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DISTRICT I

June 25, 2013

To:

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Circuit Court Judge
Milwaukee County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2012AP2743-CRNM State of Wisconsin v. Brian R. Thoennes (L.C. #2010CM2398)

Before Fine J.

Brian R. Thoennes appeals a judgment convicting him of misdemeanor possession of cocaine. Jeffrey J. Guerard, Esq., filed a no-merit report seeking to withdraw as Thoennes's appointed lawyer. *See* WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738, 744 (1967). Thoennes was informed of his right to respond, but he did not do so. After reviewing the no-merit report and conducting an independent review of the Record, we conclude there are no arguably meritorious appellate issues. Therefore, we summarily affirm.

The no-merit report first addresses whether there would be arguable merit to a claim that Thoennes's trial lawyer, Daniel G. Mitchell, Esq., was unconstitutionally ineffective. To establish that, a defendant must show both that his lawyer's performance was deficient and that his lawyer's deficient performance prejudiced his defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A lawyer's conduct is presumed to fall within a wide range of reasonable professional assistance, and the defendant bears the burden of overcoming that presumption. ***Id.*** at 689.

The no-merit report explains that Thoennes believes that Mitchell did not ask proper questions of the State's four witnesses during trial. After reading the transcript of the jury trial we agree with the no-merit report that Mitchell questioned the witnesses appropriately during trial and skillfully represented of Thoennes. There is nothing in the Record that would overcome the ***Strickland*** presumption that Mitchell acted reasonably and professionally. There is no arguable merit to a claim that Mitchell was unconstitutionally ineffective.

The no-merit report next addresses whether there would be arguable merit to a claim that the police stop of Thoennes's car and subsequent searches of Thoennes were improper. The no-merit report accurately points out that this issue was not raised in the trial court and we would not generally review an issue on appeal if it had not first been raised in the trial court. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 204, 776 N.W.2d 838, 844. Even so, we will discuss the issue because Thoennes might have a claim for ineffective assistance of trial counsel if his lawyer failed to pursue a meritorious suppression motion.

Police Officer Eric Laux testified that he and his partner stopped Thoennes because it looked like Thoennes and his passenger were not wearing their seatbelts. Laux testified that

Thoennes behaved nervously during the stop and his hands were shaking as he pulled out his driver's license. Laux inferred that there was something in the car that was not supposed to be there based on Thoennes's behavior. Laux testified that this caused him to fear for his safety, so he asked Thoennes to step out of the car in order to search him for weapons. Laux testified that during the search, he found what appeared to be methadone pills that were not in a properly marked prescription bottle. Laux knew from experience that methadone is a commonly misused street drug, so he arrested Thoennes. Later, at the police station, police discovered cocaine in a pack of Thoennes's cigarettes.

Not wearing a seatbelt violates WIS. STAT. § 347.48. The investigative stop was thus reasonable under the Fourth Amendment because police may make a traffic stop when they "reasonably suspect that a crime or traffic violation has been or will be committed." ***State v. Popke***, 2009 WI 37, ¶23, 317 Wis. 2d 118, 132, 765 N.W.2d 569, 576. Thoennes's shaking and nervous behavior during the investigative stop reasonably led Laux to suspect that Thoennes might be armed. Thus, Laux's frisk of Thoennes was reasonable under the Fourth Amendment because a police officer may frisk a person for weapons during an investigatory stop if the officer reasonably suspects that the person may be armed and dangerous. *See* ***Arizona v. Johnson***, 555 U.S. 323, 332 (2009). After Laux discovered the methadone pills, arrested Thoennes, and transported him to jail, the inventory search did not violate Thoennes's Fourth Amendment rights. *See* ***Illinois v. Lafayette***, 462 U.S. 640, 646 (1983). In sum, then, there would be no arguable merit to a claim that Thoennes's trial lawyer was unconstitutionally ineffective because he did file a suppression motion.

Our independent review of the Record reveals no arguable basis for reversing the judgment of conviction. We conclude that further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Jeffrey J. Guerard, Esq., is relieved of any further representation of Thoennes in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals