



arguable merit to any issue that could be raised on appeal. Accordingly, the judgments of conviction are summarily affirmed. *See* WIS. STAT. RULE 809.21.

The State charged Gordee with OWI as a third offense, and possession of cocaine, bail jumping, and possession of drug paraphernalia, all as a repeater. The charges stemmed from a search following a traffic stop for failing to come to a complete stop behind the white line at an intersection with a flashing red light. Gordee moved to suppress the evidence that was obtained based on the stop, arguing that the stop was not supported by reasonable suspicion that he failed to properly stop at the intersection.

The circuit court held an evidentiary hearing on the suppression motion. The arresting officer testified that she was on patrol around 3:00 a.m. when she spotted Gordee's car, which was the only car on the road at that time. The officer testified that she followed Gordee through multiple intersections, and observed Gordee fail to come to a complete stop before the white stop line at a flashing red light. The officer's body camera video was played at the hearing, and the officer testified that, in person, she had a good view of the fact that Gordee failed to stop before the white stop line and, further, that Gordee failed to come to a complete stop at any point before proceeding through the intersection. Defense counsel argued that the video showed that Gordee's brake lights were illuminated long enough to indicate that he came to a complete stop at the intersection; that he stopped before the white stop line; and that, if he did stop after the white stop line, it was because an oncoming car was turning left into the intersection and he needed to pull forward to get a safe vantage point around it. *See* WIS. STAT. § 346.46(2)(c) (“[I]f the operator cannot efficiently observe traffic on the intersecting roadway from the stop made at the stop line or crosswalk, the operator shall, before entering the intersection, stop the vehicle at

such point as will enable the operator to efficiently observe the traffic on the intersecting roadway.”).

The circuit court found that the officer had a constitutional basis for the traffic stop because she observed Gordee fail to come to a complete stop before the white stop line, as required. The court therefore denied the suppression motion.

Pursuant to a plea agreement, Gordee pled guilty to OWI as a third offense, and possession of cocaine and misdemeanor bail jumping, both as a repeater. The paraphernalia charge, as well as the charges in another case, were dismissed and read in for sentencing purposes. The State and the defense jointly recommended that the circuit court impose six months in jail and a \$1,000 fine, thirty months of driver’s license revocation, and thirty months of ignition interlock device on the OWI charge, and withhold sentence and impose two years of probation on the cocaine and bail jumping charges, with conditions of AODA assessment and treatment and 120 days of conditional jail time, consecutive to the OWI sentence. The circuit court followed the joint recommendation. Following sentencing, the court awarded Gordee 104 days of sentence credit, on the parties’ stipulation.<sup>2</sup>

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<sup>2</sup> By prior order, this court noted that, although the circuit court awarded Gordee 104 days of sentence credit, the circuit court did not issue an amended judgment of conviction reflecting that amount. This court observed that, while the parties stipulated to the 104 days of sentence credit, nothing before this court indicated how that amount should be applied between Gordee’s sentences. We directed counsel to consider the issue and to file a supplemental no-merit report if he concluded that further proceedings as to sentence credit would be wholly frivolous.

Following that order, the circuit court issued an amended judgment of conviction awarding 104 days of sentence credit, applied to Gordee’s sentence for his OWI conviction. Counsel has filed a supplemental no-merit report concluding that there would be no arguable merit to further proceedings as to sentence credit. We accept counsel’s no-merit report as taking the position that the sentence credit has been properly applied to the OWI sentence. Nothing before this court would support a non-frivolous challenge to that assessment.

The no-merit report addresses whether: the circuit court properly denied the suppression motion; Gordee knowingly, intelligently, and voluntarily entered his guilty pleas; and there is any arguable merit to challenge the sentences imposed. This court agrees with counsel's description, analysis, and conclusion that none of these issues have arguable merit.

Gordee argues in his no-merit response that the officer was not able to properly view the white stop line from behind his car, because she was at least 100 yards behind him and it was dark out. He argues that he stopped twice, once at the white stop line and again after he passed the line when an oncoming vehicle was turning into the intersection. He points out that, on the body camera footage, his brake lights were illuminated for five seconds. However, as set forth in the no-merit report, the circuit court was entitled to credit the officer's testimony that she viewed Gordee fail to stop before the white stop line. It would be wholly frivolous to argue that the court's factual findings, based on the officer's testimony, were clearly erroneous. *See State v. Backstrom*, 2006 WI App 114, ¶9, 293 Wis. 2d 809, 718 N.W.2d 246 (“We will uphold a trial court's findings of historical or evidentiary facts as long as they are not clearly erroneous.”).

Gordee also contends that the officer lied to obtain a warrant for a blood draw. Specifically, he asserts that the officer falsely stated that Gordee was driving evasively. Rather, Gordee contends, he was doubling back on his route because he had just dropped off a passenger but needed to go back and return items that the passenger had mistakenly left in his car, and he was unfamiliar with the area. Gordee did not move to suppress the results of the blood draw, and thus the question is whether there would be arguable merit to a claim that trial counsel was constitutionally ineffective by failing to challenge the warrant. As we explain next, this court determines that a claim of ineffective assistance of counsel on that basis would be wholly frivolous.

At the conclusion of the suppression hearing, the circuit court found credible the officer's testimony that she observed Gordee double back on his route, which she considered evasive driving. There is no evidence that the officer had a reason to know about the innocent explanation for Gordee's driving behavior. Thus, any claim that the officer made a knowingly or recklessly false statement that Gordee's driving was evasive prior to the stop would have failed. *See Franks v. Delaware*, 438 U.S. 154, 155-56 (1978) (holding that a court is required to conduct a hearing on a motion to suppress evidence when a "defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included ... in the warrant affidavit, and if the allegedly false statement [was] necessary to the finding of probable cause"). Counsel was not ineffective by failing to pursue an argument that would not have succeeded. *See State v. Ziebart*, 2003 WI App 258, ¶14, 268 Wis. 2d 468, 673 N.W.2d 369.

This court's independent review of the record discloses no other potential issue for appeal.

Therefore,

IT IS ORDERED that the judgments are summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Thomas Aquino is relieved of the obligation to represent Troy Gordee, Sr., in this matter. *See* WIS. STAT. RULE 809.32(3).

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*