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September 23, 2020

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

2020AP769-CRNM State of Wisconsin v. Antoniyo D. Harris (L.C. #2014CF248)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Antoniyo D. Harris appeals from a judgment of conviction for possession of cocaine with intent to deliver and obstructing an officer and from an order denying his postconviction motion to withdraw his plea. His appellate counsel has filed a no-merit report pursuant to WIS. STAT.

RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967).[2] Harris received a copy of the report and has filed a response to the no-merit report. RULE 809.32(1)(e). Upon consideration of these submissions and an independent review of the record, as mandated by ***Anders***, the judgment and order are summarily affirmed because we conclude that there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Police were alerted to possible drug activity being conducted by occupants of a white van that frequented a certain address. Upon locating the van at the address, police observed the van make a stop over the crosswalk and a traffic stop was initiated. The driver and passenger were asked to step out of the van. The female driver of the vehicle informed the officer that her passenger, Harris, sold crack cocaine and likely had cocaine on his person. Harris originally gave police a false first name when asked to identify himself. A drug dog was brought to the scene. The dog alerted on the car and it was searched. A crack pipe was found in the passenger area of the car. A search warrant was obtained for Harris's residence. During the search of the residence, a large amount of crack cocaine was found in the bathroom. Harris was charged with possession of cocaine with intent to deliver, possession of drug paraphernalia, obstructing an officer, and maintaining a drug trafficking place.

Harris filed a motion to suppress evidence obtained as a result of an alleged illegal traffic stop and alleged illegal strip search. As to the reason for the stop, the police officer testified that he never lost sight of the van and saw it stop over the crosswalk. The officer explained that he

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

[2] This is the second no-merit appeal. On June 14, 2018, appointed counsel's no-merit report in appeal No. 2015AP2309-CRNM was rejected and the time to file a second postconviction motion was extended. ***State v. Harris***, No. 2015AP2309-CRNM, unpublished op. and order (WI App June 14, 2018).

had a different vantage point than the video camera which captured the dashboard video. The trial court denied the motion to suppress evidence from the traffic stop finding that there was a valid reason for the traffic stop.[3]

Harris subsequently filed a motion to suppress evidence obtained during the search of his residence on the ground that police entered the residence and conducted the search before the warrant was obtained. He based that claim on the time and date stamp on photographs taken during the search which predated the time that the search warrant was signed. The police officer who served as the evidence technician during the search testified that the time and date stamp on the camera required manual adjustment for the switch to daylight savings time and that had not been done when the search was conducted after midnight on April 27, 2014. The officer indicated that the time and date stamp on the photographs was one hour behind the actual time. The trial court denied the motion finding that the officers did not enter the residence before issuance of the warrant.

A plea agreement was reached. Harris entered a no contest plea to possession of cocaine with intent to deliver and the obstruction of officer charge. The two other counts were dismissed as read-ins at sentencing.[4] The prosecution agreed to and did cap its sentencing recommendation to three years of initial confinement and five years of extended supervision. Harris was sentenced to five years of initial confinement and five years of extended supervision on the

[3] The trial court found the strip search to have exceeded the scope and statutory definition of a strip search and granted the motion to suppress evidence from the search. However, no evidence was discovered during the strip search and no evidence was suppressed.

[4] The plea agreement also resolved another pending prosecution against Harris on an amended charge of disorderly conduct. That case is not before the court in this appeal.

possession conviction to be served consecutively to any other sentence. A concurrent ninety-day jail sentence was imposed on the obstruction charge.

A postconviction motion was filed alleging ineffective assistance of trial counsel for not pursuing a suppression motion based on an alleged illegal extension of the traffic stop to permit the drug dog sniff. A ***Machner***[5] hearing was conducted. Harris testified that before the filing of any suppression motions, he told his trial attorney that without any reason, the stop had been prolonged to accommodate the dog sniff. Trial counsel testified that he had considered and researched whether to challenge the delay related to the dog sniff and he found the case law not in Harris's favor at that time;[6] he indicated that he filed the suppression motions he thought had the best chance of success. The trial court denied the postconviction motion concluding that there was no basis to challenge as unreasonable the delay to permit the dog sniff because probable cause to believe that Harris had committed a crime developed during the traffic stop by virtue of Harris's furtive movements and the female driver's indication to the officer that Harris was likely in possession of crack cocaine. The trial court concluded that trial counsel's performance was neither deficient nor prejudicial.

[5] A ***Machner*** hearing addresses a defendant's ineffective assistance of counsel claim. *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

[6] The testimony reflected that the decision in ***Rodriguez v. United States***, 575 U.S.348 (2015), which held that police may not extend an otherwise-completed traffic stop absent reasonable suspicion in order to conduct a dog sniff, was made after Harris entered his no contest plea on October 13, 2014.

An appeal was filed after the ruling on the postconviction motion.[7] Our no-merit review reflected that the plea colloquy had failed to comply with the requirements of WIS. STAT. § 971.08(1) and had violated the admonition in ***State v. Hoppe***, 2009 WI 41, ¶32, 317 Wis. 2d 161, 765 N.W.2d 794, that "[t]he plea colloquy cannot, however, be reduced to determining whether the defendant has read and filled out the [plea questionnaire] Form," and that "the Form cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant." We required appellate counsel to file a supplemental no-merit report addressing possible deficiencies in the plea taking. Appellate counsel asked that the no-merit appeal be dismissed in favor of an extension of time to file a postconviction motion. That request was granted.

A second postconviction motion was filed. Harris sought plea withdrawal on the ground that the plea colloquy had failed to inquire as to Harris's education and general comprehension and to ascertain his understanding of the elements of the crimes, maximum penalties, and the constitutional rights he was waiving. The motion also alleged that the required deportation warning had not been given. An evidentiary hearing was held on the postconviction motion. Harris testified that he "was really literally new to the law" and did not understand the constitutional rights he was waiving by entry of his no contest plea, the elements of the offenses, the maximum penalties, or that the judge could sentence him to five years of initial confinement. He also denied that his trial attorney went over any part of the plea questionnaire form other than

[7] A merits appeal was filed. After multiple extensions of time to file the appellant's brief, and more than a year after the notice of appeal was filed, appointed appellate counsel indicated he would file a no-merit report and the appeal was converted to a no-merit appeal.

the information about disposition of the charges and what the prosecutor would recommend.[8] Harris's trial attorney testified that his standard practice was to read to his client each individual constitutional right listed on the plea questionnaire form, to define each crime, to discuss the associated maximum penalties, and to advise that the trial court can impose the maximum penalty. He also indicated that his standard practice was to go over the terms of the plea agreement with his client at the beginning of reviewing the form and again at the conclusion of reviewing the form and before the client signed it. The trial court denied the motion for plea withdrawal concluding that even if the plea colloquy was defective, the prosecution had met its burden of establishing that Harris was informed of and understood the information missing from the colloquy so that the no contest was freely, voluntarily, and intelligently entered. Specifically, the trial court pointed to Harris being advised of his constitutional rights at the initial appearance, Harris's confirmation at the plea hearing of having reviewed the plea questionnaire form and that its contents were accurate, Harris's prior criminal justice experience,[9] and trial counsel's testimony that he discussed with Harris the constitutional rights Harris was waiving, the elements of the offense, the penalties, and the plea agreement.

The no-merit report addresses the potential issues of whether the motions to suppress evidence were correctly denied, whether the postconviction motions for plea withdraw were

[8] Harris confirmed that no deportation warning had been given and that he is a United States citizen. The failure to give the deportation warning required by WIS. STAT. § 971.08(1)(c) during the plea colloquy does not support plea withdrawal because there is no suggestion that Harris could show that his plea is likely to result in deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1, *overruled on other grounds by* ***State v. Fuerte***, 2017 WI 104, ¶36, 378 Wis. 2d 504, 904 N.W.2d 773.

[9] At sentencing, it was established that Harris had three prior convictions for drug offenses in Milwaukee County. At the postconviction hearing, Harris's trial attorney confirmed that Harris had a prior conviction for a drug offense.

correctly denied, whether there was an adequate factual basis to support the acceptance of Harris's no contest plea, and whether the sentence was a proper exercise of discretion or unduly harsh. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit, and this court will not discuss them further except as necessary to address Harris's response.

In his response, Harris first suggests there is arguable merit to a claim that the plea colloquy was defective. However, that issue was litigated in the second postconviction motion. As the no-merit report observes, the trial court's finding that Harris was otherwise informed of the information that may have been omitted from the plea colloquy is not clearly erroneous. Notably, the trial court was free to reject Harris's testimony that he was "new to the law." "Due regard is given to the opportunity of the trial court to judge the credibility of witnesses." ***State v. Long***, 190 Wis. 2d 386, 393, 526 N.W.2d 826 (Ct. App. 1994). There is no arguable merit to any further claim about the plea taking.

Harris also raises in his response other claims that were litigated regarding the suppression of evidence. The trial court found probable cause for the stop and the extension of the stop to permit the dog sniff. It also found that the police did not enter Harris's residence before the issuance of the search warrant. Harris suggests that there is further evidence that police entered the residence before issuance of the warrant because a police log indicates that at the very moment the officers arrived at the residence, one officer communicated that the female driver could be released from custody because officers found nothing in the residence connecting her to the residence. However, the record reflects that the police arrived at the residence at 12:08 a.m., and the communication that the driver could be released was at 12:23 a.m. A sufficient amount of time passed for the officer to conclude there was nothing in the residence linking the

driver to it. In short, the inconsistency between the time and date stamp on the pictures taken during the search and the officers' testimony about the time the warrant was obtained and executed was fully litigated. There is no new claim of arguable merit on which to seek suppression of evidence.

Finally, Harris claims that appellate counsel has been ineffective in concluding there is no arguable merit and that he is entitled to new appellate counsel because he has an attorney grievance pending against appellate counsel. A no-merit report is an approved method by which appointed counsel discharges the duty of representation. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). This court's decision that there is no arguable merit to further postconviction or appellate proceedings, accepting the no-merit report, and discharging appointed counsel of any further duty of representation rests on the conclusion that counsel provided the level of representation constitutionally required. That conclusion rests on this court's independent review of the record. That Harris filed an attorney grievance does not entitle him to new counsel. Not only does this court have no reason to consider what the grievance might be in light of our independent review of the record, but a defendant cannot subvert the no-merit process and garner the appointment of new counsel by simply filing an attorney grievance.

Our review of the record discloses no potential meritorious issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Harris further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Ralph J. Sczygelski is relieved from further representing Antoniyo D. Harris in this appeal. *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