

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

July 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 95-3355-CR-NM**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**KEVIN J. PIERCE,**

**Defendant-Appellant.**

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed.*

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

PER CURIAM. Kevin Pierce appeals his conviction of attempted first-degree sexual assault. Pursuant to RULE 809.32, STATS., and *Anders v. California*, 386 U.S. 738 (1967), appellate counsel filed a no merit report. Thereafter, Pierce became incompetent to participate in the no merit procedure.

Based upon our independent review of the entire record, as mandated in *Anders*, we conclude that it discloses no issue of arguable merit. Because Pierce

is incompetent and therefore unable to effectively participate in the no merit proceedings, we conclude that Pierce is not foreclosed in the future from raising issues that he would have been able to raise now but for his incompetency. We affirm the judgment of conviction.

After filing the no merit report, appellate counsel filed a motion for a competency evaluation of Pierce, stating that when she met with Pierce after his conviction, he appeared to understand the purpose of the report and his role in the no merit procedure. However, after filing the no merit report, she received his letter and had a telephone call with him that demonstrated his confusion. She learned that ch. 51, STATS., commitment proceedings were pending. Because she questioned his competency, she requested that we hold the no merit proceedings in abeyance pending determination of Pierce's competency.

Pursuant to *State v. Debra A.E.*, 188 Wis.2d 111, 523 N.W.2d 727 (1994), we granted appellate counsel's motion for a remand to determine competency. On remand, based upon a report of Dr. Kenneth Smail of the forensic unit of the Milwaukee County Mental Health Complex, the trial court determined that Pierce was incompetent to proceed with the appellate process due to (1) schizoaffective disorder, (2) polysubstance abuse and (3) anti-social personality disorder. The court appointed a guardian ad litem to protect Pierce's interests in the appellate process. The case is now before us following remand.

## ISSUES

There are two general issues: (1) the appropriate procedure with respect to the no merit process with an incompetent defendant, and (2) whether the record reveals any issue of arguable merit by which to attack Pierce's conviction.

## INCOMPETENCY ISSUE

Although not in reference to a no merit report, our supreme court addressed the procedure to be used when defendant's competency becomes an issue during postconviction proceedings. See *Debra A.E.* It concluded that the "circuit court should determine a defendant's competency when it has reason to believe that the defendant is unable ... to assist counsel or to make decisions committed by law to the defendant with a reasonable degree of rational understanding." *Id.* at 119, 523 N.W.2d at 729. To protect an incompetent defendant's rights to meaningful postconviction relief, as well as the interest in expediting postconviction relief and reaching a final determination on the merits,

the following procedures are to be applied as appropriate: 1) continuation of postconviction relief proceedings, 2) continuances or enlargement of time limits for postconviction relief, 3) appointment of temporary guardians and 4) permitting defendants who regain competency to raise issues at a later proceeding that could not have been raised earlier because of incompetency.

*Id.* at 119, 523 N.W.2d at 729-30.

The court observed that whether a person is competent depends on the mental capacity that the task at issue requires. *Id.* at 125, 523 N.W.2d at 732. Also, "the statutes do not require circuit courts to rule on competency during the postconviction relief proceedings," but "constitutional due process guarantee mandates fair procedures on appeals as of right ...." *Id.* at 128, 523 N.W.2d at 733. The court noted that "Meaningful postconviction relief can be provided even though a defendant is incompetent." *Id.* at 130, 523 N.W.2d at 734.

After sentencing, if the court has reason to doubt defendant's competency, it shall, as an exercise of discretion, determine a method for evaluating defendant's competency, such as affidavits, stipulation, observation or professional examination. *Id.* at 132, 523 N.W.2d at 734. A ruling serves three purposes: (1) it sets the stage for seeking the appointment of a temporary guardian to make decisions committed by law to the defendant personally, not counsel; (2) it preserves defendant's rights to raise issues in later proceedings

that he did not raise earlier because he was incompetent, and (3) aids a circuit court in determining whether it appears counsel is necessary in a later § 974.06, STATS., motion. *Debra A.E.*, 188 Wis.2d at 132-33, 523 N.W.2d at 735.

The court further concluded that pending the determination of incompetency, defense counsel should initiate or continue postconviction proceedings when issues rest on the circuit court record, do not necessitate the defendant's assistance or decision making and "involve no risk to the defendant." *Id.* at 133, 523 N.W.2d at 735. This ensures that the defendant will not suffer from the delay of meritorious claims. *Id.* at 133-34, 523 N.W.2d at 735. Pending or after a ruling on competency, if proceedings cannot be initiated or continued because issues necessitate defendant's assistance, counsel may request a continuance. *Id.* at 134, 523 N.W.2d at 735-736. Also, if the defendant is found to be incompetent, counsel may request the appointment of a guardian to make decisions the defendant is required to make, such as "whether to initiate postconviction relief and, if so, what objectives to seek." *Id.* at 135, 523 N.W.2d at 736.

Finally, the court concluded that defendants who are incompetent at the time they seek postconviction relief should, "after regaining competency, be allowed to raise issues at later proceeding that could not have been raised earlier because of incompetency." For example, *State v. Escalona-Naranjo*, 185 Wis.2d 168, 517 N.W.2d 157 (1994), would not bar an incompetent defendant from invoking § 974.06, STATS., after being restored to competency. *Debra A.E.*, 188 Wis.2d at 135-36, 523 N.W.2d at 736.

Applying *Debra A.E.* to the no merit procedure leads to the conclusion that (1) the no merit procedure should continue; (2) the circuit court should make a competency determination; and (3) in the event the defendant is found incompetent, this court should rule that he would not be barred from later raising issues he would have been able to raise now but for incompetency.

Here, appellate counsel had already met and discussed the no merit procedure with Pierce and filed the no merit report before she had reason to question his competency. Therefore, an essential purpose of determining competency and appointing a temporary guardian is eliminated; counsel and defendant had already decided "whether to file an appeal and what objectives

to pursue." *Id.* at 125-26, 523 N.W.2d at 732. Further, commitment proceedings were being pursued, thus ensuring that the defendant's personal needs were being addressed.

Because a no merit report does not contemplate the pursuit of meritorious claims, § 809.32, STATS., and *Anders* require us to independently evaluate the record to determine whether any potential claims of arguable merit exist. Any delay in the no merit proceedings, with respect to potential appellate issues contained in the record, would not benefit Pierce, because in the event the record contains error, an appeal based on such error would not proceed expeditiously.

Consequently, a competency determination at this point protects the defendant's rights to raise new issues at a later proceeding. *Id.* at 132-33, 523 N.W.2d at 735. Therefore, it comports with the instructions of *Debra A.E.*, for this court to proceed with the no merit evaluation established in *Anders*. Once our independent review of the record is complete, if we conclude that the record discloses no potential issue of any arguable merit, the conviction may be affirmed and counsel relieved of further obligation to represent Pierce on appeal. Because Pierce is incompetent, he would not be foreclosed from later raising new issues that he could not have raised at this time due to his incompetency. See *Debra A.E.*, 188 Wis.2d at 135-36, 523 N.W.2d at 736. If we would uncover an issue of arguable merit, then we would reject the report and require appellate counsel to pursue postconviction proceedings, governed by *Debra A.E.*

## NO MERIT ISSUES

### 1. Facts of the Offense

The victim, age twenty-six, testified that she had been addicted to cocaine but had not used it in two and one-half months. She had been convicted of a crime once before. On the night of the assault, she was at home getting high on cocaine by herself. She got depressed and around midnight decided to walk to her mother's. At Third and Center Streets, she decided to use the phone when Pierce flashed money at her. He asked her if she wanted to do a blow, which she interpreted to mean did she want to do cocaine together.

She said yes, and they started walking to find a place to do the coke. When he did not pull out any drugs, she got nervous and said she would pass.

The victim testified that Pierce grabbed her by the face and said that he was going to rape her. He directed her to remove her pants and he opened his pants. He put his penis in her mouth for a short time; he had a hold of her, and was pulling her up a hill. He picked up broken glass and threatened to murder her. When he was unfastening his pants, she ran away. He caught her and punched her. She screamed and scratched him. After fighting, she got away, ran to the middle of a street where a squad car was passing. She was hysterical, nude, bleeding, and the officers gave her a blanket and took her to the hospital. She gave a false name and address because of outstanding warrants. She later identified Pierce from photos and a line-up.

## 2. Trial and Sentencing

Pierce was charged with one count of second-degree sexual assault and one count of attempted first-degree sexual assault. At a *Miranda-Goodchild* hearing, the trial court determined that Pierce had given a voluntary statement to the officers. Pierce's statement was that he was home asleep during the assault. Counsel for the prosecution and defense characterized the case as one of credibility of the victim.

Defense counsel challenged the victim's credibility in a number of ways. R30:103 Counsel's theory of defense was that the victim was soliciting and got into a fight with Pierce, her customer, over what the money was to be exchanged for.

The jury acquitted Pierce of the second-degree sexual assault but found him guilty of the attempted first-degree sexual assault. Before sentencing, defense requested the court to order a competency evaluation, because Pierce was "rather out of touch with what's going on and even a bit delusional." He was not hearing voices and was not hallucinating, but had delusions with regard to events in the jail. A competency evaluation was ordered.

On March 10, 1995, Michael Held, M.D., a psychiatrist, reported to the trial court that "[a]lthough he does have a longstanding psychiatric history of a schizophrenic-type illness, Mr. Pierce maintains an adequate understanding of his legal situation, is able to describe in rational terms circumstances around the alleged offense which constitute his own version of the events. He is also able to understand the basic proceedings of a court trial" and was competent to stand trial.

At the subsequent sentencing hearing, the trial court sentenced Pierce to twenty years in prison, based upon the seriousness of the offense, Pierce's prior record that indicated his character, and the need to protect the community.

### 3. Potential Appellate Issues

The no merit report addresses three potential issues: (1) sufficiency of the evidence; (2) whether Pierce is entitled to a new trial after an officer testified that Pierce had been arrested for sexual assault and a couple of warrants; and (3) whether the twenty-year prison sentence is a reasonable exercise of sentencing discretion. Pierce filed a response to the no merit report, raising credibility of the victim and sentencing discretion.

Because the record discloses sufficient evidence to support the conviction, any challenge with respect to this issue would lack arguable merit. An appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). The question of credibility of a witness is for the jury, and not for this court, to determine. *Nabbefeld v. State*, 83 Wis.2d 515, 529, 266 N.W.2d 292, 299 (1978). With regard to a single witness's testimony, a jury "may choose to believe one assertion and disbelieve the other." *Id.* On review of jury findings of fact, viewing the evidence most favorably to the state and the conviction, we ask only if the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. *State v. Alles*, 106 Wis.2d 368, 367-68, 316 N.W.2d 378, 382 (1982). Also,

[i]t has been universally held that logical consistency in the verdict as between the several counts in a criminal information is not required. The verdict will be upheld despite the fact that the counts of which the defendant was convicted cannot be logically reconciled with the counts of which the defendant was acquitted.

*Nabbefeld*, 83 Wis.2d at 529-30, 266 N.W.2d at 299 (citation omitted).

The jury acquitted Pierce of second-degree sexual assault but found Pierce guilty of attempted first-degree sexual assault, contrary to §§ 940.225(1)(b) and 939.32, STATS. To support the conviction, the following elements must have proved beyond a reasonable doubt: (1) sexual intercourse with the victim; (2) without consent; (3) by use or threat of an article reasonably believed by the victim to be a dangerous weapon; (4) intent to commit the sexual assault and (5) that the defendant did an act that unequivocally demonstrated he intended and would have committed the offense except for the intervention of some other person or extraneous factor. *See id.*

The victim testified to the effect that Pierce grabbed her, threatened to rape her, forced her to commit fellatio, used broken glass to threaten to murder her, forced her to undress, opened his pants, and punched her. After fighting him off, she was found in the street, nude, bleeding and hysterical. It was the duty and the responsibility of the jury to consider and determine the credibility of the witnesses based upon their general demeanor. *See Nabbefeld*, 83 Wis.2d at 529, 266 N.W.2d at 299. The jury could have believed the victim's testimony, but disbelieved her assertion of nonconsensual fellatio. Her testimony supports the findings that without her consent, Pierce grabbed her, intending to rape her, using a dangerous weapon to threaten her, and would have done so if she had not fought him off and gotten away. This assessment of credibility is within the province of the jury, and the record demonstrates no issue of arguable merit with respect to the sufficiency of the evidence.

Next, the record reveals no issue of arguable merit with respect to the trial court's discretionary decision to deny Pierce's motion for a mistrial when an officer testified that Pierce was arrested for sexual assault and a couple

of warrants. Officer Dale Jackson testified to interviewing Pierce after his arrest. He testified that he began the interview by introducing himself and explaining to Pierce that he had been arrested for sexual assault and a couple of warrants. Defense counsel moved for mistrial based on the officer mentioning the warrants.

A motion for a mistrial is addressed to trial court discretion. In view of the entire proceeding, the court must determine whether the error is sufficiently prejudicial to require a new trial. *State v. Pankow*, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). Here, the trial court struck the officer's answer in its entirety and instructed the jury to disregard it. The jury is presumed to follow the instructions given it. *See id.* The record reveals therefore that any possible prejudice from the answer was cured by the immediate instruction to the jury. As a result, the alleged error presents no issue of arguable merit.

Next, we conclude that the record reveals no arguable basis to challenge the trial court's sentencing discretion. A review of the sentencing court's discretion is highly deferential. *See Ocanas v. State*, 70 Wis.2d 179, 183, 233 N.W.2d 457, 460 (1975). The sentencing court considered the seriousness of the offense, Pierce's background and character, and the needs of the community. The record discloses that sentencing was held in abeyance pending a psychiatric evaluation. The psychiatrist reported that although Pierce had a mental illness, he was able to understand the proceedings and was competent to participate in the legal proceedings. The record discloses that the trial court considered proper factors, and fails to reveal any arguable merit to a challenge to sentencing discretion.

Next, we conclude that Pierce's response fails to raise any issues of arguable merit. His response addresses the victim's credibility and sentencing discretion, two issues that we have already discussed. Our independent review of the record does not reveal any other potential issue of arguable merit. Therefore, we relieve Attorney Donna Hintze of further responsibility to represent Pierce in this appeal and affirm the judgment of conviction. Because Pierce has been determined to be incompetent at this time, he is not foreclosed from raising at a later time any issue that he could have raised now but for his incompetency.

*By the Court.* – Judgment affirmed.