

STATE OF WISCONSIN  
COURT OF APPEALS  
DISTRICT X  
Case No. XXXXAPXXXX CRNM

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN SMITH,

Defendant-Appellant.

---

On Notice of Appeal to Review a Judgment of Conviction  
Entered in the Circuit Court for Bay County,  
the Honorable Grover Cleveland, Presiding

---

NO MERIT BRIEF OF DEFENDANT-APPELLANT  
PURSUANT TO WIS. STAT. RULE 809.32

---

[NAME OF ATTORNEY]  
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

## **ISSUES PRESENTED**

1. Did the trial court err in denying the defense motion to suppress evidence and dismiss the charges?
2. Was Mr. Smith's plea knowingly, intelligently, and voluntarily entered?
3. Did the trial court misuse its discretion in sentencing Mr. Smith?

## **STATEMENT OF THE CASE/STATEMENT OF FACTS**

A criminal complaint was filed on August 31, 2011, charging Mr. Smith with third offense operating a motor vehicle while intoxicated and third offense operating with a prohibited alcohol concentration, both with fine enhancers. (2).

The defense filed a motion seeking suppression of the evidence and dismissal of the charge, alleging Mr. Smith was illegally stopped. (14). A hearing on the motion was held before the Honorable Grover Cleveland on April 16, 2012, at which Officer James Friendly of the Bay City police department testified.

Officer Friendly stated that at about 12:58 a.m. on August 4, 2011, he was on patrol on Main Street in Bay City, approaching County Highway V when he observed a motorcycle turn off County Highway V southbound onto Main Street. As the motorcycle completed the turn, it revved its engine. This caught the officer's attention as he believed it to be excessive in violation of a village ordinance for disorderly conduct with a motorcycle. Officer Friendly then

turned around and performed a traffic stop of the vehicle. (45:5, 7-8). Mr. Smith was the driver of the motorcycle. (45:5-6). Before Officer Friendly could explain why his stopped him, Mr. Smith apologized for revving his engine and acting “stupid.” (45:7).

Officer Friendly also testified that based on his own personal experience as a motorcyclist for the last seven years, there was no reason for the engine to be revved under these circumstances. (45:7). He stated the sound on the video of the incident was slighted muffled, and that what he heard was louder than the video. (45:7-10).

Judge Cleveland denied the motion finding both that the officer was credible, and that there was reasonable suspicion for the stop. (45:18-20).

Mr. Smith then pleaded guilty to operating a motor vehicle while intoxicated as a third offense pursuant to a plea agreement with the state. Under the terms of the agreement, in return for Mr. Smith’s plea the state would dismiss the charge of operating with a prohibited alcohol level and the fine enhancer. At sentencing it would recommend OWI court with 11 months imposed and stayed and two years probation with various conditions, including 14 days in jail and a \$750 fine. (46:2-10). The court followed the sentencing recommendation. (45:12).

A notice of appeal was filed on September 27, 2012. (43).

## ARGUMENT

### I. Did the Trial Court Err in Denying the Defense Motion to Suppress Evidence and Dismiss the Case?

A potential claim could be raised that Judge Cleveland erred in ruling that Officer Friendly possessed reasonable suspicion to stop Mr. Smith. After a review of the motion hearing testimony and the relevant law, counsel believes such an argument would be frivolous.

The Fourth Amendment provides protection against unreasonable searches and seizures. To avoid violating this protection, police must “have a reasonable suspicion, grounded in specific articulable facts and reasonable inferences from those facts, that an individual is [or was] violating the law in order to justify an investigatory stop. *State v. Colstad*, 2003 WI App 25, ¶8, 260 Wis. 2d 406, 659 N.W.2d 394. An investigatory stop is permissible when the person’s conduct may constitute only a civil forfeiture. *State v. Krier*, 165 Wis. 2d 673, 678, 478 N.W.2d 63 (Ct. App. 1991).

In reviewing an order denying a motion to suppress evidence, the findings of fact by the trial court are upheld unless against the great weight and clear preponderance of the evidence. *Id.* at 676. However whether a stop is constitutional is a question of law subject to independent review. *Id.*

Here Officer Friendly testified that based on his experience there was no reason for Mr. Smith to rev the engine of the motorcycle after making the turn onto Main Street and that it was excessive and loud. He initiated the traffic stop as he believed this revving of the engine violated

the municipal ordinance proscribing disorderly conduct with a motor vehicle.\*

Judge Cleveland heard the evidence and found Officer Friendly to be credible. His finding was based in part on his review of the video of the incident as he explained:

I must say that when I watched the video, to me it sounded pretty loud. I mean, to me it sounded like an engine that was really revving. So I don't find anything incredible – in fact, I find the officer to be credible on that point. I think his observations were supported by the video.

(45:19). Because the court concluded the stop “was based on specific observations that this motorcycle’s engine was excessively revving,” it ruled there was a reasonable suspicion for the stop and denied the motion. (45:20).

