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June 12, 2013

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

2012AP1978-CRNM State of Wisconsin v. Devlon L. Driggers (L.C. #2007CF646)

Before Brown, C.J., Reilly and Gundrum, JJ.

Devlon Driggers appeals from judgments convicting him of fleeing/eluding an officer contrary to WIS. STAT. § 346.04(3) (2007-08), hit and run contrary to WIS. STAT. § 346.67(1) (2007-08), and possession of drug paraphernalia contrary to WIS. STAT. § 961.573(1) (2007-08). Driggers' appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Driggers received a copy of the report and

[1] All subsequent references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

filed a response. We construed counsel's petition to remand to the circuit court to address an error in one of the judgments of conviction as counsel's supplemental no-merit report. *See* RULE 809.32(1)(f). Upon consideration of the report, Driggers' response, counsel's supplemental no-merit report, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we order one judgment modified and as modified, we summarily affirm both judgments because there are no issues that would have arguable merit for appeal. WIS. STAT. RULE 809.21.

The no-merit report addresses the following possible appellate issues: (1) whether Driggers' guilty pleas were knowingly, voluntarily, and intelligently entered and had a factual basis; (2) whether the circuit court misused its sentencing discretion; and (3) whether the circuit court erroneously denied Driggers' motions to dismiss and suppress. We agree with appellate counsel that these issues do not have arguable merit for appeal.

With regard to the entry of the guilty pleas, Driggers answered questions about the pleas and his understanding of his constitutional rights during a colloquy with the circuit court that complied with ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The record discloses that Driggers' guilty pleas were knowingly, voluntarily, and intelligently entered, ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986), and that they had a factual basis, ***State v. Harrington***, 181 Wis. 2d 985, 989, 512 N.W.2d 261 (Ct. App. 1994). Additionally, the plea questionnaire and waiver of rights form Driggers signed is competent evidence of knowing and voluntary pleas. ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-29, 416 N.W.2d 627 (Ct. App. 1987). Although a plea questionnaire and waiver of rights form may not be relied upon as a substitute for a substantive in-court personal colloquy, it may be referred to and used at the plea hearing to ascertain the defendant's understanding and knowledge at the time a plea is taken. ***Hoppe***, 317 Wis. 2d 161, ¶¶30-32. The circuit court properly explained the consequences of the

three counts that were dismissed and read in as part of the plea agreement. *See* ***State v. Straszkowski***, 2008 WI 65, ¶5, 310 Wis. 2d 259, 750 N.W.2d 835. We agree with appellate counsel that there would be no arguable merit to a challenge to the entry of Driggers' guilty pleas.

The circuit court sentenced Driggers to a three-year term for fleeing/eluding, a forfeiture for hit and run, and a concurrent thirty-day jail term for possessing drug paraphernalia. The record reveals that the sentencing court's discretionary decision had a "rational and explainable basis." ***State v. Gallion***, 2004 WI 42, ¶76, 270 Wis. 2d 535, 678 N.W.2d 197. In fashioning the sentences, the court considered the seriousness of the offenses; Driggers' character and lengthy history of other criminal offenses, including domestic violence; the impact on the victim of the hit and run; Driggers' multiple failures on supervision; and the need to protect the public. ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court adequately discussed the facts and factors relevant to sentencing Driggers. The court made Driggers eligible for the Challenge Incarceration and Earned Release Programs, but denied Driggers a risk reduction sentence due to the gravity of his conduct. The felony sentence for fleeing/eluding complied with WIS. STAT. § 973.01 (2007-08) relating to the imposition of a bifurcated sentence of confinement and extended supervision. We agree with appellate counsel that there would be no arguable merit to a challenge to the sentences.

We turn to the circuit court's denial of Driggers' motions to dismiss and suppress. The case against Driggers arose from a 911 call from a motel complaining about an altercation; the caller provided a description of the suspect. Driggers argued that the responding officers did not have reasonable suspicion to try to stop him in the motel parking lot. The following evidence was adduced at the suppression hearing. As the responding officers arrived in a squad car

without lights and siren, they saw a vehicle leaving the motel parking lot and determined that the driver matched the suspect identified in the 911 call. The officers attempted to block the vehicle from exiting the parking lot. The vehicle, driven by Driggers, drove around the officers' squad and fled. The officers followed with lights and siren activated. During the ensuing high-speed chase, Driggers hit another vehicle but did not stop. When Driggers' vehicle was finally stopped and he was apprehended at gunpoint, police located drug paraphernalia in Driggers' possession. During the high-speed chase, Driggers committed the three crimes to which he pled guilty: fleeing/eluding, hit and run, and possession of drug paraphernalia.

The circuit court concluded that based on the information provided to the officers by dispatch, the officers had reasonable suspicion to stop Driggers: the person driving the vehicle matched the description of the suspect and was departing the suspect's last known location. The driver evaded the officers and fled at high speed. The court found that Driggers was lawfully seized when police attempted to block his vehicle from leaving the motel. The court denied the motion to suppress.

Any argument that the police lacked reasonable suspicion to stop Driggers as he tried to exit the motel parking lot is without arguable merit. The circuit court's findings of fact regarding the officers' reasonable suspicion are not clearly erroneous. *See* ***Klinefelter v. Dutch***, 161 Wis. 2d 28, 33, 467 N.W.2d 192 (Ct. App. 1991). We defer to the circuit court's credibility determinations about the "specific articulable facts and reasonable inferences from those facts" the officers relied upon in trying to stop Driggers from leaving the parking lot. ***State v. Gammons***, 2001 WI App 36, ¶6, 241 Wis. 2d 296, 625 N.W.2d 623; *see also* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345 (circuit court assesses credibility). Because the initial encounter in the parking lot was a valid stop and

Driggers thereafter committed the crimes of conviction in the presence of police officers, there was no basis to suppress any evidence.

Driggers moved to dismiss the criminal complaint because the tape of the 911 call was not produced in response to his discovery request. Proceedings in the circuit court revealed that a technical problem in the 911 call center resulted in several hours of 911 calls not being recorded on the night the Driggers 911 call came in. Therefore, there was no 911 tape to turn over in discovery. The circuit court found that the 911 caller gave his name and that he later gave a statement to police about what led him to call 911. The court found that the failure to record the Driggers 911 call was not the result of bad faith and that the 911 call did not contain exculpatory evidence.[2] These findings are not clearly erroneous. WIS. STAT. § 805.17(2). We conclude that the absence of a 911 tape did not preclude the circuit court from finding credible the officer's testimony at the suppression hearing about the motel parking lot encounter. Any challenge to the denial of the motions to dismiss and suppress would lack arguable merit.

In his response to counsel's no-merit report, Driggers argues that he was deprived of his right to counsel because his trial counsel declined to file a WIS. STAT. RULE 809.50 petition for leave to appeal from the circuit court's orders denying Driggers' motions to dismiss and suppress because counsel determined that such a petition would be frivolous. We conclude that Driggers was not prejudiced because, as discussed above, there would have been no arguable merit to an appellate challenge to the circuit court's orders denying his motions to dismiss and suppress.

[2] We need not address the circuit court's finding that the 911 call did not contain exculpatory evidence because the crimes to which Driggers pled guilty were all committed in the presence of police officers after he fled the motel parking lot.

Driggers argues that the circuit court permitted appointed trial counsel to withdraw without undertaking the proper colloquy as required by ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997). We need not decide whether the circuit court's colloquy complied with ***Klessig*** because this issue lacks arguable merit on other grounds. As discussed above, counsel declined to file a petition for leave to appeal. The circuit court accommodated Driggers' request to discharge counsel so that he could file a *pro se* petition for leave to appeal. During the period that Driggers was without counsel (September 8, 2009, until approximately January 15, 2010), the circuit court held status conferences, which Driggers attended by telephone, but the court did not address any substantive issues. Rather, the circuit court adjourned the case to give Driggers an opportunity to seek interlocutory review. The court confirmed that Driggers wanted appointed counsel once the petition for leave to appeal was resolved. Driggers ultimately received new counsel, and the substantive proceedings in the case resumed. We discern no prejudice to Driggers.

Driggers contends that his trial counsel was ineffective at the suppression hearing because counsel did not impeach the police witnesses. We normally decline to address claims of ineffective assistance of trial counsel if the issue was not raised by a postconviction motion in the circuit court. ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). However, because appointed counsel asks to be discharged from the duty of representation, we must determine whether such a claim would have sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner*** hearing. Our review of the suppression hearing does not confirm Diggers' contention. Trial counsel effectively probed the officers' recollections and testimony about the motel parking lot encounter and the absence of the 911 tape.

Driggers argues that his plea agreement was breached by the State and that his trial counsel was ineffective because the judgment of conviction for Counts 5 and 6 describes his conviction on Count 5 as "hit and run-involve injury" when Driggers pled guilty to hit and run without injury. We agree that the judgment of conviction for Counts 5 and 6 is inaccurate and must be amended on remand to show that the hit and run did not involve injury. The defect is in the form of the judgment of conviction, which may be corrected on remand in accordance with the actual determination by the circuit court. ***State v. Prihoda***, 2000 WI 123, ¶17, 239 Wis. 2d 244, 618 N.W.2d 857. On remand, "the circuit court may either correct the clerical error … or direct the clerk's office to make such a correction." ***Id.***, ¶27. The rest of Driggers' claims lack merit for appeal.

Our independent review of the record does not disclose any potentially meritorious issue for appeal. Because we conclude that there would be no arguable merit to any issue that could be raised on appeal, we accept the no-merit report, affirm the judgment of conviction for Count 3, modify the judgment of conviction for Counts 5 and 6 to show that the hit and run was without injury, and as modified, we affirm that judgment. We remand this matter to the circuit court for the entry of an amended judgment of conviction for Counts 5 and 6. Once the amended judgment of conviction is entered, Attorney Jeff Wilson is relieved of further representation of Driggers in this matter.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of the circuit court for Count 3 is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that the judgment of the circuit court for Counts 5 and 6 is modified, and as modified, the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this matter is remanded to the circuit court for the entry of an amended judgment of conviction for Counts 5 and 6.

IT IS FURTHER ORDERED that once an amended judgment of conviction is entered for Counts 5 and 6, Attorney Jeff Wilson is relieved of further representation of Devlon Driggers in this matter.

Diane M. Fremgen
Clerk of Court of Appeals