

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

February 21, 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. 94-0981-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ISMET D. DIVANOVIC,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County:
MICHAEL S. FISHER, Judge. *Affirmed.*

ANDERSON, P.J. Ismet D. Divanovic appeals from a judgment of conviction for disorderly conduct and battery. The state public defender appointed Attorney Robert F. Sfasciotti as Divanovic's appellate counsel. Sfasciotti served and filed a no merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Divanovic filed a response. After an independent review of the record as mandated by *Anders*, we conclude that any further appellate proceedings would lack arguable merit.

A jury found Divanovic guilty of disorderly conduct contrary to § 947.01, STATS., and battery contrary to § 940.19(1), STATS.¹ Because Divanovic was convicted as a repeater on both counts, the trial court imposed the maximum penalty enhancer of three years on each count and imposed two three-year consecutive sentences. Section 939.62(1)(a), STATS.

The no merit report addresses three potential issues: (1) Divanovic's absence from the preliminary hearing; (2) the admissibility of prejudicial testimony about Divanovic's parole status; and (3) ineffective assistance of trial counsel. Divanovic raises these potential issues and also asserts that he was denied the effective assistance of appellate counsel.

Divanovic has a constitutional right to attend the preliminary hearing. U.S. CONST. amend. VI; WIS. CONST. art. I, § 7; § 971.04, STATS.; *Beverly v. State*, 47 Wis.2d 725, 729, 177 N.W.2d 870, 872 (1970), *cert. denied*, 400 U.S. 995 (1971). However, he refused to attend. The trial court had previously adjourned the preliminary hearing to allow the appointment of successor counsel. The trial court believed that Divanovic's refusal to attend the hearing was to avoid being shackled. However, the trial court required Divanovic to be shackled "because of his prior violent history and the fact that ... he's a serious escape risk." At the preliminary hearing, counsel advised the court that Divanovic did not authorize his representation. Despite counsel's misgivings, the trial court proceeded with the preliminary hearing. Appellate counsel contends that it would lack arguable merit to raise any alleged error at the preliminary hearing. *State v. Webb*, 160 Wis.2d 622, 628, 467 N.W.2d 108, 110 ("A conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing."), *cert. denied*, 502 U.S. 889 (1991). We agree.

Appellate counsel addresses the potential issue of the admissibility of prejudicial testimony about Divanovic's parole status because it demonstrates that he was previously incarcerated. The prosecutor elicited testimony from a Department of Corrections probation and parole agent to show motive and intent, namely, that Divanovic would effectuate his threats of revenge once he completed parole.² Trial counsel did not object to or cross-examine this

¹ Divanovic was acquitted of four other counts.

² This evidence was allegedly relevant to some of the other charges for which Divanovic also

witness.³ We agree with appellate counsel's description, analysis and conclusion that pursuing this issue would lack arguable merit.

Divanovic claims ineffective assistance of trial counsel principally because of the problems with the preliminary hearing,⁴ jury selection and his belief that representation by the state public defender was inherently less effective than by privately retained counsel.⁵ "[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel." *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). It is inappropriate for this court to determine the competency of trial counsel on unsupported allegations. *State v. Simmons*, 57 Wis.2d 285, 297, 203 N.W.2d 887, 894-95 (1973). Because there is no evidentiary record on this issue, we cannot review Divanovic's ineffective assistance of trial counsel claim.

Divanovic also claims ineffective assistance of appellate counsel, as evidenced by his filing a no merit report.⁶ If Divanovic seeks to pursue this claim, he must file a petition for a writ of habeas corpus in this court. See *State v. Knight*, 168 Wis.2d 509, 522, 484 N.W.2d 540, 545 (1992). We will not review it on direct appeal. See *id.* at 512-13, 484 N.W.2d at 541.

(.continued)

was tried, namely, intimidating a victim, § 940.45(1), STATS., and making threatening and harassing telephone calls contrary to § 947.012(1), STATS. The jury acquitted Divanovic of these charges.

³ Failure to object to this testimony constitutes waiver. Sections 805.11(1) and 901.03(1)(a), STATS.

⁴ Appellate counsel addresses whether trial counsel was ineffective for failing to petition for leave to appeal from the preliminary hearing rulings, but concludes that Divanovic suffered no prejudice by not attending. See *State v. Webb*, 160 Wis.2d 622, 632, 467 N.W.2d 108, 112 (addressing § 808.03(2), STATS.), *cert. denied*, 502 U.S. 889 (1991).

⁵ Divanovic was dissatisfied with each of his six appointed lawyers. However, the sentencing court complimented trial counsel on doing "an outstanding job of representing a very difficult client. And that basically [Attorney] Borda was far more successful than [the court] ever anticipated an attorney could be representing this man."

⁶ Filing a no merit report does not demonstrate ineffective assistance of appellate counsel. It signifies conflicting conclusions between an appellant and appellate counsel. Recognizing this conflict, RULE 809.32(1), STATS., permits an appellant to respond to counsel's report, which is not statutorily authorized in a contested appeal.

We have addressed each issue disclosed by appellate counsel and by Divanovic. Upon our independent review of the record, as mandated by *Anders* and RULE 809.32(3), STATS., we also conclude there are no other meritorious issues and that any further proceedings in this appeal would lack arguable merit. Accordingly, we affirm the judgment of conviction and relieve Attorney Robert F. Sfasciotti of any further appellate representation of Divanovic.

By the Court. – Judgment affirmed.