.50(3)(g); 939.62(1)(b). The sentence is further not so excessive so as to shock public sentiment. *See* ***Ocanas v. State***, 70

Wis. 2d 179, 185, 233 N.W.2d 457 (1975). There is no arguable merit to a challenge to the circuit court's sentencing discretion.

The final issue addressed in the no-merit report is whether the $250 DNA surcharge should be waived. At sentencing, the circuit court had stated that Matlock did not have to pay the surcharge a second time if he had previously paid it, but the surcharge was nevertheless included on the judgment of conviction as a taxed cost. Matlock had previously paid the surcharge, so his postconviction motion sought to have the surcharge waived entirely. The request was held in abeyance pending a supreme court decision. As the no-merit report correctly notes, that decision was that the circuit courts have no discretion to waive the surcharge. *See* ***Cox***, 382 Wis. 2d 338, ¶¶24-25. Thus, there is no arguable merit to a claim that the circuit court erred in denying Matlock's postconviction request to vacate the surcharge.

Our independent review of the record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Kaitlin A. Lamb is relieved of further representation of Matlock 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