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DISTRICT I

July 24, 2013

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

2012AP1249-CRNM State of Wisconsin v. John Henry Dudley
(L.C. # 2011CF1884)

Before Curley, P.J., Fine and Brennan, JJ.

John Henry Dudley appeals from a judgment entered after he pled guilty to possession of more than one gram but less than five grams of cocaine, with the intent to deliver, as a repeater. *See* WIS. STAT. §§ 961.41(1m)(cm)1r., 939.62(1)(c). Dudley's appellate lawyer, Marcella De Peters, Esq., has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Dudley did not respond. After independently reviewing the Record, the no-merit report, and the supplemental no-merit report received by the court on April

1, 2013, we conclude there are no issues of arguable merit that could be raised on appeal and summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

In her no-merit report, counsel addresses whether there is any basis for challenging the denial of Dudley's motion to suppress, the validity of Dudley's guilty plea, or the sentence imposed. We agree with counsel's assessment that these issues lack arguable merit.

Motion to Suppress

Counsel first addresses whether there is merit to challenge the circuit court's denial of Dudley's motion to suppress. In his motion, Dudley argued that police unlawfully stopped his vehicle, searched, and arrested him without reasonable suspicion that he had committed or was committing an offense. Dudley claimed that any evidence subsequently obtained should be suppressed.

An investigatory stop is reasonable and therefore constitutional, if the officer possesses reasonable suspicion under WIS. STAT. § 968.24. ***State v. Krier***, 165 Wis. 2d 673, 678, 478 N.W.2d 63, 66 (Ct. App. 1991). Under § 968.24, an investigatory stop for criminal and noncriminal violations is warranted if an officer reasonably suspects, based on the totality of the circumstances, that the motorist has committed, is in the process of committing, or is about to commit an unlawful act. ***Krier***, 165 Wis. 2d at 677–678, 478 N.W.2d at 65–66.

Additionally, a warrantless arrest must be supported by probable cause. *See* ***State v. Lange***, 2009 WI 49, ¶19, 317 Wis. 2d 383, 391, 766 N.W.2d 551, 555. "Probable cause is a flexible, commonsense standard." ***State v. Nieves***, 2007 WI App 189, ¶14, 304 Wis. 2d 182, 190, 738 N.W.2d 125, 128. We have explained: "Probable cause for arrest exists when the

totality of the circumstances within the arresting officer's knowledge would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Kutz***, 2003 WI App 205, ¶11, 267 Wis. 2d 531, 544–545, 671 N .W.2d 660, 667.

Two officers and Dudley testified during the suppression hearing. Officer Daniel Robinson explained that on April 24, 2011, he and his partner were patrolling what was considered to be a high crime area of Milwaukee. Officer Robinson testified to his observations that night:

> We were stopped at a stop sign at West Vliet Street … [and] observed the defendant, Mr. Dudley, exit a[n] SUV that was parked approximately three to four feet away from the curb, just north of West Vliet Street.
>
> He exited the passenger side of the vehicle and walked around and entered a vehicle that was parked in front of that SUV.

As Officer Robinson and his partner drove past the vehicles, Officer Robinson observed that the vehicle Dudley had gotten into—a Grand Marquis—was parked too close to the mouth of an alley, in violation of a city ordinance. In addition, Officer Robinson noted that the registration sticker on the license plate was not properly displayed, which was also in violation of a city ordinance. When the Grand Marquis started to pull away, Officer Robinson activated his red and blue lights to conduct a stop.

During cross-examination, Officer Robinson acknowledged that part of the reason he stopped the Grand Marquis was because he suspected drug activity was afoot. Upon stopping the Grand Marquis, Officer Robinson made contact with the driver of the SUV and his partner, Officer Scott Kaiser, spoke with Dudley.

Officer Kaiser testified that because he was in the front passenger seat, he was in a better position to observe the two vehicles and the activity of the occupants. He testified that the rear vehicle, an SUV, was parked in the driving lane obstructing northbound traffic. Meanwhile, the front vehicle was parked at the mouth of an alley, approximately two feet from the curb. Officer Kaiser confirmed Officer Robinson's testimony regarding the improperly displayed registration sticker on the vehicle in front of the SUV.

Officer Kaiser spoke to Dudley during the traffic stop. When Officer Kaiser asked Dudley if he had anything illegal in the car, Dudley responded that he had "a beer, a blunt and a rock." Officer Kaiser knew that "a blunt" was a marijuana cigar and that "a rock" was a quantity of crack cocaine. Based on Dudley's statement, Officer Kaiser asked him to step out of the car. Officer Kaiser handcuffed Dudley and searched him. He found eighteen individual bags of suspected cocaine base in Dudley's pocket.

Other than confirming that his registration sticker was improperly displayed, Dudley's testimony during the hearing varied significantly from Officer Kaiser's. Dudley said that Officer Kaiser came to his vehicle and ordered him to get out. When Dudley asked why he was being stopped, Officer Kaiser put handcuffs on him and began to frisk him without responding to his question. According to Dudley, Officer Kaiser did not ask if he had anything illegal until after Dudley was in handcuffs.

In denying Dudley's suppression motion, the circuit court concluded that the officers' testimony established reasonable suspicion for the investigative stop and probable cause for Dudley's subsequent arrest. The circuit court found that the portions of Dudley's testimony contradicting the officers' testimony were not credible. The circuit court believed the officers'

observations concerning the violations of the traffic laws and concluded that there was a reasonable basis to stop the vehicle. Citing ***State v. Baudhuin***, 141 Wis. 2d 642, 416 N.W.2d 60 (1987), the circuit court explained that the fact that the officers may have been suspicious that drug activity was underway was not a basis to set aside a lawful stop. *See* ***id.***, 141 Wis. 2d at 651, 416 N.W.2d at 63 ("As long as there was a proper legal basis to justify the intrusion, the officer's subjective motivation does not require suppression of the evidence or dismissal."). The circuit court went on to conclude that Dudley's statement that he had "a beer, a blunt and a rock" created probable cause to justify the subsequent arrest. There would be no arguable merit to a challenge to the circuit court's ruling.

