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DISTRICT III

April 12, 2022

To:

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Electronic Notice

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Clerk of Circuit Court
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Todd R. Dormanen 673812
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You are hereby notified that the Court has entered the following opinion and order:

2019AP1803-CRNM State of Wisconsin v. Todd R. Dormanen (L. C. No. 2018CF80)

Before Stark, P.J., Hruz and Gill, 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).

Todd Dormanen appeals a judgment, entered upon his guilty pleas, that convicted him of one count of homicide by intoxicated use of a vehicle while having a prior intoxicant-related conviction and one count of operating a motor vehicle while intoxicated (OWI) causing injury, as a second and subsequent offense. Attorney Jeremy Newman has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20).[1] Dormanen

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

was advised of his right to respond to the no-merit report and has filed a response. We subsequently ordered counsel to file a supplemental no-merit report addressing two issues. Upon our independent review of the entire record, as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

At approximately 12:42 p.m. on February 12, 2018, a vehicle that Dormanen was driving was involved in a crash with another vehicle. As a result of the crash, the driver of the other vehicle was pronounced dead at the scene, and a passenger in that vehicle sustained serious injuries. At the accident scene, an officer noticed a strong odor of alcohol coming from inside Dormanen's vehicle. Later that day, a sheriff's deputy made contact with Dormanen at a hospital and noticed that his speech was slurred, his eyes were glassy and bloodshot, and there was a strong odor of intoxicants coming from his person. Dormanen told the deputy that he had worked the night shift the evening before the crash, and after he finished work at 6:00 or 6:30 a.m., he may have had a few beers at a bar in Menomonie. The bartender who was working that day confirmed that Dormanen was at the bar from 6:30 a.m. until approximately 11:30 a.m. or 12:00 p.m., and that she had served him eight to ten beers. At approximately 3:23 p.m. on the day of the crash, Dormanen consented to an evidentiary chemical test of his blood, which showed that his blood alcohol concentration was 0.154 at the time of collection.

Based on these events, the State charged Dormanen with six offenses: homicide by intoxicated use of a vehicle while having a prior intoxicant-related conviction; OWI causing injury, as a second and subsequent offense; fourth-offense OWI; homicide by negligent

operation of a vehicle; reckless driving causing great bodily harm; and fourth-offense operating with a prohibited alcohol concentration.[2] Pursuant to a plea agreement, Dormanen entered guilty pleas to the first two charges. The remaining counts were dismissed and read in. Both sides were free to argue at sentencing.

The circuit court ultimately imposed consecutive sentences totaling seventeen years' initial confinement and fifteen years' extended supervision. The court declared Dormanen ineligible for the Substance Abuse Program and the Challenge Incarceration Program. Dormanen subsequently filed a postconviction motion asking the court to modify his judgment of conviction to declare him eligible for the Substance Abuse Program on Count 2. Following a hearing, the court granted Dormanen's motion and amended his judgment of conviction accordingly.

The record discloses no arguable basis for a claim to withdraw Dormanen's guilty pleas. The circuit court conducted a plea colloquy, during which it confirmed that Dormanen was forty-seven years old and understood the English language. The court also confirmed that Dormanen was not suffering from any mental health condition and had not consumed any alcohol, medications, or other drugs that would affect his ability to understand the proceedings. The court reviewed the nature of the charges to which Dormanen was pleading, including the maximum penalties for each offense.

With reference to the Plea Questionnaire/Waiver of Rights Form that Dormanen had completed and signed, the circuit court also confirmed that Dormanen had reviewed the elements

[2] The complaint alleged that Dormanen had been convicted of three prior OWI offenses.

of the charges with his attorney and understood those elements. The court reviewed the constitutional rights that Dormanen was waiving by entering his guilty pleas and confirmed that Dormanen understood and was willing to waive those rights. The court also ascertained that Dormanen agreed that the facts alleged in the charging documents provided an adequate factual basis for his pleas. Finally, the court confirmed that Dormanen's attorney had answered all of his questions regarding the case and that Dormanen was satisfied with counsel's representation.

The circuit court did not specifically ascertain during the plea colloquy whether any threats or promises had been made to Dormanen, aside from the plea agreement, to induce him to enter his pleas. *See* ***State v. Bangert***, 131 Wis. 2d 246, 262, 389 N.W.2d 12 (1986). The court also failed to inform Dormanen that it was not bound by the parties' sentence recommendations and could impose the maximum sentences. *See* ***State v. Hampton***, 2004 WI 107, ¶42, 274 Wis. 2d 379, 683 N.W.2d 14. Counsel therefore concedes in the supplemental no-merit report that the court's plea colloquy was defective.[3]

[3] The circuit court did confirm during the plea colloquy that Dormanen had reviewed the Plea Questionnaire/Waiver of Rights Form with his attorney and had signed the form. The form expressly states: "I have decided to enter this plea of my own free will. I have not been threatened or forced to enter this plea. No promises have been made to me other than those contained in the plea agreement." The form also states: "I understand that the judge is not bound by any plea agreement or recommendations and may impose the maximum penalty."

Although a circuit court "may use the completed Plea Questionnaire/Waiver of Rights Form when discharging its plea colloquy duties," the plea colloquy cannot "be reduced to determining whether the defendant has read and filled out the Form." ***State v. Hoppe***, 2009 WI 41, ¶¶30, 32, 317 Wis. 2d 161, 765 N.W.2d 794. In ***Hoppe***, for instance, the supreme court determined that a defendant had made a prima facie showing that the plea colloquy was defective, even though the circuit court confirmed during the colloquy that the defendant had signed the Plea Questionnaire/Waiver of Rights Form, because "neither the circuit court nor the defendant made any statements during the plea hearing relating to promises or threats made in connection with the defendant's plea or any statements relating to the range of punishments to which the defendant subjected himself by entering his plea." ***Id.***, ¶34.

Nevertheless, to pursue a postconviction motion for plea withdrawal, a defendant must allege not only that the plea colloquy was deficient, but "that [the defendant] in fact did not know or understand the information which should have been provided at the plea hearing." ***Bangert***, 131 Wis. 2d at 274. In an affidavit attached to the supplemental no-merit report, counsel avers that Dormanen has confirmed that he understood the information that should have been provided under ***Hampton***. Counsel also avers that Dormanen has confirmed "that he was not threatened or promised anything outside of the plea agreement to enter his pleas." As such, we agree with counsel that any claim for plea withdrawal on these grounds would lack arguable merit.

The circuit court also failed to inform Dormanen during the plea colloquy of the potential immigration consequences of his pleas, as required by WIS. STAT. § 971.08(1)(c). The record reflects, however, that Dormanen was born in Minneapolis, Minnesota, and is therefore a United States citizen. Consequently, the court's failure to inform Dormanen of the potential immigration consequences of his pleas was harmless, as there were none, and any challenge to Dormanen's pleas on that basis would lack arguable merit. *See* ***State v. Reyes Fuerte***, 2017 WI 104, ¶¶1-3, 378 Wis. 2d 504, 904 N.W.2d 773 (applying a harmless error analysis to a court's failure to provide the information required by § 971.08(1)(c)).

In his response to the no-merit report, Dormanen contends that his trial attorney was ineffective by failing to move to suppress evidence obtained during a search of his cell phone. Dormanen contends that the search violated the Fourth Amendment because law enforcement unreasonably delayed in obtaining a warrant to search his phone. Dormanen also contends that the search warrant was defective because it lacked particularity as to the material on the phone that could be searched. He further argues that the warrant violated the Wisconsin Constitution

because there is "no indication in the record that law enforcement had the warrant affidavit reviewed by a specially trained police officer or government authority."

If Dormanen's trial attorney was constitutionally ineffective by failing to file a suppression motion, counsel's ineffective assistance could provide a basis for Dormanen to withdraw his guilty pleas. *See* ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 769 N.W.2d 110 (noting that ineffective assistance of counsel can constitute a manifest injustice permitting a defendant to withdraw his or her plea after sentencing). However, in the supplemental no-merit report and attached affidavit, counsel contends there would be no arguable merit to a plea withdrawal claim on this basis because Dormanen cannot establish that he was prejudiced by counsel's failure to file a suppression motion. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (stating a defendant must establish both deficient performance and prejudice to prevail on an ineffective assistance claim).

Counsel avers that he has discussed this issue with Dormanen, and Dormanen has confirmed "that trial counsel's failure to move to suppress the evidence *at trial* would not have affected his desire to otherwise accept the plea agreement." To establish prejudice in the context of a postconviction motion to withdraw a guilty plea based on ineffective assistance of counsel, the defendant must allege that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. ***State v. Burton***, 2013 WI 61, ¶50, 349 Wis. 2d 1, 832 N.W.2d 611. Counsel's affidavit establishes that Dormanen cannot make this showing.

Dormanen instead believes that he was prejudiced by trial counsel's failure to file a suppression motion because the State referred to evidence from his cell phone during its sentencing argument. Yet, as counsel aptly notes in the supplemental no-merit report, a circuit

court "may consider suppressed evidence in determining a proper sentence." ***State v. Rush***, 147 Wis. 2d 225, 226, 432 N.W.2d 688 (Ct. App. 1988). Thus, even if Dormanen's trial counsel had successfully moved to suppress the cell phone evidence, the State still could have referred to that evidence during its sentencing argument. Under these circumstances, we agree that Dormanen cannot show that he was prejudiced by trial counsel's failure to file a suppression motion. Any claim that trial counsel was ineffective in that regard would therefore lack arguable merit.[4]

Finally, the no-merit report addresses whether there would be any arguable merit to a claim challenging Dormanen's sentences. Having independently reviewed the record, we agree with counsel's description, analysis, and conclusion that any challenge to Dormanen's sentences would lack arguable merit. We therefore do not address that issue further.

Our independent review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

[4] In his response to the no-merit report, Dormanen also contends that postconviction counsel was ineffective by failing to file a postconviction motion alleging that his trial attorney was ineffective by failing to file a suppression motion. We have determined, however, that any claim challenging trial counsel's performance on that basis would lack arguable merit. Postconviction counsel cannot be deemed ineffective for failing to raise a meritless argument. *See* ***State v. Sanders***, 2018 WI 51, ¶29, 381 Wis. 2d 522, 912 N.W.2d 16.

IT IS FURTHER ORDERED that Attorney Jeremy Newman is relieved of further representing Todd Dormanen 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