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February 3, 2016

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

2015AP199-CRNM State of Wisconsin v. Paul D. Ammerman (L.C. #2013CF52)

Before Neubauer, P.J., Reilly, and Gundrum, JJ.

Paul D. Ammerman appeals from a judgment of conviction for possession of child pornography with lifetime supervision as a serious sex offender. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***,

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

386 U.S. 738 (1967). Ammerman has filed five responses to the no-merit report.[2] RULE 809.32(1)(e). We also required appointed counsel to file a supplemental no-merit report addressing the DNA surcharge. Upon consideration of these submissions and an independent review of the record, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

Police reported to Ammerman's probation agent that Ammerman's computer may have been used for file sharing pornography. Possession of pornography was a violation of Ammerman's supervision rules. Ammerman was taken into custody and his apartment was searched by his probation agent. Computers, related computer equipment, and other contraband were seized by the probation agent. Police obtained a search warrant and took possession of the computers and other items from the probation agent. Ammerman was charged with fifteen counts of possession of child pornography; count one included the lifetime supervision enhancer. A motion to suppress evidence alleging that the probation agent's search was a "stalking horse" was denied. Ammerman pled no contest to count one and the remaining counts were dismissed as read ins at sentencing. Under the plea agreement the State was to recommend a moderate period of initial confinement as a consecutive sentence to the sentence imposed in another case. A consecutive sentence was imposed consisting of nine years' initial confinement and ten years'

[2] In response to an order requiring a supplemental no-merit report regarding a potential DNA surcharge issue, Ammerman filed a motion for reconsideration under WIS. STAT. RULE 809.24. No motion for reconsideration could be filed as we had not yet issued a decision under WIS. STAT. § 752.41(1). Thus, the motion for reconsideration is denied. Ammerman's motion argues there are other potential issues that need to be addressed so it functions as another response to the no-merit report.

extended supervision, with the lifetime supervision as a serious sex offender. Only one $500 child pornography surcharge under WIS. STAT. § 973.042(2) was ordered.

The no-merit report addresses the potential issues of whether the trial court correctly denied Ammerman's suppression motion; whether trial counsel was ineffective for not pursuing a motion to suppress evidence based on a defective search warrant; whether Ammerman's plea was freely, voluntarily and knowingly entered; whether trial counsel was ineffective for not objecting to a possible breach of the plea agreement by the prosecutor's sentencing remarks; and whether the sentence was the result of an erroneous exercise of discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as without merit and we do not discuss them further. Below we address two points not discussed by the no-merit report.

During the plea colloquy the deportation warning required by WIS. STAT. § 971.08(1)(c) was not given. However, Ammerman confirmed that his native language is English and Ammerman had prior sexual assault convictions that did not result in deportation. The failure to give the warning is not grounds for relief because there is no suggestion that Ammerman could show that his plea is likely to result in deportation. *See* ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1.

The judgment of conviction includes the WIS. STAT. § 973.046(1r) mandatory $250 DNA surcharge. Although the surcharge was not mandatory when Ammerman committed his crime in 2013, the single mandatory surcharge applicable to sentences imposed after January 1, 2014, is not an unconstitutional ex post facto violation. *See* ***State v. Scruggs***, 2015 WI App 88, ¶19, 365 Wis. 2d 568, 872 N.W.2d 146. Appointed counsel's supplemental no-merit report indicates that Ammerman had not previously been ordered to provide a DNA sample and Ammerman does not

recall having previously provided a DNA sample. Ammerman is a defendant situated like the defendant in ***Scruggs***—giving a DNA sample for the first time and required to pay the mandatory surcharge. Under ***Scruggs***, imposition of the mandatory DNA surcharge is not an ex post facto violation. The DNA surcharge does not present an issue of arguable merit.[3]

In his responses, Ammerman suggests several claims of ineffective assistance of trial counsel that he believes have arguable merit. He first contends that his trial counsel was ineffective during the hearing on the motion to suppress because counsel failed to demonstrate that the probation agent lied when he indicated that the two police detectives present during the apartment search did not engage in any search activity.[4] He claims trial counsel was ineffective for not moving to suppress character evidence at pretrial hearings that created a risk of unfair prejudice.[5] He claims trial counsel was ineffective for not moving to suppress contaminated evidence—the forensic search of his computer which may have changed the time/date stamp on

[3] The supplemental no-merit report also indicates that Ammerman does not wish to file a postconviction motion challenging the surcharge. Any potential challenge is waived by Ammerman.

[4] Ammerman bases his claim on the transcript of the sentencing after revocation hearing in a prior case at which his trial counsel asked Ozaukee county sheriff detective Wayne Lambrecht where "you found" a child-sized sex doll in Ammerman's apartment. The sentencing after revocation and preliminary hearings for this case took place on May 31, 2013; the suppression motion was heard in this case on October 23, 2013. Ammerman makes much of the fact that the detective did not clarify during the sentencing after revocation hearing that he did not find the doll. The transcript of the sentencing after revocation hearing is not in the appellate record but Ammerman reproduces two nonconsecutive pages from the hearing in his response. The transcript of the preliminary hearing held that same day is in the record. Ammerman omits information that completes the picture of detective Lambrecht's testimony on the day of the sentencing after revocation hearing and preliminary hearing. During the preliminary hearing portion of detective Lambrecht's testimony, he indicated that he and another sheriff's detective stood along side the probation agents as they did their walkthrough of Ammerman's apartment. He indicated that a female probation agent discovered the doll. Trial counsel lacked a reasonable basis to suggest that testimony during the suppression hearing that the detectives did not engage in the searching activities at the apartment was false.

[5] Ammerman does not specify what "certain evidence" should have been kept out of pretrial hearings. It appears he is referring to evidence of other sex-related supplies found in his apartment.

when images were last accessed.[6] His final claim is that trial counsel was ineffective for not challenging the search warrant as based on perjured and incredible averments, lack of probable cause, and for being too general, broad and overreaching.[7]

By his no-contest plea Ammerman forfeited the right to raise nonjurisdictional defects and defenses, including claimed violations of constitutional rights. ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. By his plea Ammerman forfeited the ineffective assistance of counsel claims. It can also be said that Ammerman waived his right to raise a claim of ineffective assistance of counsel related to counsel's pre-plea representation. Just about a month before the scheduled jury trial, Ammerman filed with the court a letter to his trial counsel complaining about certain things counsel had failed to do and asking counsel to withdraw or be fired. At the start of the plea hearing about three weeks later, the circuit court inquired about the Ammerman's complaint and Ammerman personally stated that he and his attorney had worked out their difficulties and that he wanted counsel to continue to represent him.

[6] That the forensic search of his computer was done improperly and failed to capture the true time and date when pornographic images were last accessed is the primary focus of all of Ammerman's responses. Ammerman suggests that if the time/date stamp on the images had not been altered by the forensic examination he would have been able to prove he was at work at the time of last access. We note that a notice of alibi was filed one month before the scheduled jury trial date. Possible contamination of the evidence was part of the theory of defense that would have been presented had Ammerman elected to proceed to trial.

[7] In his third revised response to the no-merit report, Ammerman asserts that the fact that the police retained items discovered during the probation agent's search means the probation agent was a "stalking horse" for the police. The probation agent and not police first took possession of items seized from Ammerman's apartment. That police accompany the probation agent and take possession of contraband does not convert the search to a police search. *See* ***State v. Griffin***, 131 Wis. 2d 41, 46-47, 63, 388 N.W.2d 535 (1986) (search in which police accompanied probation officers and took possession of gun found during the search was not a police search).

In his fourth and fifth responses to the no-merit, Ammerman claims that his decision to enter a no-contest plea was affected by trial counsel's failure to inform him of a report from private investigator Michael J. Bredlau which stated, "[t]here is a good (99%) possibility Detective Lambrecht contaminated the physical evidence used to obtain the search warrant."[8] Ammerman includes Bredlau's report, a letter dated November 11, 2013, from his trial attorney, and two supplementary police reports in an appendix to his first no-merit response. None of these documents are part of the record on which our review is based. Considering the documents, there is no arguable merit to a claim that Ammerman entered his plea unaware of the possibility that the computer evidence was contaminated. The November 11, 2013 letter from trial counsel to Ammerman includes "Mr. Bredlau's most recent response to the discovery provided by the State." The letter also informed Ammerman: "As you can see, we still have a lot of unanswered questions regarding the evidence (which I am trying to get answered)." Ammerman was informed of Bredlau's concern that the evidence was contaminated prior to his May 8, 2014 no-contest plea.

Ammerman points to the supplementary police reports as showing that a Detective Lambrecht indeed accessed materials. However, the detective's February 12, 2013 report indicates that the detective previewed the contents of a "black Attache zip drive." Then, a couple days later, other computers and equipment seized from Ammerman's apartment were sent to the Wisconsin Department of Justice Division of Criminal Investigation (DCI) for analysis. The black Attache zip drive was not one of those items. Thus, even if the detective's action

[8] Ammerman quotes the same language in his first response to the no-merit report but makes no claim in that response that he was unaware of Bredlau's report.

contaminated the evidence, such contamination was limited to the Attache zip drive and not evidence examined by DCI. Ammerman's suggestion that he was not aware of the potential claim that the detective contaminated evidence has no bearing on the evidence discovered by DCI for use at trial. No manifest injustice exists which would support a motion for plea withdrawal. "A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." ***Brady v. United States***, 397 U.S. 742, 757 (1970).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction and discharges appellate counsel of the obligation to represent Ammerman further in this appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney John J. Grau is relieved from further representing Paul D. Ammerman in this appeal. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals