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DISTRICT III

December 5, 2023

To:

Hon. Melissia R. Mogen
Circuit Court Judge
Electronic Notice

Jacqueline Baasch
Clerk of Circuit Court
Burnett County Courthouse
Electronic Notice

Megan Elizabeth Lyneis
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Nahom Tesfalidet 715643
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You are hereby notified that the Court has entered the following opinion and order:

2022AP1070-CRNM State of Wisconsin v. Nahom Tesfalidet (L. C. No. 2020CF41)

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).

Nahom Tesfalidet appeals from a judgment convicting him of fleeing or attempting to elude an officer, as a repeat offender. Attorney Megan Lyneis has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2021-22).¹ The no-merit report sets forth the procedural history of the case and discusses whether Tesfalidet has any arguably meritorious basis to challenge his plea or sentence. Tesfalidet has filed a response to the no-merit report alleging: (1) a double jeopardy violation; (2) judicial bias at sentencing;

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

(3) prosecutorial misconduct; and (4) ineffective assistance of counsel. 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 Tesfalidet led police officers from several different law enforcement agencies on a high speed chase of up to 105 miles per hour that crossed the state line from Minnesota into Wisconsin. The officers eventually apprehended Tesfalidet and a female passenger after setting out spike strips to deflate the tires on the vehicle Tesfalidet was driving. Upon arresting Tesfalidet, the officers searched the vehicle and recovered drugs and a methamphetamine pipe. Based on this incident, the State charged Tesfalidet with: (1) a second or subsequent offense of possession of methamphetamine (as a party to a crime); (2) fleeing or attempting to elude an officer (as a repeat offender); (3) a second or subsequent offense of possession with intent to deliver THC (as a party to a crime); and (4) possession of drug paraphernalia (as a party to a crime).

The circuit court dismissed Counts 1, 3 and 4, on Tesfalidet's motion under WIS. STAT. § 961.45, after Tesfalidet was convicted in Minnesota on drug charges arising from the same incident. Tesfalidet then pled guilty to the enhanced fleeing charge, with both parties free to argue at sentencing. The court accepted Tesfalidet's plea after conducting a plea colloquy and reviewing Tesfalidet's signed plea questionnaire, and it ordered a presentence investigation report (PSI).

At the sentencing hearing, the State recommended a sentence of eighteen months' initial confinement followed by twenty-four months' extended supervision, to be served consecutive to

the Minnesota sentences. Tesfalidet requested that the circuit court impose probation, consistent with the two-year term of probation recommended in the PSI.

The circuit court commented that it was not impressed with the PSI, which it felt lacked thoroughness. The court stated that the offense was very serious because Tesfalidet had endangered his passenger, law enforcement, and the public by the speed at which he was driving, and he had not stopped until forced to do so. The court observed that “situations like this” made worse an already “difficult time” for both law enforcement and people being stopped. The court discussed Tesfalidet’s extensive criminal history—which included domestic abuse, property damage, and driving after revocation of his license—and it noted that the current offense demonstrated that Tesfalidet continued down a “criminal path.” The court acknowledged that Tesfalidet had some substance abuse issues, observing that he appeared to use alcohol and drugs to avoid other issues and problems in his life. The court concluded that probation would unduly depreciate the seriousness of the offense, and it sentenced Tesfalidet to eighteen months’ initial confinement followed by eighteen months’ extended supervision, to be served consecutive to the Minnesota sentences.

Upon reviewing the record, we agree with counsel’s description, analysis, and conclusions that the plea colloquy was adequate and the sentence was authorized by law. We further note that Tesfalidet does not claim that his plea was unknowingly or involuntarily entered or that his sentence was illegal. We will therefore not discuss those issues further. We will briefly address why the issues Tesfalidet raises in his response to the no-merit report also lack arguable merit.

First, the PSI relates that Tesfalidet was also convicted in Minnesota of fleeing a police officer in a motor vehicle. Tesfalidet’s convictions in both Minnesota and Wisconsin on charges arising from the same high-speed chase do not violate the Double Jeopardy Clause. Under the dual sovereignty doctrine, there is no constitutional bar to successive prosecutions for the same offense by different sovereigns. *State v. Hansen*, 2001 WI 53, ¶10, 243 Wis. 2d 328, 627 N.W.2d 195. WISCONSIN STAT. § 961.45, which sets out an exception to the dual sovereignty doctrine for controlled substance offenses, does not apply to other types of crimes. Moreover, driving on Wisconsin roads after crossing state lines constituted a separate act.

Second, the record does not show any judicial bias at sentencing. In analyzing a claim of judicial bias, we begin with the presumption that a judge is fair, impartial, and capable of ignoring any biasing influences. *State v. Gudgeon*, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. To overcome that presumption, a party must demonstrate the objective² existence of “actual bias” (i.e., that the judge in fact treated the party unfairly), or the “appearance of bias” (i.e., that there are circumstances present under which “a reasonable person—taking into consideration human psychological tendencies and weaknesses—[would conclude] that the average judge could not be trusted to ‘hold the balance nice, clear and true’”). *Id.*, ¶¶20-24. Opinions formed by a judge based upon facts introduced or events occurring during the course of a current or prior proceeding involving a party do not constitute the basis for a bias or partiality motion unless they display “a deep-seated favoritism or antagonism that would make fair judgment impossible.” *State v. Rodriguez*, 2006 WI App 163, ¶36, 295 Wis. 2d

² Although a judge may also be subjectively biased, that is a determination that can only be made by the judge himself or herself. *State v. McBride*, 187 Wis. 2d 409, 415-16, 523 N.W.2d 106 (Ct. App. 1994).

801, 722 N.W.2d 136; *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) (judicial rulings alone almost never constitute a valid basis for a partiality motion).

Here, Tesfalidet argues that the circuit court judge treated him unfairly by making his sentence consecutive to his Minnesota sentence arising out of the same conduct. But the court explained that Tesfalidet endangered people in two different states. Tesfalidet also complains that the court placed too much emphasis on his criminal history and gave too little regard to the PSI's recommendation. Weighing relevant factors, however, is precisely what the court is required to do at sentencing. Tesfalidet additionally alleges that the court retaliated against him for complaining about a history of racial profiling and harassment by the police. That allegation is not supported by anything in the record. Rather, the record shows that the court based its sentencing decision upon proper factors and the facts of record, not upon any personal animosity toward Tesfalidet.

Third, Tesfalidet alleges there is a "good chance" that the initial prosecutor assigned to this case, Daniel Steffen, allowed Tesfalidet's female passenger to exchange sexual favors for leniency. This allegation is based upon Steffen's conduct in other cases, for which Steffen was prosecuted and convicted. Tesfalidet further alleges that the Burnett County district attorney's office has a pattern of making improper advances toward female defendants based upon the conduct of former prosecutor, William Nortrine. Neither of these allegations has any bearing on the validity of Tesfalidet's own plea or sentence, however. Specifically, Tesfalidet does not allege that any prosecutor made improper advances or offers of leniency to him.

Fourth, Tesfalidet alleges that his trial counsel, Michelle Erdman, provided ineffective assistance by failing to adequately communicate with him or prepare for his sentencing hearing.

Tesfalidet does not, however, identify any actions that counsel took, or failed to take, that would have altered his decision to enter a plea or had any likely effect upon his sentencing. Therefore, even assuming for the sake of argument that counsel's performance was deficient in some manner, Tesfalidet could not demonstrate the prejudice necessary to obtain relief on a claim of ineffective assistance of counsel.

In addition to the issues discussed by counsel and Tesfalidet, we note that Tesfalidet waived the right to personally appear at the plea and sentencing hearings and instead appeared by videoconference in order to avoid delays caused by Covid restrictions, which were then in effect. *See State v. Soto*, 2012 WI 93, ¶46, 343 Wis. 2d 43, 817 N.W.2d 848. 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.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Megan Elizabeth Lyneis is relieved of further representation of Nahom Tesfalidet in these matters. *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