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

2015AP446-CRNM State of Wisconsin v. Nehemiah D. Randle
(L. C. No. 2012CF3251)

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

Counsel for Nehemiah Randle has filed a no-merit report pursuant to WIS. STAT. RULE 809.32,[1] concluding no grounds exist to challenge Randle's convictions for armed robbery with threat of force, as party to a crime, and possession of a firearm by a felon. Randle has filed responses challenging his convictions, and counsel filed a supplemental no-merit report addressing Randle's concerns. Upon our independent review of the record as mandated by

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

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.

The State charged Randle with armed robbery with threat of force, as party to a crime, and possession of a firearm by a felon. Randle's pretrial motions to suppress statements and evidence were denied. Randle was convicted upon a jury's verdict of the crimes charged. Out of a maximum possible forty-year sentence for the armed robbery, the court imposed twelve years' initial confinement followed by six years' extended supervision. Out of a maximum possible ten-year sentence on Randle's felon in possession of a firearm conviction, the court imposed and stayed the maximum ten-year sentence consisting of five years' initial confinement and five years' extended supervision and placed Randle on five years' probation, consecutive to the other sentence.

Any challenge to the circuit court's denial of Randle's motion to suppress evidence would lack arguable merit. Randle sought to suppress evidence recovered as a result of the warrantless search of a home owned by Joe Robinson, the father of Randle's co-defendant, Jordan Robinson. According to the complaint, Joe Robinson gave consent for the officers to enter his home. To the extent Randle contends the officers did not have consent to *search* the home, "a party attempting to exclude evidence obtained as a result of a search or seizure that violates the Fourth Amendment must demonstrate a legitimate expectation of his own privacy in the object of the search or must himself be the person seized." ***State v. Malone***, 2004 WI 108, ¶22, 274 Wis. 2d 540, 683 N.W.2d 1.

When determining whether an individual has a reasonable expectation of privacy in an area, we ask (1) whether the individual has demonstrated an actual, subjective expectation of privacy in the area searched and in the item seized; and (2) "whether society is willing to recognize such an expectation of privacy as reasonable." ***State v. Trecroci***, 2001 WI App 126, ¶35, 246 Wis. 2d 261, 630 N.W.2d 555 (citation omitted). In his motion to suppress, Randle conceded "[t]his is not my home, I don't live here" and did not otherwise assert an expectation of privacy in the home. Because Randle failed to establish he had a reasonable expectation of privacy in his co-defendant's father's home, any challenge to the denial of this suppression motion would lack arguable merit.

The record discloses no arguable basis for challenging the denial of Randle's motion to suppress his statements to police. At a ***Miranda-Goodchild***[2] hearing, Randle conceded he was read and waived his ***Miranda*** rights. Randle argued, however, that his inculpatory statements were not voluntary because the interviewing officer represented that if Randle confessed to the armed robbery, he could "go home and … wouldn't get in any kind of trouble." Upon review of lower court proceedings involving ***Miranda-Goodchild*** hearings, this court will not upset the findings of fact unless it appears they are against the great weight and clear preponderance of the evidence. ***Norwood v. State***, 74 Wis. 2d 343, 361, 246 N.W.2d 801 (1976). When determining whether a confession or admission is voluntary, we look to the totality of circumstances. ***State v. Schneidewind***, 47 Wis. 2d 110, 117, 176 N.W.2d 303 (1970).

[2] A trial court holds a ***Miranda-Goodchild*** hearing to determine whether a suspect's rights under ***Miranda v. Arizona***, 384 U.S. 436 (1966), were honored and also whether any statement the suspect made to the police was voluntary. *See* ***State ex rel. Goodchild v. Burke***, 27 Wis. 2d 244, 264, 133 N.W.2d 753 (1965).

In order to find a defendant's statement involuntary, "there must be some affirmative evidence of improper police practices deliberately used to procure a confession." ***State v. Clappes***, 136 Wis. 2d 222, 239, 401 N.W.2d 759 (1987). Based on an audio recording of the interview and the testimony of Randle and the interviewing officers, the circuit court found "no evidence of coercion, no evidence of lack of voluntariness." The court added: "The only evidence we have here is that Mr. Randle spoke freely and voluntarily." The circuit court's findings and conclusions are supported by the record.

Any challenge to the jury's verdict would also lack arguable merit. When reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to sustaining the jury's verdict. *See* ***State v. Wilson***, 180 Wis. 2d 414, 424, 509 N.W.2d 128 (Ct. App. 1993). At trial, S. M. testified he was the only person working in the dining area of the Silver Dragon Restaurant at approximately 4 p.m. on the day of the robbery. An individual entered the Chinese restaurant asking for Mexican rice and then left with a menu. A short time later, an individual wearing a hooded sweatshirt and a hospital mask over his face entered the restaurant brandishing a gun and ordered S. M. to give him money from the cash register. Surveillance video from the restaurant showed the individual pointing the gun at S. M.'s head. S. M. testified that he gave the perpetrator his wallet and iPhone and emptied the cash register's contents, including bills and coins, into a white plastic bag. S. M. indicated he intentionally gave his iPhone knowing it could be tracked.

Milwaukee police officer Joseph Esqueda used the iPhone's tracking application to locate the phone at Joe Robinson's home, a few blocks from the restaurant. Esqueda knocked on the home's door, entered with Robinson's consent into a "kitchen area," and observed an individual, later identified as Randle, sprint down a hallway into a bedroom. Esqueda followed Randle and

saw him drop an iPhone and a white "grocery-style" bag containing loose change. After Randle's arrest, a gold coin taken from the restaurant was recovered from Randle's person.

The jury heard the audio recording of Randle's second interview with police, in which he was read and waived his ***Miranda*** rights before ultimately admitting his participation in the crime. During the interview, Randle stated that Jordan Robinson entered the restaurant to determine who was there and asked for Mexican rice before leaving. Randle admitted that he then entered the restaurant and committed the robbery to obtain money for his child's birthday. Randle described details to police that only the perpetrator would know.

To the extent there may have been inconsistencies in witness testimony, it is the jury's function to decide the credibility of witnesses and reconcile any inconsistencies in the testimony. ***Morden v. Continental AG***, 2000 WI 51, ¶39, 235 Wis. 2d 325, 611 N.W.2d 659. Moreover, a jury is free to piece together the bits of testimony it found credible to construct a chronicle of the circumstances surrounding the crime. *See* ***State v. Sarabia***, 118 Wis. 2d 655, 663-64, 348 N.W.2d 527 (1984). Further, "[f]acts may be inferred by a jury from the objective evidence in a case." ***Shelley v. State***, 89 Wis. 2d 263, 273, 278 N.W.2d 251 (Ct. App. 1979). The evidence submitted at trial is sufficient to support Randle's convictions.

Any challenge to the circuit court's decision to permit the State to reopen its case would lack arguable merit. Before trial, Randle stipulated that he had been convicted of a felony for purposes of the felon in possession of a firearm charge. The court explained the jury would "just know that you are convicted of a felony … [t]hey won't know that the felony crime was in the past." Outside the jury's presence, the State indicated it had no further witnesses. When the court noted the pretrial stipulation had not been presented to the jury, the State moved to reopen

its case over defense counsel's objection. The circuit court has discretion to reopen a case for further testimony in order to make a more complete record in the interests of equity and justice. *See* ***State v. Hanson***, 85 Wis. 2d 233, 237, 270 N.W.2d 212 (1978). Further, WIS. STAT. § 972.10(3) provides:

> The state first offers evidence in support of the prosecution. The defendant may offer evidence after the state has rested. If the state and defendant have offered evidence upon the original case, the parties may then respectively offer rebuttal testimony only, *unless* the court in its discretion permits them to offer evidence upon their original case.

(Emphasis added.) Here, the circuit court granted the motion to reopen, stating:

> It's simply a matter of fairness. This is something that the parties have clearly agreed on in advance, and the fact that [the prosecutor] did not technically do something that I think is probably appropriate does not reduce in any way the significance of the stipulation of the parties, and therefore, for the technical purpose of having the jury within the evidence informed [sic], and, of course, they don't know that anyone has rested, as far as they know there is more to come, and in fact, there is more to come, which is the announcement of the stipulation, I see no harm in granting this request to have the evidence reopened.

Because the record displays an adequate basis for the circuit court to conclude it was appropriate to let the State reopen its case, any challenge to this decision would lack arguable merit.

Any challenge to Randle's waiver of his right to testify would lack arguable merit. "[A] criminal defendant's constitutional right to testify on his or her behalf is a fundamental right." ***State v. Weed***, 2003 WI 85, ¶39, 263 Wis. 2d 434, 666 N.W.2d 485. The circuit court must therefore conduct an on-the-record colloquy with a criminal defendant to ensure that: (1) the defendant is aware of his or her right to testify; and (2) the defendant has discussed this right with his or her counsel. ***Id.***, ¶43. Here, the court engaged Randle in an on-the-record colloquy,

informing him of both his right to testify and his right to not testify. After indicating that he had sufficient time to discuss his rights with counsel, Randle confirmed he was waiving his right to testify. There is no arguable merit to challenge this waiver.

Citing a Milwaukee Police Department incident report, Randle asserts the State violated its discovery obligations by failing to disclose fingerprint or DNA testing. The incident report, however, shows only that a fingerprint was lifted from the pistol magazine and DNA samples were collected. At trial, an officer testified he did not believe any fingerprints were recovered, but he noted the gun was swabbed for DNA. The officer explained that once Randle confessed to the crimes, no processing of the samples was done. Because the record shows no testing was done, there is no arguable merit to a claim that the State failed to disclose test results. Further, under the facts of this case, there is no reason to believe further testing of the gun would have exonerated Randle.

The record discloses no arguable basis for challenging the effectiveness of Randle's trial counsel. To establish ineffective assistance of counsel, Randle must show that his counsel's performance was not within the range of competence demanded of attorneys in criminal cases and that the ineffective performance affected the outcome of the trial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). In his response to the no-merit report, Randle asserts his trial counsel was ineffective by failing to: (1) review discovery with him; (2) request latent fingerprint or DNA testing; (3) file a notice of alibi; or (4) subpoena witnesses. Randle, however, does not specify what discovery counsel should have reviewed with him, explain his alibi, or identify possible trial witnesses. Ultimately, in light of the evidence at trial and, in particular, Randle's confession, there is no arguable merit to any claim that these alleged deficiencies affected the outcome. Our review of the record, the no-merit reports, and Randle's

responses discloses no basis for challenging trial counsel's performance and no grounds for counsel to request a ***Machner***[3] hearing.

There is no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. At sentencing, Randle continued to deny any culpability or remorse for the crimes and the circuit court expressed frustration that it could not give Randle any consideration for accepting responsibility. The court nevertheless considered the seriousness of the offenses; Randle's character, including his criminal history; the need to protect the public; and the mitigating circumstances raised by defense counsel before imposing a sentence authorized by law. *See* ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197. It cannot reasonably be argued that Randle'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).

We also conclude there is no arguable basis for challenging the imposition of the DNA analysis surcharge. When Randle committed his crime, a DNA surcharge was discretionary with the circuit court. *See* WIS. STAT. § 973.046(1g) (2011-12). Here, the circuit court properly exercised its discretion, noting "DNA is an essential crime-fighting tool" used to solve "this very type of crime." The court added, "[T]he [State] looked for DNA as evidence in this case … [a]nd the DNA collection and maintenance of the database is expensive … so Mr. Randle can help in alleviating that cost for the people of the community."

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

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

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

IT IS FURTHER ORDERED that attorney Jon LaMendola is relieved of further representing Randle in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals