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DISTRICT III

May 23, 2023

To:

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Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
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Michael Matthew Werch 552169
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You are hereby notified that the Court has entered the following opinion and order:

2023AP193-CRNM State of Wisconsin v. Michael Matthew Werch
(L. C. No. 2021CM929)

Before Gill, J.[1]

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).

Counsel for Michael Werch has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding that no grounds exist to challenge Werch's convictions for possession of tetrahydrocannabinols (THC) and possession of drug paraphernalia. Werch was informed of his right to file a response to the no-merit report, but he has not responded. Upon our

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2021-22). All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, police were dispatched to a private parking lot in Green Bay following a report that a vehicle was parked in the lot without permission and a man appeared to be sleeping inside the vehicle. When officers arrived on the scene, the vehicle in question was running, and Werch was sleeping inside. The officers knocked on the vehicle and woke Werch. The complaint alleges that while speaking to the officers, Werch repeatedly reached around in his vehicle and "was not making much sense." The officers observed that Werch was "very fidgety and also did not have direct answers for simple questions."

While speaking to Werch, the officers learned that he had multiple outstanding Oneida County warrants. The officers confirmed that the warrants were "extraditable and had a cash bond amount affixed to them." The officers then placed Werch under arrest on the warrants and performed a search of his person incident to the arrest. During the search, the officers located an orange toothpick case in Werch's pocket, which contained a "white crystal rock-like substance" that appeared to be consistent with methamphetamine.

A canine sniff of Werch's vehicle was then performed, and the dog alerted on the vehicle. Officers subsequently searched the vehicle and found a backpack containing: (1) a glass pipe with white powdery residue inside it; (2) a black pipe of the type "commonly used for smoking marijuana" with "some burnt green leafy substance on the end of it"; and (3) a white earbuds case containing a green plant-like substance that the officers believed to be marijuana. An

officer field-tested the plant-like substance, which tested positive for marijuana. A field test of the white rock-like substance was inconclusive.

Based on these events, the State charged Werch with possession of THC and possession of drug paraphernalia. Werch ultimately entered guilty pleas to both charges. Following a plea colloquy, supplemented by a plea questionnaire and waiver of rights form, the circuit court accepted Werch's guilty pleas. The court then proceeded directly to sentencing. The parties jointly recommended that the court place Werch on probation for eighteen months, with sixty days of conditional jail time. Consistent with the joint recommendation, the court withheld sentence and placed Werch on probation for eighteen months. However, the court imposed only thirty days of conditional jail time—half of what the parties had recommended.

The no-merit report first asserts that there would be no arguable merit to a claim that Werch's trial attorney was constitutionally ineffective by failing to move to suppress the drug paraphernalia and marijuana found inside Werch's vehicle. We agree with appellate counsel's conclusion in that regard. The Oneida County warrants provided a permissible basis for the officers to arrest Werch, *see* WIS. STAT. § 968.07(1)(b), and the officers were allowed to search Werch's person incident to that arrest, *see* ***United States v. Robinson***, 414 U.S. 218, 235 (1973).

Thereafter, the warrantless search of Werch's vehicle was permissible under the automobile exception to the warrant requirement. That exception justifies a warrantless search of a vehicle when: (1) there was probable cause to search the vehicle; and (2) the vehicle was readily mobile. ***State v. Marquardt***, 2001 WI App 219, ¶33, 247 Wis. 2d 765, 635 N.W.2d 188. Here, the officers had probable cause to search Werch's vehicle for drugs based on: Werch's strange behavior when speaking to the officers; the suspected methamphetamine found during

the search of Werch's person; and the dog's alert on Werch's vehicle. *See* ***State v. Hughes***, 2000 WI 24, ¶21, 233 Wis. 2d 280, 607 N.W.2d 621 (explaining that probable cause requires only a "fair probability" that contraband or evidence of a crime will be found in a particular place); *see also* ***State v. Miller***, 2002 WI App 150, ¶¶12-14, 256 Wis. 2d 80, 647 N.W.2d 348 (concluding that a dog's alert provided probable cause to search a vehicle for drugs). Furthermore, the record demonstrates that Werch's vehicle was readily mobile. The vehicle was running when the officers approached it, and officers had directed Werch to move the vehicle out of the same parking lot the previous week, which Werch apparently did before returning to the parking lot.

For these reasons, a motion to suppress the drug paraphernalia and marijuana found in Werch's vehicle would have been properly denied. Consequently, there would be no arguable merit to a claim that Werch's trial counsel was constitutionally ineffective by failing to file a suppression motion. *See* ***State v. Berggren***, 2009 WI App 82, ¶21, 320 Wis. 2d 209, 769 N.W.2d 110 (counsel does not perform deficiently by failing to make a motion that would have been properly denied).

The no-merit report next addresses whether there would be any arguable merit to a claim challenging the validity of Werch's guilty pleas. Upon our independent review of the record, we noted that the circuit court failed to comply with three of its mandatory duties during the plea colloquy. First, although the court asked Werch whether anyone had made any threats or promises to induce him to sign the plea questionnaire and waiver of rights form, the court did not inquire whether any "agreements" had been made in connection with Werch's anticipated pleas. *See* ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906 (requiring a circuit court, before accepting a guilty plea, to "address the defendant personally" and "[a]scertain whether any promises, agreements, or threats were made in connection with the defendant's

anticipated plea"). Second, the court failed to ask any questions during the plea colloquy that would have established Werch's "understanding of the nature of the crime[s] with which he [was] charged and the range of punishments to which he [was] subjecting himself by entering [pleas]." *See* ***id.*** Third, the court failed to provide the deportation warning required by WIS. STAT. § 971.08(1)(c). *See* ***Brown***, 293 Wis. 2d 594, ¶35.

If a postconviction motion for plea withdrawal identifies a defect in the plea colloquy and alleges that the defendant did not understand the information that should have been provided, the burden shifts to the State to show, by clear and convincing evidence, that the defendant's plea was knowingly, voluntarily, and intelligently entered. *See* ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). Given the identified defects in the circuit court's plea colloquy, we requested further input from appellate counsel as to whether there would be arguable merit to a postconviction motion for plea withdrawal. In response, counsel informed us that Werch does not wish to pursue a postconviction motion for plea withdrawal based on any of the issues that we identified. Our review of the record shows that the circuit court otherwise complied with its mandatory duties during the plea hearing. *See* ***Brown***, 293 Wis. 2d 594, ¶35. Thus, aside from the identified defects in the plea colloquy that Werch does not wish to pursue, the record contains no arguable basis to challenge Werch's guilty pleas.

Finally, the no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. We agree with counsel's description, analysis, and conclusion that this potential issue lacks arguable merit. In particular, we note that the court placed Werch on probation for eighteen months, consistent with the parties' joint recommendation, and imposed less conditional jail time than the parties had jointly recommended. A defendant may not

challenge on appeal a sentence that he or she affirmatively approved. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989).

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.

IT IS FURTHER ORDERED that Attorney Andrew Morgan is relieved of any further representation of Michael Werch 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