

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 29, 1995

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. 94-1651-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOUGLAS R. PEDERSEN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Kenosha County:
EMMANUEL VUVUNAS, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

PER CURIAM. Douglas R. Pedersen appeals from a judgment convicting him of escape. The state public defender appointed Attorney William J. Tyroler as Pedersen's appellate counsel. Tyroler served and filed a no merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Pedersen 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 Pedersen guilty of felony escape, contrary to § 946.42(3)(a), STATS. The trial court imposed a four-year sentence.

The no merit report addresses the sufficiency of the evidence, two evidentiary issues¹ and whether the trial court erroneously exercised its sentencing discretion. After reviewing the appellate record, we agree with counsel's description, analysis and conclusion that pursuing these appellate issues would lack arguable merit. Pedersen raises these issues and focuses on an evidentiary issue analyzed by appellate counsel, namely, whether the trial court erroneously exercised its discretion in requiring Pedersen to proceed without the testimony of a witness. Pedersen also claims prosecutorial misconduct and ineffective assistance of trial counsel. We address Pedersen's contentions seriatim.

Pedersen admits that the evidence is substantially undisputed. He was in custody in the Kenosha County Jail with Huber law privileges and was required to return by midnight. However, Pedersen failed to return and was apprehended by police in Chicago, returned to Kenosha and charged with felony escape. See § 946.42(3)(a), STATS.

"[A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force 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).

Pedersen does not dispute the sufficiency of the evidence. However, he claims that the State did not prove specific intent because he did not intend to escape, but merely to be with his father before he died.² Although

¹ The first issue involved Pedersen's court appearance in shackles. Because the shackles were removed before the jury observed him, Pedersen admits that this issue lacks arguable merit. We address the second issue on the absence of a key witness.

² Pedersen erroneously implies that by waiving extradition he voluntarily returned to custody. First, we do not consider this argument because there is nothing in the record about waiving extradition. See *Vredenburg v. Safety Devices Corp.*, 270 Wis. 36, 39, 70 N.W.2d 226, 228 (1955),

Pedersen had court authorization to visit his terminally ill father, he had not obtained the requisite visitation furlough because he did not believe he would be prosecuted.³

Pedersen wanted the lawyer he had previously consulted to corroborate that he intended to turn himself in. However, that lawyer did not arrive. The trial court instead advised the jury that the parties stipulated that Pedersen telephoned a lawyer on a given date.

To pursue this issue would lack arguable merit since Pedersen's witness did not arrive and trial counsel failed to move for a continuance.⁴ We agree with appellate counsel that most of the testimony of this lawyer-witness would have been corroborative since Pedersen testified about why he called the lawyer. Moreover, it is questionable whether this evidence would have been relevant since contacting a lawyer after the escape would not negate Pedersen's guilt.

(..continued)

overruled on other grounds by First Wis. Nat'l Bank v. Wichman, 85 Wis.2d 54, 270 N.W.2d 168 (1978). Second, waiving extradition is not voluntarily returning to custody. Third, waiving extradition and explaining the reasons for doing so are not relevant to whether Pedersen committed the crime of felony escape. See § 946.42(3)(a), STATS.

³ The jury did not equate Pedersen's belief that he would not be prosecuted with the absence of specific intent.

⁴ Trial counsel asked for "a few minutes" to wait for this lawyer-witness.

TRIAL COUNSEL: If I could have a few minutes,
your Honor?

TRIAL COURT:Not really. Let's go ahead.

TRIAL COUNSEL:I'd like to check and see if Mr. Hanson [the lawyer-witness] is
here.

TRIAL COURT:Go ahead. All right. Let's take the jury out for five minutes. You
be back in five minutes. We'll start again
at eleven o'clock.

Trial counsel did not formally move for a continuance. Consequently, this issue was not preserved for appellate review.

Pedersen claims prosecutorial misconduct for allowing false testimony by a sheriff's sergeant, Edward L. Kamin, Jr. Kamin testified that Pedersen was absent without leave ("AWOL") and required apprehension on an escape warrant. Pedersen claims that this was false because he waived extradition. However, this waiver did not negate his AWOL status.⁵ He also contends that trial counsel was ineffective for failing to ameliorate this alleged prosecutorial misconduct. We refute this contention with Pedersen's other ineffective assistance of trial counsel claims.

Pedersen contends that the sentencing court considered inaccurate information. A defendant has a due process right to be sentenced on accurate information. *State ex rel. LeFebvre v. Israel*, 109 Wis.2d 337, 345, 325 N.W.2d 899, 903 (1982). However, trial counsel corrected the statement that Pedersen was convicted of armed robbery rather than extortion. The trial court noted that both crimes were felonies and advised trial counsel that it did not consider this distinction material for sentencing on the escape conviction. Because Pedersen has not shown that the trial court relied on this information, this challenge would lack arguable merit.

Pedersen also claims ineffective assistance of trial counsel. However, "it 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 claim, we do not review Pedersen's ineffective assistance of trial counsel contentions.

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

⁵ Pedersen's waiver of extradition is not in the record, nor is it relevant to whether he escaped, contrary to § 946.42(3)(a), STATS. *See supra* note 2.

By the Court.—Judgment affirmed.