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DISTRICT II

January 31, 2024

To:

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Circuit Court Judge
Electronic Notice

Chris Koenig
Clerk of Circuit Court
Sheboygan County Courthouse
Electronic Notice

Roberta A. Heckes
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Alton Stephon Lucas #592012
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You are hereby notified that the Court has entered the following opinion and order:

2022AP2161-CRNM State of Wisconsin v. Alton Stephon Lucas (L.C. #2020CF658)
2022AP2163-CRNM State of Wisconsin v. Alton Stephon Lucas (L.C. #2021CF263)

Before Gundrum, P.J., Neubauer and Grogan, 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).

In these consolidated appeals, Alton Stephon Lucas appeals from judgments, entered following his no contest pleas, convicting him of criminal trespass to dwelling, disorderly conduct, and two counts of felony bail jumping—all counts with the repeater enhancer. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Lucas filed a response, and counsel filed a

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

supplemental no-merit report. After reviewing the record, counsel's reports, and Lucas's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgments. *See* WIS. STAT. RULE 809.21.

In Sheboygan County case No. 2020CF658, a criminal complaint alleged that in August 2020, Lucas, while released on bond in another case, broke into his ex-girlfriend's residence and took a television. The conditions of his bond included that he not commit any new crimes and that he not have contact with that specific residence. The State charged Lucas with burglary of a dwelling and two counts of felony bail jumping, all as a repeater. Lucas subsequently established, through a receipt, that he owned the television. The State amended the burglary charge to criminal trespass to a dwelling. Pursuant to a plea agreement, Lucas pled to the amended charge of criminal trespass to a dwelling and one count of felony bail jumping, both as a repeater. The remaining bail-jumping charge was dismissed and read in.

In Sheboygan County case No. 2021CF263, a criminal complaint alleged that in April 2021, Lucas, while released on bond in three other cases, was involved in a pre-arranged fight and initially lied to police about why he was in the area. The State charged Lucas with disorderly conduct, obstructing an officer, and three counts of felony bail jumping, all as a repeater. Pursuant to a plea agreement, Lucas pled to disorderly conduct and one count of felony bail jumping, both as a repeater. The remaining charges were dismissed and read in.

At sentencing, and consistent with the plea agreements, the State recommended that for the trespass case, the court should withhold sentence and place Lucas on probation for two years. The State made no recommendation as to a sentence for the pre-arranged-fight case. The circuit

court sentenced Lucas to a cumulative sentence of four years' initial confinement and four years' extended supervision.[2] These consolidated no-merit appeals follow.

We first agree with counsel's analysis and conclusion that any challenge to the validity of Lucas's pleas would lack arguable merit. *See* ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12 (1986). Our review of the record and of counsel's analysis in the no-merit report satisfies us that the circuit court complied with its obligations for taking Lucas's pleas. *See* WIS. STAT. § 971.08; ***Bangert***, 131 Wis. 2d at 261-62; ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906.

With regard to the circuit court's sentencing discretion, our review of the record confirms that the court appropriately considered the relevant sentencing objectives and factors, specifically focusing on the fact that Lucas "feel[s] as though [he] can do whatever [he] want[s] whenever [he] want[s] to do it and [he doesn't] have to follow the rules" and that he "continue[s] to commit more crimes in the community when [he has] other criminal cases pending." *See* ***State v. Odom***, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695; ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The sentence was not so excessive so as to shock the public's sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). Therefore, there would be no arguable merit to a challenge to the court's sentencing discretion.

In response to the no-merit report, Lucas asserts there is an issue of arguable merit as to whether he should be permitted to withdraw his pleas because the State withheld material

[2] The circuit court sentenced Lucas to consecutive sentences of one year initial confinement and one year extended supervision on each count to which he pled.

exculpatory and impeachment evidence, violating Lucas's rights under ***Brady v. Maryland***, 373 U.S. 83 (1963). Lucas explains that after his appointed counsel filed the no-merit report in these cases he learned through one of his pending circuit court cases that an officer, who also happened to be an officer involved in the trespass case, had a finding in his employment file that the State advised was discoverable under ***Brady***. Appointed counsel filed a supplemental no-merit report, advising that she reached out to the district attorney and the district attorney confirmed the officer was only involved in the trespass case and advised that the ***Brady*** issue with that officer occurred after Lucas was charged but before he pled.

A district attorney is required to disclose any exculpatory evidence to a defendant. *See* WIS. STAT. § 971.23(1)(h). Suppression by the State of evidence favorable to the accused, where the evidence is material to guilt or punishment, violates due process regardless of good faith or bad faith by the prosecution. *See* ***Brady***, 373 U.S. at 87. To establish a ***Brady*** violation, though, a defendant must establish that the withheld evidence is material and favorable. *See* ***State v. Harris***, 2004 WI 64, ¶13, 272 Wis. 2d 80, 680 N.W.2d 737. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." ***Id.***, ¶14 (citation omitted). "The materiality requirement of ***Brady*** is the same as the prejudice prong of the ***Strickland***[3] analysis." ***State v. Wayerski***, 2019 WI 11, ¶36, 385 Wis. 2d 344, 922 N.W.2d 468.

[3] ***Strickland v. Washington***, 466 U.S. 668 (1984).

It is unclear whether appointed counsel has reviewed the officer's conduct report. Instead, appointed counsel argues that given other evidence in the trespass case, the officer's conduct report is not material. We agree.

There is no dispute that at the time of the trespass incident Lucas was under bond conditions to have no contact with his ex-girlfriend's residence. Although the officer with the conduct report was involved in that case, so were at least two other officers. Lucas's ex-girlfriend reported he entered her residence when the no-contact bond conditions were in place and took the television. She produced time-stamped photographs of the television in her residence before it was missing. The serial number on the television box at her residence matched the serial number on the television in Lucas's room. Lucas's new roommate reported that Lucas did not have the television in his room until officers came to inquire about it. We conclude that given the other evidence in this case, there is no reasonable probability that knowledge of the officer's conduct report would have produced a different result. *See* ***Harris***, 272 Wis. 2d 80, ¶14.

Lucas next argues there is an issue of arguable merit as to whether the circuit court judge should have recused herself from Lucas's case. Lucas contends that the circuit court judge prosecuted him in 2019 when she worked for the district attorney's office. Lucas argues that the judge's statement that she had not worked at the district attorney's office since 2017 was "a misrepresentation of the truth [and] supports the conclusion of judicial bias." In support, Lucas provided a CCAP printout from his 2019 case. The printout shows that in 2019, before the judge was elected to the bench, she represented Sheboygan County—not as an assistant district attorney but as an assistant corporation counsel, in a child support action against Lucas. Lucas's

printout does not demonstrate that the judge's statement about when she left the district attorney's office was inaccurate.

In any event, we agree with appointed counsel that there is no arguable merit to a claim that the circuit court was required to recuse herself because, before she became a judge, she previously represented Sheboygan County in a child support action against Lucas. WISCONSIN STAT. § 757.19(2)(c), which mandates disqualification when a judge previously acted as counsel to any party in the same action or proceeding, is not applicable in this situation. Lucas's criminal cases are unrelated to the child support action. Furthermore, there is no showing that the judge determined that she could not, or it appeared that she could not, act in an impartial manner. *See* WIS. STAT. § 757.19(2)(g).

Lucas next asserts there is an issue of arguable merit as to whether the circuit court should have granted his substitution request. On July 1, 2021, the former circuit court judge told Lucas that Judge Samantha Bastil would preside over the next hearing, which was scheduled for August 17. On August 17, counsel moved for substitution. Judge Bastil denied the request as untimely. Lucas later entered no contest pleas. *See* ***State v. Damaske***, 212 Wis. 2d 169, 188, 567 N.W.2d 905 (Ct. App. 1997) (observing that a guilty or no contest plea "made knowingly and voluntarily, waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights prior to the plea."). By pleading no contest, Lucas forfeited his right to directly challenge the denial of his substitution request. *See* ***id.*** at 189 ("By entering his plea and by proceeding to sentencing without either seeking a review of [the judge's] denial of his request for substitution or at least reserving the right to appeal from that denial, [the defendant] waived any objection to [the judge's] competency to 'act further' in his case."). There is no issue of arguable merit regarding a direct challenge of the substitution request.

Lucas then argues there is an issue of arguable merit as to whether trial counsel was ineffective for failing to timely file a substitution request against Judge Bastil. To establish a claim of ineffective assistance, Lucas must show that trial counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). A claim of ineffective assistance of counsel for failing to seek substitution of the assigned circuit court judge cannot succeed unless the record of the proceeding under review demonstrates that the assigned judge was partial or fundamentally unfair. *See* ***Damaske***, 212 Wis. 2d at 200-01. As the supreme court has explained, the assessment of the prejudice prong of the ***Strickland*** analysis

> should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry.

Strickland, 466 U.S. at 695. We have carefully examined the record in this case, and nothing in it reflects partiality on the part of the assigned judge. Accordingly, we conclude a challenge to trial counsel's effectiveness based on failure to seek judicial substitution would lack arguable merit.

Our independent review of the record discloses no other potential issues for appeal. This court accepts the no-merit report, affirms the judgments of conviction, and discharges appellate counsel of the obligation to represent Lucas further in these appeals.

Upon the foregoing reasons,

IT IS ORDERED that the judgments of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Roberta A. Heckes is relieved of further representation of Alton Stephon Lucas in these appeals. *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