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DISTRICT III

June 25, 2013

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

2013AP87-CRNM State of Wisconsin v. Yeng Moua (L.C. # 2008CF603)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Yeng Moua filed a no-merit report concluding there is no arguable basis for Moua to withdraw his guilty plea, to challenge the sentence imposed for possession of methamphetamine with intent to deliver as a party to a crime, or to appeal an order denying Moua's postconviction motion. After this court's initial review of the record disclosed a potential issue relating to the validity of the guilty plea, Moua filed a letter stating that he does not wish to challenge the validity of the plea. Our review of the circuit court's denial of a motion

to suppress evidence, the sentence imposed and the denial of the postconviction motion confirms there is no arguable basis for appeal.

Moua was a passenger in a car that was stopped for failing to make a turn from a mandatory turn lane. The officer noticed that both the driver and Moua appeared unusually nervous. Moua gave the officer a false name and told the officer he had no driver's license. The name he gave the officer came back to a licensed driver in Minnesota. The officer asked where the parties were going and they gave an address the officer recognized as a drug house. He then requested a canine unit to sniff for drugs.

Five minutes later, before the officer completed writing the warning ticket for the traffic offense, the canine unit arrived. Within one minute the dog alerted to the presence of drugs. The officers searched the car and found \$2,900, a plastic spoon with a crystalline substance, a small digital scale and plastic bags filled with what the driver identified as methamphetamine. After being administered *Miranda*¹ warnings, both individuals denied awareness of the presence of the methamphetamine, but Moua conceded his fingerprints would be found on the containers.

Moua filed a pretrial motion to suppress the evidence seized from the car, arguing the officer unjustifiably extended the traffic stop. The circuit court denied the motion, finding the officer did not unjustifiably extend the stop and there was reasonable articulable suspicion to justify the canine sniff.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Pursuant to a plea agreement, Moua then pled guilty to one count of possession of methamphetamine with intent to deliver as a party to a crime. In return, the State moved to dismiss three other drug offenses and a charge of obstructing an officer, and agreed to cap its recommendation for initial incarceration at ten years. The court imposed a sentence of nine years' initial confinement and seven years' extended supervision.

Moua filed a postconviction motion alleging ineffective assistance of counsel based on his attorney's failure to investigate and present evidence of the dog's reliability alerting to drugs. The court denied the motion after a hearing, concluding Moua did not establish any prejudice from his counsel's failure to raise that issue because the dog's success rate was sufficient to establish probable cause.

The court properly denied Moua's motion to suppress the evidence seized from the vehicle. On review, this court defers to the circuit court's findings of historical fact unless they are clearly erroneous. *State v. Griffith*, 2000 WI 72, ¶23, 236 Wis. 2d 48, 613 N.W.2d 72. We review de novo whether those facts constitute a constitutional violation. *State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. Because the canine arrived within five minutes and the dog almost immediately alerted to the presence of drugs before the officer completed writing the warning citation, the record supports the circuit court's finding that the traffic stop was not unduly extended.

The record also supports the circuit court's finding at the postconviction hearing that the dog's reliability was sufficient to establish probable cause for the search. The dog's handler testified the dog had executed approximately 400 "canine sniffs." He testified the dog was reliable in detection of drug odor based on not having "falsely alerted" during training. At the

dog's recertification in 2010 or 2011 the dog ranked first of seventy dogs in narcotic odor detection training. Based on police records involving drug searches of cars, in seventy percent of the cases in which the dog alerted to the presence of drugs, drugs were found. In an additional twenty-one percent of the alerts, investigation established narcotics were previously present and were removed before the search. This evidence established sufficient reliability to support a finding of probable cause that drugs would be found in the car. Furthermore, after the postconviction hearing in this case, the Supreme Court ruled that canine field data was not required to establish the reliability of a canine for a vehicle search and alert. *Florida v. Harris*, 133 S. Ct. 1050, 1058-59 (2013). Rather, the dog's training and recertifications constituted a sufficient showing to establish the reliability required by the Fourth Amendment. *Id.* Therefore, Moua's trial counsel's failure to challenge the dog's success rate did not prejudice the defense.

Finally, the record discloses no arguable basis for challenging the sentence. The court could have imposed a sentence of forty years' imprisonment and a \$100,000 fine. The court appropriately considered the seriousness of the offenses; Moua's character, including his prior record; and the need to protect the public. *See State v. Harris*, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court considered no improper factors and the sentence is not arguably so excessive as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

IT IS ORDERED that the judgment and order are summarily affirmed. WIS. STAT. RULE 809.21 (2011-12).

IT IS FURTHER ORDERED that attorney James Rebholz is relieved of his obligation to further represent Moua in this matter. WIS. STAT. RULE 809.32(3) (2011-12).

Diane M. Fremgen
Clerk of Court of Appeals