Counsel believes any argument that an independent review of Judge Cleveland’s ruling regarding the constitutionality of the stop would result in a different conclusion would be without merit.

## II. Should Mr. Smith Be Permitted to Withdraw His Plea as It Was Not Knowingly, Intelligently, and Voluntarily Entered?

It might be argued on behalf of Mr. Smith that he should be permitted to withdraw his plea. However there appears to be no legal basis to do so as a review of the plea hearing establishes he voluntarily entered his plea with the full knowledge and understanding of the elements of the offense, the penalties he faced, the constitutional rights he surrendered, and the facts in support of the plea.

---

\* Bay City, WI, Code § 10.03(2)(a).

A motion to withdraw a plea is addressed to the discretion of the trial court, *State v. Van Camp*, 213 Wis. 2d 131, 139, 569 N.W.2d 577 (1997), and will be granted only when necessary to correct a manifest injustice. *State v. Williams*, 2000 WI 78, ¶13, 236 Wis. 2d 293, 613 N.W.2d 132. This standard is met when a defendant establishes his plea was not knowingly, intelligently and voluntarily entered. *State v. Brown*, 2006 WI 100, ¶18, 293 Wis. 2d 594, 716 N.W.2d 906.

Pursuant to Wis. Stat. § 971.08(1)(a) and *Brown*, prior to accepting a plea the trial court must address the defendant personally to assess his capacity to understand the issues to be addressed at the hearing and to determine the plea is voluntary and made with an understanding of the nature of the charges and the potential punishment. The trial court did this in Mr. Smith's case.

At the beginning of the plea hearing, the prosecutor set forth the terms of the plea agreement which called for a dismissal of one of the counts as well as the fine enhancer and, at sentencing, a joint recommendation of OWI court, and an imposed and stayed sentence with probation and various conditions. (46:2-4). Mr. Smith indicated his understanding of the agreement. (46:5).

The court then advised Mr. Smith that it was likely to follow the recommendation of the parties, but that it was not required to do so, and proceeded to explain the penalties which could be imposed for the offense. Mr. Smith stated he understood this. (46:5). He further acknowledged reviewing the Plea Questionnaire and Waiver of Rights form and the Elements of the Offense form with his attorney, understanding all of the information contained therein, and signing the former. (46:6).

Judge Cleveland identified the elements of the offense as well as the constitutional rights which accompany a jury trial, and ascertained that Mr. Smith understood each of them and that it was his intention to waive his right to a jury trial and enter a plea to the charge. (46:5-6, 7-8). The parties stipulated to the facts in the criminal complaint for a factual basis and Mr. Smith personally entered a guilty plea and acknowledged it would be a third offense. (46:9).

The record demonstrates the trial court met its obligation to ensure Mr. Smith's plea was knowingly, intelligently, and voluntarily entered.

### III Did the Trial Court Misuse Its Discretion in Sentencing Mr. Smith?

Mr. Smith may wish to challenge the sentence he received. However the parties made a joint recommendation with respect to the sentence to be imposed, which Judge Cleveland adopted. (46:2-4, 10-13). Pursuant to *State v. Sherreiks*, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989), a defendant may not join in a sentence or affirmatively approve it and later challenge it on appeal.

## CONCLUSION

For the reasons set forth above, counsel believes there are no issues of arguable merit to be raised on behalf of Mr. Smith. Accordingly, she asks that she be released from any obligation to represent Mr. Smith further in this case.

Dated this 4<sup>th</sup> day of February, 2013.

Respectfully submitted,

[NAME OF ATTORNEY]  
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

**CERTIFICATION IN COMPLIANCE  
WITH 809.32(1)(b)**

I hereby certify that I have discussed with my client all potential issues identified by me and by my client and the merit of an appeal on these issues, and I have informed my client that he/she must choose one of the following 3 options: 1) to have me file a no-merit report; 2) to have me close the file without an appeal; or 3) to have me close the file and to proceed without an attorney or with another attorney retained at my client's expense. I have informed my client that a no-merit report will be filed if he/she either requests a no-merit report or does not consent to have me close the file without further representation. I have informed my client that the transcripts and circuit court case record will be forwarded at his/her request. I have also informed my client that he/she may file a response to the no-merit report and that I may file a supplemental no-merit report and affidavit or affidavits containing matters outside the record, possibly including confidential information, to rebut allegations made in my client's response to the no-merit report.

Dated this 4<sup>th</sup> day of February, 2013.

Signed:

\_\_\_\_\_  
[NAME OF ATTORNEY]  
[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant

**CERTIFICATE OF COMPLIANCE  
WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this no-merit brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic no-merit brief is identical in content and format to the printed form of the no-merit brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this no-merit brief filed with the court and served on all opposing parties.

Dated this 4<sup>th</sup> day of February, 2013.

Signed:

---

[NAME OF ATTORNEY]

[State Bar No.]

[Contact information]

Attorney for Defendant-Appellant