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DISTRICT II

March 15, 2023

To:

Hon. Bruce E. Schroeder
Circuit Court Judge
Electronic Notice

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
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Anthony T. Caldwell, #712725
Drug Abuse Corr. Center
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Winnebago, WI 54985-0190

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

2021AP1980-CRNM State of Wisconsin v. Anthony T. Caldwell (L.C. #2019CF1438)

Before Gundrum, P.J., Neubauer and Grogan. 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).

Anthony T. Caldwell appeals from a judgment convicting him of possession of cocaine with intent to deliver (15-40 grams). His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Caldwell received a copy of the report, was advised of his right to file a response, and has filed a response. Caldwell's counsel then filed a supplemental no-merit report addressing the issue raised in Caldwell's response. Upon consideration of the reports, the response, and an independent review

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

of the record, we conclude that the judgment may be summarily affirmed because there are no issues with arguable merit for appeal. *See* WIS. STAT. RULE 809.21.

During an investigation of Caldwell for human trafficking and drug trafficking, police executed a search warrant on Caldwell's home and found eighty-three individually wrapped plastic, corner-cut baggies, each containing a substance that testified positive for cocaine. Officers also found a digital scale, eleven cell phones, and three firearms. Police conducted a traffic stop of Caldwell's vehicle and, ultimately, found over $1800 in cash, two cell phones, and a motel room key on Caldwell's person. After his arrest, Caldwell told police he makes money by selling cocaine.

In exchange for Caldwell's plea to possession with intent to deliver cocaine (15-40 grams), the State agreed to dismiss the second-or-subsequent-offense enhancer and make no specific recommendation at sentencing. The court accepted his plea, found him guilty, and sentenced him to five years' initial confinement and five years' extended supervision. This no-merit appeal follows.

The no-merit report first addresses the potential issues of whether Caldwell's plea was knowingly, intelligently, and voluntarily entered and whether the circuit court properly exercised its discretion at sentencing. This court is satisfied there is no merit to these issues and will not discuss them further.

The no-merit report also discusses whether there is arguable merit to a claim that Caldwell received ineffective assistance of counsel when his trial counsel failed to file a motion to suppress evidence found during the search of Caldwell's home. While represented by trial counsel, Caldwell filed six pro se suppression and dismissal motions. In all of these motions,

Caldwell objected to the search warrant's execution. Specifically, he observed the face of the warrant stated "you are commanded forthwith to search the said premises" and "[y]ou are further commanded to return this warrant within forty-eight hours before the Deputy Clerk of the Circuit Court[.]"[2] Caldwell interpreted this language to mean law enforcement was required to execute and return the warrant within forty-eight hours. Because the search of his home did not occur within forty-eight hours after the warrant was issued, Caldwell argued the warrant had expired, police did not have authority to search his home, and the evidence collected needed to be suppressed. The circuit court advised Caldwell it would not consider Caldwell's motions while he was represented by counsel.

The no-merit report addresses whether there is arguable merit to a claim that trial counsel was ineffective for failing to move to suppress based on the warrant's execution and return. WISCONSIN STAT. § 968.15(1) requires a search warrant to be "executed and returned not more than 5 days after the date of issuance." WISCONSIN STAT. § 968.17(1), in turn, requires a search warrant to be returned to the clerk of court "within 48 hours after execution." Here, the warrant was issued on November 8, 2019, at 12:57 p.m., and, pursuant to the complaint, it was executed on November 13, 2019, at approximately 4:24 a.m., which falls within the five-day statutory deadline. Although we recognize the warrant directs that the search commence "forthwith," the supreme court has previously observed that "'forthwith' requires no more or less than reasonable promptness, diligence or dispatch in executing a warrant, considering the difficulties actually encountered in attempting to perform the task." ***State v. Edwards***, 98 Wis. 2d 367, 374, 297

[2] We observe this language largely mirrors the illustrative warrant language found in WIS. STAT. § 968.23.

N.W.2d 12 (1980) (citation omitted). "It is our opinion that the five-day period set forth in [§] 968.15 … represents a legislative recognition that execution of a search warrant within the five-day period satisfies any requirement that the execution be with 'reasonable promptness, diligence or dispatch.'" ***Id.*** at 375. We agree with appellate counsel that there is no arguable merit to claim that, based on the language used in the warrant, police were required to execute and return it within forty-eight hours.

As for the return of the warrant, appellate counsel recognizes the warrant was returned to the clerk's office approximately fifty-four hours after execution. Counsel explains there is no arguable merit to challenge the validity of the search based on the delay in the return. "[T]he requirement of the prompt return is a valuable safeguard of the property rights of individuals[;] the privacy of the individual, which is protected by the Fourth Amendment, has already been invaded by the time the inventory-and-return statute becomes relevant." ***State v. Meier***, 60 Wis. 2d 452, 459, 210 N.W.2d 685 (1973) (citation omitted). "Law enforcement's failure to return the order and inventory within the confines of [WIS. STAT.] §§ 968.15 and 968.17 do not render the execution of the order unreasonable." ***State v. Sveum***, 2010 WI 92, ¶69, 328 Wis. 2d 369, 787 N.W.2d 317. "The timely return of a warrant is 'a ministerial duty which [does] not affect the validity of the search absent prejudice to the defendant.'" ***Id.*** (citation omitted). Because the return deadline is ministerial and there is nothing in the record to indicate Caldwell's rights were prejudiced by a delay in the return, we agree with appellate counsel there is no arguable merit to move for suppression on this basis.

In addition, within his pro se motions, Caldwell argued on one occasion that the stop of his vehicle was illegal because it was not supported by reasonable suspicion—but in a subsequent motion he acknowledged he was stopped for a U-turn. *See* ***State v. Houghton***, 2015

WI 79, ¶30, 364 Wis. 2d 234, 868 N.W.2d 143 ("[R]easonable suspicion that a traffic law has been or is being violated is sufficient to justify all traffic stops."). On another occasion, he argued the search was illegal because it was executed at 4:24 a.m. (a night-time search). *But see* ***State v. Seyferth***, 134 Wis. 2d 354, 358, 397 N.W.2d 666 (Ct. App. 1986) (stating that "the execution of a search warrant in the nighttime is statutorily permitted"). We agree with appellate counsel there is no arguable merit to claim counsel was ineffective for failing to bring a suppression motion on these bases.

In his response to the no-merit report, Caldwell contends trial counsel was ineffective for failing to move to suppress on the basis that the "confidential [i]nformant did not testify at a probable cause hearing to validate the warrant." Appellate counsel filed a supplemental no-merit report pointing out there is no legal requirement that a confidential informant testify at a probable cause hearing. *See* WIS. STAT. § 968.12(2) ("*A search warrant may be based upon sworn complaint or affidavit*, or testimony … showing probable cause therefor.") (emphasis added). Appellate counsel indicated Caldwell has not offered any reason to question the reliability of the information in the search warrant. We therefore agree there is no arguable merit to a claim of ineffective assistance of counsel based on counsel's failure to file a suppression motion on this basis.

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

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney Leonard D. Kachinsky is relieved of further representation of Anthony T. Caldwell 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