



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215

P.O. BOX 1688

MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880

TTY: (800) 947-3529

Facsimile (608) 267-0640

Web Site: www.wicourts.gov

DISTRICT IV

May 8, 2025

To:

Hon. Raymond S. Huber
Circuit Court Judge
Electronic Notice

John Blimling
Electronic Notice

Yvette Kienert
Clerk of Circuit Court
Waupaca County Courthouse
Electronic Notice

Ellen J. Krahn
Electronic Notice

Matthew Lee Banta
1530 Addie Pkwy.
Oshkosh, WI 54904

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

2023AP1923-CRNM State of Wisconsin v. Matthew Lee Banta (L.C. # 2020CF204)

Before Blanchard, Graham, and Taylor, 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).

Attorney Matthew Giesfeld, appointed counsel for Matthew Banta, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2023-24)¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). Attorney Ellen Krahn has substituted as appointed counsel. Banta has responded to the no-merit report. On independently reviewing the entire record, as well as the no-merit report and response, we conclude that there are no arguably meritorious appellate issues. Accordingly, we affirm.

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

Banta was charged with second-degree recklessly endangering safety, battery to a law enforcement officer, resisting an officer, and disorderly conduct, all with the use of a dangerous weapon, in addition to another count of battery to a law enforcement officer without the dangerous weapon enhancer. The charges arose from an interaction between Banta and the victim officer during an organized protest in Waupaca that was attended by several armed individuals, including Banta. According to the criminal complaint, numerous police officers were present at the protest and attempted to direct the protesters off the streets under a city ordinance prohibiting persons from obstructing traffic. Banta approached the victim officer and said that the protesters intended to continue marching. The officer advised Banta that if he did not get out of the street he would be placed under arrest, and Banta refused to move. The officer reached for Banta's arm to take him into custody, and Banta pulled away. The officer reached for Banta's backpack, and Banta turned toward the officer and pointed the rifle that he was carrying at the officer. The officer grabbed Banta by the shoulders, threw him to the ground, and attempted to hold him there. Banta kicked the officer and bit him on the forearm. The officer was ultimately able to place Banta in handcuffs and secure Banta's weapon.

Banta moved to suppress the evidence obtained during his interaction with the officer, arguing that the evidence should be suppressed because: (1) the ordinance prohibiting the obstruction of traffic violated his First Amendment rights; (2) police used excessive force in arresting him; and (3) the encounter had not been recorded on the victim officer's body camera. After an evidentiary hearing, the circuit court denied these three motions. Pursuant to a plea agreement, Banta pled no-contest to the count of battery to a law enforcement officer without the dangerous weapon enhancer, and the other counts were dismissed and read in for sentencing purposes. The parties jointly recommended that the circuit court withhold sentence and impose

three years of probation. The circuit court followed the joint sentencing recommendation, and also imposed a fine of \$1,500 plus court costs.

The no-merit report addresses whether there would be arguable merit to a challenge to the validity of Banta's no-contest plea, any of the circuit court's decisions denying the suppression motions, or the sentence imposed by the court. On reviewing the record, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit.

Banta has filed a response to the no-merit report asserting the following. On the day of his arrest, Banta was part of an armed escort of a group of protestors, based on the potential for conflict with counter-protesters. When the protestors and the armed escorts gathered, police "handed out papers stating that [the protestors] would be harassed and possibly arrested" based on the city ordinance. When the victim officer was "harassing" another protester, Banta stepped in between them. Banta told the officer that if the officer let them march, they would be done soon. Banta turned away. Banta asserts that the officer then "assaulted" him and that Banta "acted in self-defense."

To the extent that Banta is asserting that he had a claim of self-defense to the battery charge that he could have raised at trial, Banta waived the right to raise such a defense when he entered a no-contest plea. *See State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886 (valid no-contest plea waives all nonjurisdictional defects and defenses).

Alternatively, if Banta is suggesting that his trial counsel was constitutionally ineffective for failing to advise Banta to reject the plea offer and go to trial on a theory of self-defense, nothing before this court supports a claim of self-defense. "A person is privileged to ... intentionally use force against another for the purpose of preventing or terminating what the

person reasonably believes to be an unlawful interference with his or her person by such other person.” WIS. STAT. § 939.48(1). The statutory right to self-defense applies when an officer uses excessive force during an arrest. *See State v. Hobson*, 218 Wis. 2d 350, 368 n.17, 577 N.W.2d 825 (1998). Thus, if an officer employs excessive force in making an arrest, the person arrested may invoke the self-defense privilege and counter with reasonable force to protect against the unreasonable force. *See State v. Reinwand*, 147 Wis. 2d 192, 201, 433 N.W.2d 27 (1988). However, “[o]ne who resists a lawful arrest not only commits a criminal offense by so doing, ... but also justifies the officer in employing such force as is reasonably necessary to overcome the resistance and accomplish the arrest.” *Id.* at 200-01.

Here, according to the criminal complaint, testimony at the preliminary hearing, and testimony at the suppression hearing, when the officer attempted to arrest Banta for violating a city ordinance, Banta raised the rifle he was carrying and pointed it at the officer. The officer then tackled Banta to the ground to secure him and the weapon, and Banta kicked and bit the officer. In his no-merit response, Banta does not dispute those facts. Rather, Banta states only that, after he turned away from the officer, he was “assaulted” and “acted in self-defense.” However, the facts before this court would not support a claim that Banta reasonably believed that he needed to point the rifle at the officer to defend himself from harm, or that the officer used excessive force in tackling Banta and holding him on the ground after Banta pointed the gun at him. Thus, Banta does not provide any factual support for a self-defense claim, and therefore he fails to show that there would be arguable merit to an argument that trial counsel was ineffective in not advising Banta about an affirmative defense that lacked a factual basis. *See State v. Toliver*, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994) (counsel is not ineffective for failing to pursue a meritless claim).

Banta also argues that Waupaca's local ordinance is unconstitutional, and that Banta's arrest was therefore illegal. However, as set forth in the no-merit report, there would be no arguable merit to a challenge to the circuit court's decision denying Banta's suppression motion that raised that issue because, even if the ordinance is unconstitutional, police were entitled to rely on the local ordinance in good faith. *See State v. Prado*, 2020 WI App 42, ¶67, 393 Wis. 2d 526, 947 N.W.2d 182 (although the exclusionary rule generally bars evidence at trial that was obtained by an unconstitutional search or seizure, it does not apply to exclude evidence obtained when law enforcement acted in objective good faith reliance on settled law). Thus, even if Banta could have eventually persuaded the courts that the ordinance is unconstitutional, the officer was entitled to rely on the ordinance at the time of the arrest.

Banta also asserts that his second amendment rights were violated because he was lawfully carrying a firearm during the protest. However, Banta was not charged or convicted of any crime based on simply possessing a firearm at the protest. Accordingly, there would be no arguable merit to any issue based on a claim that Banta's second amendment rights were violated.

On our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

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

IT IS FURTHER ORDERED that Attorney Ellen Krahn is relieved of any further representation of Matthew Banta in this matter. *See* 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