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DISTRICT III

May 20, 2025

To:

Hon. Sarah M. Harless
Circuit Court Judge
Electronic Notice

Thomas J. Erickson
Electronic Notice

Cherie Norberg
Clerk of Circuit Court
Eau Claire County Courthouse
Electronic Notice

Nicholas G. Witt 619024
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

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Electronic Notice

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

2023AP1680-CRNM State of Wisconsin v. Nicholas G. Witt (L. C. No. 2021CF311)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Nicholas Witt appeals from a judgment convicting him, upon his no-contest pleas, of possession of methamphetamine with intent to deliver and possession of a firearm by a felon. Attorney Thomas J. Erickson has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2023-24).¹ The no-merit report sets forth the procedural

¹ All references to the Wisconsin Statutes are to the 2023-24 version.

history of the case and addresses a suppression ruling,² Witt's pleas, and his sentences. Witt has filed a response to the no-merit report, alleging that his trial counsel provided ineffective assistance by failing to raise an additional ground for suppression, and Erickson has filed a supplemental no-merit report addressing that issue. Having independently reviewed the entire record as mandated by *Anders v. California*, 386 U.S. 738, 744 (1967), we conclude that counsel will be allowed to withdraw, and the judgment shall be summarily affirmed.

The complaint alleged that Eau Claire County Sheriff's Deputy Riley Schulner pulled over Witt's vehicle because it bore both a Minnesota license plate and a temporary Wisconsin license plate, along with three temporary license tags. Witt informed Schulner that he had just purchased the car and that the temporary tags were his and were registered to the vehicle but that he had not had time to remove the Minnesota plate. Witt acknowledged that he did not have insurance on the vehicle and that when the squad car approached him, he had pulled into the driveway of a house whose residents he did not know.

Schulner noted that Witt appeared nervous and that he lit a cigarette after Schulner returned to his squad car, which behavior Schulner had observed, in his experience, as being done to mask other odors in a vehicle. Schulner ran a records check on Witt and learned that Witt had a valid driver's license, that he had prior drug and firearm convictions, and that he was currently on "parole." Schulner also contacted another law enforcement officer, Kurt Devroy, for assistance.

² WISCONSIN STAT. § 971.31(10) permits appellate review of a suppression ruling following a guilty or no-contest plea.

Schulner returned to Witt's vehicle to check the plate on the front, and he asked Witt whether he had any weapons. Witt stated that he had a few pocket knives, which Schulner was unable to view. Schulner asked Witt to step out of the vehicle. When Devroy arrived, Schulner searched Witt's vehicle pursuant to 2013 Wis. Act 79, and Schulner discovered a container with bundles of \$20, \$50, and \$100 bills, banded together, totaling \$10,160. At that time, Witt was handcuffed and placed in the back of one of the squad cars.

Both law enforcement officers then conducted a more thorough search of the vehicle and located a Smith & Wesson 39-2 semiautomatic handgun with a loaded magazine under the driver's seat; two plastic bags, containing a substance that field-tested positive as methamphetamine; a purse containing another \$3,250 in cash; a wallet containing \$2,421 in cash; several packages with unused needles; three fixed-blade knives; several hundred unused gem baggies; several cell phones; and a vape pen with two THC cartridges.

Based on the items recovered during the traffic stop, the State charged Witt with possession of more than 50 grams of methamphetamine with intent to deliver, as a second or subsequent offense; possession of a firearm by a felon; maintaining a drug trafficking place, as a second or subsequent offense; possession of THC, as a second or subsequent offense; possession of drug paraphernalia; carrying a concealed knife; and carrying a concealed weapon. Each of the counts also included an allegation that Witt was a repeat offender.

Witt moved to suppress all of the evidence seized from his vehicle on the alleged ground that law enforcement officers lacked the reasonable suspicion required for an Act 79 search of his vehicle. *See State v. Anderson*, 2019 WI 97, ¶2, 389 Wis.2d 106, 935 N.W.2d 285. Schulner—the sole witness at the suppression hearing—testified consistently with the police

reports cited in the complaint, except that he identified Witt's status as having been on "probation" rather than "parole." In addition, Schulner testified that he had observed Witt make three left turns before he pulled him over and that the area in which the stop occurred was known as a high-crime area with a lot of drug activity. The circuit court denied the suppression motion after determining that, at a minimum, Schulner had reasonable suspicion, based on Witt's own statements, to believe that Witt was committing the crime of carrying a concealed knife by a prohibited person, contrary to WIS. STAT. § 941.231.

Witt pled no contest to possession of more than 50 grams of methamphetamine with intent to deliver and to possession of a firearm by a felon, without any penalty enhancers. In exchange, the State agreed to dismiss the remaining charges as read-in offenses and to make a joint recommendation for concurrent terms of five years' initial confinement followed by five years' extended supervision on each count, with an additional property forfeiture of the cash recovered during the traffic stop. The circuit court accepted Witt's pleas after conducting a plea colloquy, reviewing a signed plea questionnaire with attached jury instructions, and ascertaining that there was a factual basis for the pleas.

The circuit court ordered a presentence investigation report (which recommended 15 to 17 years' initial confinement followed by 7 to 8 years' extended supervision on the methamphetamine charge, with a lesser concurrent sentence on the firearm charge), and the court subsequently held a sentencing hearing. After hearing from the parties, the court discussed factors related to the severity of the offenses and Witt's character, and it explained how they related to the court's sentencing goals of protecting the public and rehabilitation. The court then accepted the parties' joint recommendation and sentenced Witt to terms of five years' initial confinement followed by five years' extended supervision on each count, to be served

concurrently to each other and any other sentence Witt was presently serving. The court also found Witt eligible for the Challenge Incarceration Program and Substance Abuse Program, and it awarded 119 days of sentence credit.

Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that the suppression ruling properly applied the relevant law to the facts of record, the plea colloquy was adequate, and the circuit court properly exercised its sentencing discretion and imposed valid sentences. We will therefore not discuss those issues further. We will briefly address why the additional ineffective assistance of counsel issue that Witt raises in his response to the no-merit report also lacks arguable merit.

Witt contends that his trial counsel should have challenged the initial traffic stop itself because there is nothing illegal about driving with temporary tags on a vehicle. Witt cites *State v. Lord*, 2006 WI 122, ¶8, 297 Wis. 2d 592, 723 N.W.2d 425, for the proposition that “a law enforcement officer cannot infer wrongful conduct based solely on the display of a temporary license plate.” Here, however, Witt was not pulled over *solely* because his vehicle was displaying temporary tags. Rather, Witt was pulled over because his vehicle was displaying *both* temporary tags from Wisconsin and a permanent plate from Minnesota. In other words, it was the potential discrepancy between the displayed permanent and temporary plates from two different states that raised an articulable suspicion that the vehicle might not be properly registered.

To the extent that Witt contends that his counsel should have argued that *Lord* should be extended to this context, we question the legal merit of that argument. In any event, the law would, at best, be unsettled, such that counsel could not be deemed deficient for failing to raise

the issue. *See State v. Hanson*, 2019 WI 63, ¶29, 387 Wis. 2d 233, 928 N.W.2d 607 (explaining that counsel is not required to take action in an area where the law is unsettled).

Our independent review of the record discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders*. Accordingly, counsel shall be allowed to withdraw, and the judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Thomas J. Erickson is relieved of any further representation of Nicholas Witt in this matter pursuant to WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals