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**DISTRICT I**

December 15, 2020

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

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2020AP1226-CRNM      State of Wisconsin v. Stephen Allen Cole (L.C. # 2017CF5905)

Before Brash, P.J., Donald and White, 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).**

Stephen Allen Cole appeals from a judgment of conviction for first-degree reckless homicide and first-degree recklessly endangering safety. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18),<sup>1</sup> and *Anders v. California*, 386 U.S.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

738 (1967). Cole received a copy of the report, was advised of his right to file a response, and has elected not to do so. Upon consideration of the report and an independent review of the record, as mandated by *Anders*, the judgment is 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.

Cole stabbed his mother to death and attacked his stepfather with a knife. He was charged with first-degree reckless homicide and first-degree recklessly endangering safety. After a competency evaluation resulted in a finding that Cole was competent to stand trial, a conclusion Cole did not challenge, Cole entered a plea of not guilty by reason of mental disease or defect (NGI). Two expert evaluations were done and neither expert report supported the defense. The NGI defense was withdrawn. Cole moved to suppress statements given to the police on the ground that he had not made a voluntary and knowing waiver of his *Miranda*<sup>2</sup> rights. The motion was denied. On the day of the jury trial, the prosecution filed an amended information charging Cole with first-degree intentional homicide and attempted homicide. Cole then entered a guilty plea to the original charges and the amended information was withdrawn. Cole was sentenced to concurrent terms totaling thirty years of initial confinement and fifteen years of extended supervision.<sup>3</sup>

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<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>3</sup> Cole was sentenced to six years of extended supervision on the first-degree recklessly endangering safety conviction. That term of extended supervision was commuted to five years after the Department of Corrections pointed out that five years was the maximum term of extended supervision for the crime of first-degree recklessly endangering safety.

The no-merit report addresses the potential issues of whether Cole's plea was knowingly, voluntarily, and intelligently entered and whether the sentence was the result of an erroneous exercise of discretion or unduly harsh or excessive. 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.

The no-merit report does not discuss whether there is arguable merit to a claim that the suppression motion should have been granted.<sup>4</sup> When seeking admission of statements made during custodial questioning, the State must make two separate showings: (1) that the defendant was informed of his *Miranda* rights, understood them and intelligently waived them; and (2) that under *State ex rel. Goodchild v. Burke*, 27 Wis. 2d 244, 264, 133 N.W.2d 753 (1965), the defendant's statement was voluntary. See *State v. Lee*, 175 Wis. 2d 348, 359, 499 N.W.2d 250 (Ct. App. 1993). The determination of whether a confession is voluntary is made by examining the totality of the circumstances and requires the court to balance the personal characteristics of the defendant against the pressures imposed upon by police in order to induce him to respond to the questioning. *State v. Clappes*, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). Where there is no evidence of either physical or psychological coercive tactics by the police, the balancing test becomes virtually unnecessary. See *id.* at 239-40. Further, the defendant's weakened condition is not dispositive of voluntariness. Cf. *id.* at 240 (the mere existence of pain and/or intoxication is insufficient to render a statement involuntary). Our standard of review is that the trial court's findings of evidentiary or historical fact will not be disturbed unless they are

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<sup>4</sup> When a guilty plea is entered, a defendant may still challenge on appeal the denial of a motion to suppress evidence or the defendant's statement. See WIS. STAT. § 971.31(10).

contrary to the great weight and clear preponderance of the evidence, and we independently review the facts to determine whether any constitutional violations have occurred. *Id.* at 235.

Cole did not dispute that he was read his *Miranda* rights. His claim was that he was in no condition to make a valid waiver of his rights when the interview started at 4:10 a.m. and after he received treatment at a hospital.<sup>5</sup> The police officer testified that Cole did not appear to be impaired in any way when the interview started and that Cole was responsive to the questions asked. Cole confirmed in his testimony that although he did not remember much about the police interview, he had been provided a blanket, cigarettes, and water, that the police officer was not physically aggressive toward him, and that the officer made no promises or threats in order to get him to make a statement. The trial court found that upon the totality of the circumstances, the State met its burden that Cole knowingly and intelligently waived his rights and that Cole's statements were voluntary. Applying our standard of review, we conclude there is no arguably meritorious basis to challenge the denial of the suppression motion.

Our review of the record discloses no other 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 Cole further in this appeal.

Upon the foregoing reasons,

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

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<sup>5</sup> During his attack on his stepfather, Cole suffered a cut to his head.

IT IS FURTHER ORDERED that Attorney Marcella De Peters is relieved from further representing Stephen Allen Cole in this appeal. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*