

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 6, 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. 94-2569-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROBERT CURTIS,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

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

PER CURIAM. Counsel for Robert Curtis has filed a no merit report pursuant to RULE 809.32, STATS. Curtis has responded to it. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal.

The State charged Curtis with two counts of second-degree sexual assault and one count of robbery—threat of force, in a complaint filed on December 2, 1993. On December 21, 1993, the trial court dismissed the charges because of the seventeen-day delay between Curtis' arrest and his initial appearance. With the court's permission, however, a new complaint was filed the same day.

At Curtis' bench trial, the evidence included a cervical smear from the victim that contained traces of semen. There was no evidence presented that linked Curtis to the sample taken. At the close of evidence, the trial court found Curtis guilty and sentenced him to consecutive sentences totalling twenty-six years.

Counsel's no merit report addresses whether the trial court properly allowed the State to refile the charges against Curtis, whether the court heard sufficient evidence to find him guilty, whether he received effective assistance of counsel, whether the trial court erred by admitting the cervical smear into evidence, whether Curtis waived the opportunity to have DNA testing done on the semen sample, and whether the trial court properly conducted the sentencing hearing and properly exercised its sentencing discretion. We concur with counsel's analysis of these issues and his conclusion that none has merit.

In his response, Curtis contends that his due process and double jeopardy rights were violated when the State refiled the charges against him. However, the remedy for violation of the forty-eight-hour rule for a probable cause determination, established by *County of Riverside v. McLaughlin*, 500 U.S. 444 (1991), is not dismissal with prejudice. *State v. Golden*, 185 Wis.2d 763, 769, 519 N.W.2d 659, 661 (Ct. App. 1994). Additionally, double jeopardy does not attach before the defendant's trial begins. *State v. Barthels*, 174 Wis.2d 173, 182, 495 N.W.2d 341, 345 (1993).

Curtis also challenges the State's use of the semen sample as evidence. However, even if it were error to admit that evidence, Curtis was not prejudiced by it. It did not link him to the crimes, but merely established that the victim had recently had intercourse. In rendering its decision, the trial court expressly discounted the significance of that evidence in finding Curtis guilty.

Finally, Curtis suggests that the court should have allowed him to offer a closing statement. The record indicates, however, that he did not request that opportunity. Trial counsel offered a closing statement on his behalf and Curtis acknowledges that he received the effective assistance of counsel.

Our review of the record discloses no other potential issues for appeal. Therefore, we affirm the judgment of conviction and relieve Curtis' counsel of any further representation of him in this matter.

By the Court. – Judgment affirmed.