Plea

Counsel next addresses whether Dudley has an arguably meritorious basis for challenging his plea on appeal. Pursuant to the plea agreement, Dudley pled guilty to possession of more than one gram but less than five grams of cocaine, with the intent to deliver, as a repeater. In exchange, the State recommended a six-year sentence comprised of three years of initial confinement followed by three years of extended supervision to run consecutive to a revocation sentence Dudley was serving.[1]

To be valid, a guilty plea must be knowing, intelligent, and voluntary. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12, 20 (1986). Dudley completed a plea

[1] In summarizing the plea negotiations for the circuit court, the State explained that in exchange for Dudley's plea, it would move to dismiss an amended information that added a penalty enhancer for second or subsequent offenses. *See* WIS. STAT. § 961.48. As it turned out, although the State had provided a copy of the amended information to the defense, it was never filed with the circuit court. Accordingly, there was no need for a dismissal motion by the State.

questionnaire and waiver of rights form, *see* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827–828, 416 N.W.2d 627, 630 (Ct. App. 1987), which set forth the elements of the offense to which he was pleading. The form listed, and the court explained, the maximum term of imprisonment Dudley faced. The form, along with an addendum, further specified the constitutional rights that Dudley was waiving with his plea. *See* ***Bangert***, 131 Wis. 2d at 270–272, 389 N.W.2d at 24–25. Additionally, the circuit court conducted a plea colloquy, as required by WIS. STAT. § 971.08, ***Bangert***, and ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 399, 683 N.W.2d 14, 24. There would be no arguable merit to challenging the validity of Dudley's guilty plea.

Sentencing

Counsel also addresses whether the circuit court erroneously exercised its sentencing discretion. *See* ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 549, 678 N.W.2d 197, 203. At sentencing, a circuit court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others, ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 606–607, 712 N.W.2d 76, 82, and determine which objective or objectives are of greatest importance, *see* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207. In seeking to fulfill the sentencing objectives, the circuit court should consider a variety of factors, including the gravity of the offense, the character of the offender, and the protection of the public, and may consider several subfactors. *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 850–851, 720 N.W.2d 695, 699. The weight to be given to each factor is committed to the circuit court's discretion. *See* ***Gallion***, 2004 WI 42, ¶41, 270 Wis. 2d at 557–558, 678 N.W.2d at 207.

In its sentencing remarks, the circuit court reflected on the serious nature of the crime. The circuit court explained that Dudley was not just using drugs, he was dealing them, which leads to crime and violence in neighborhoods. The circuit court noted that drug dealing impacts children directly because when parents become addicted, they neglect their responsibilities for making sure their children are safe. And, the circuit court continued, if drug dealers do not sell to parents, they sell to children directly, who get addicted. In addition, the circuit court commented on Dudley's long history of drug dealing, which revealed that Dudley had not learned his lesson and had rehabilitative needs. The circuit court concluded that incarceration was necessary to send a message to Dudley about the damage he was doing to the community.

The maximum possible sentence Dudley could have received was eighteen and one-half years. *See* WIS. STAT. §§ 961.41(1m)(cm)1r., 939.62(1)(c), 939.50(3)(f), 973.01. Dudley's sentence totaling six years is well within the range authorized by law, *see* ***State v. Scaccio***, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 108–109, 622 N.W.2d 449, 456–457, and is not so excessive as to shock the public's sentiment, *see* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457, 461 (1975). There would be no arguable merit to a challenge to the circuit court's sentencing discretion, as far as imprisonment and the terms of extended supervision.

DNA Surcharge

Counsel did not address the circuit court's imposition of a DNA surcharge in her original no-merit report. *See* ***State v. Cherry***, 2008 WI App 80, 312 Wis. 2d 203, 752 N.W.2d 393. While under WIS. STAT. § 973.047(1f), providing the sample is required, the surcharge is not: in ***Cherry***, this court held that a sentencing court must exercise its discretion when determining whether to impose the DNA analysis surcharge under WIS. STAT. § 973.046(1g). *See* ***Cherry***,

2008 WI App 80, ¶¶9–10, 312 Wis. 2d at 207–209, 752 N.W.2d at 395–396. To that end, we held that the court "should consider any and all factors pertinent to the case before it, and that it should set forth in the record the factors it considered and the rationale underlying its decision." ***Id.***, 2008 WI App 80, ¶9, 312 Wis. 2d at 207–208, 752 N.W.2d at 395.

At Dudley's sentencing, the circuit court stated: "Court will impose or order that you submit the mandatory DNA sample, pay the surcharge, unless you've already provided it and paid for it." Because we were not convinced that the Record in this case reflected consideration of relevant factors, we directed counsel to file a supplemental report addressing the issue. In our order, we explained that if Dudley had previously paid the surcharge, and it is therefore not actually due in this case, no issue of arguable merit exists.

In her supplemental no-merit report, counsel advised that she spoke with a Financial Specialist for the Wisconsin Correctional Center System and learned that Dudley is not being assessed the DNA surcharge in this case because he previously paid it in another case.

Our independent review of the Record reveals no other potential issues of arguable merit.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Marcella De Peters, Esq., is relieved of further repre**se**ntation of John Henry Dudley in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals