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DISTRICT III

March 8, 2016

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

2014AP2286-CRNM State of Wisconsin v. Trevor A. Thompson (L. C. #2012CF382)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Trevor Thompson has filed a no-merit report concluding no grounds exist to challenge Thompson's conviction for operating while intoxicated, as a fifth offense. Thompson was informed of his right to file a response to the no-merit report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967),

we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2013-14).[1]

The State charged Thompson with operating while intoxicated and with a prohibited blood alcohol concentration, both counts as a fifth offense. The circuit court denied Thompson's pretrial motion to suppress evidence. Upon entry of Thompson's guilty plea to the OWI charge, the State dismissed the PAC charge outright and dismissed and read in two misdemeanor charges from a Pierce County case. The State also agreed to join in defense counsel's recommendation for three years' probation with one year of conditional jail time and Huber privileges. The court imposed a sentence consistent with the joint recommendation.[2]

Any challenge to the circuit court's denial of Thompson's suppression motion would lack arguable merit. In his motion, Thompson argued the arresting officer lacked both reasonable suspicion to detain him and probable cause to arrest him. This court analyzes the denial of a suppression motion under a two-part standard of review: we uphold the circuit court's findings of fact unless they are clearly erroneous, but we independently review whether those facts warrant suppression. ***State v. Conner***, 2012 WI App 105, ¶15, 344 Wis. 2d 233, 821 N.W.2d 267.

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

[2] At sentencing, the circuit court imposed the $250 DNA surcharge pursuant to WIS. STAT. § 973.046(1r), which made the surcharge mandatory for sentences imposed on or after January 1, 2014, regardless when the crime was committed. Thompson filed a postconviction motion to eliminate the surcharge, arguing that because his crime was committed before the statute's effective date, the mandatory surcharge had a punitive effect, thereby creating an *ex post facto* violation. The State stipulated to removal of the surcharge and the circuit court amended the judgment to eliminate the surcharge.

At the suppression motion hearing, Wausau police officer Brent Olson testified he was dispatched to the 400 block of North Third Street for a report of a person "passed out or sleeping" in a Ford pickup truck. When Olson arrived, he saw only one Ford pickup truck in that area, parked along the roadway in an angled parking spot. Olson walked up to the truck and observed a male, later identified as Thompson, "with his head slumped forward and his eyes closed in the driver's seat." Olson testified that the truck's engine was running[3] with its headlights and taillights on, and he could not determine if Thompson was breathing. Because Thompson's head was slumped forward and his eyes were closed, Olson was unsure if Thompson was sleeping or having a medical issue. Olson consequently opened the truck door, took the keys out of the ignition, and shook Thompson's shoulder, causing him to awaken.

Olson testified he detected a strong odor of an intoxicant and observed Thompson's eyes were glassy. After Thompson told Olson he had consumed a total of seven beers, Olson initiated field sobriety tests. Olson testified that the "horizontal gaze nystagmus" test revealed four out of six clues of intoxication; the "walk and turn" test revealed two out of four clues; and the "one leg stand" had to be discontinued for safety reasons because Thompson was unable to stand on one leg. A preliminary breath test Olson administered showed a BAC of 0.16, and Thompson was then placed under arrest.

When acting as a community caretaker, an officer may conduct a search or seizure without probable cause or reasonable suspicion, as long as the search or seizure satisfies the

[3] Although Thompson testified at the suppression motion hearing that the engine was not running when Olson woke him up, the circuit court found Olson's testimony to be credible. The court, in its capacity as fact-finder, is the ultimate arbiter of witness credibility, *see* ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345, and there is sufficient evidence in the record to support the court's credibility determination.

reasonableness requirement of the Fourth Amendment. ***State v. Kelsey C.R.***, 2001 WI 54, ¶34, 243 Wis. 2d 422, 626 N.W.2d 777. When a community caretaker function is asserted to justify a seizure, the circuit court must determine: "(1) that a seizure within the meaning of the fourth amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the privacy of the individual." ***State v. Kramer***, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598. This court independently reviews whether an officer's community caretaker function satisfies the requirements of the Fourth Amendment. ***Id.***, ¶16.

Even assuming a seizure occurred here, there is no arguable merit to an argument that the officer's actions were unreasonable under the Fourth Amendment. In evaluating whether police conduct was bona fide community caretaker activity, we examine the totality of the circumstances as they existed at the time of the police conduct, and we have rejected the contention that community caretaker functions must be totally independent from the detection, investigation, or acquisition of evidence relating to the commission of a crime. ***Kelsey C.R.***, 243 Wis. 2d 422, ¶30. Regarding the third factor, people have a lower expectation of privacy in a vehicle than in a home. ***Cardwell v. Lewis***, 417 U.S. 583, 590-91 (1974).

Here, the circuit court properly determined Olson engaged in a "bona fide community caretaker activity by acting to insure that the slumped over citizen in the running vehicle was not experiencing a medical episode." The court further reasoned that society as a whole would deem the officer's actions reasonable. We agree with the circuit court's conclusions based on our independent analysis of this possible issue. Any challenge to the seizure therefore lacks arguable merit.

There is likewise no arguable merit to a claim that Olson lacked probable cause to arrest Thompson once contact was made. "Probable cause exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Riddle***, 192 Wis. 2d 470, 476, 531 N.W.2d 408 (Ct. App. 1995). Olson's discovery of Thompson slumped over in the driver's seat of a truck with the engine running, combined with the odor of an intoxicant; Thompson's admission that he had been drinking alcohol; and the results of field sobriety testing provided probable cause for Thompson's arrest.

The record discloses no arguable basis for withdrawing Thompson's guilty plea. The circuit court's plea colloquy, as supplemented by a plea questionnaire and waiver of rights form that Thompson completed, informed Thompson of the elements of the offense, the penalties that could be imposed, and the constitutional rights he waived by entering a guilty plea. The court confirmed Thompson's understanding that it was not bound by the terms of the plea agreement, *see* ***State v. Hampton***, 2004 WI 107, ¶2, 274 Wis. 2d 379, 683 N.W.2d 14, and found that a sufficient factual basis existed in the criminal complaint to support the conclusion that Thompson committed the crime charged. Although the court failed to advise Thompson of the deportation consequences of his plea, as mandated by WIS. STAT. § 971.08(1)(c), the no-merit report indicates Thompson is a United States citizen not subject to deportation. Any challenge to the plea on this basis would therefore lack arguable merit. The record shows the plea was knowingly, voluntarily and intelligently made. *See* ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986).

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. Where a defendant affirmatively joins or approves a sentence

recommendation, the defendant cannot attack the sentence on appeal. ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989). Here, the court sentenced Thompson consistent with the joint recommendation. In any event, it cannot reasonably be argued that Thompson's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Andrew Hinkel[4] is relieved of further representing Thompson in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

[4] Although attorney Shelley M. Fite submitted the no-merit report, attorney Hinkel was later substituted as counsel in this matter.