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DISTRICT I

October 14, 2024

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

2023AP554-CRNM State of Wisconsin v. Todd Q. Carter (L.C. # 2018CF5483)

Before White, C.J., Donald, P.J., and Colón, J.

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).

Todd Q. Carter, by Attorney Pamela Moorshead, is pursuing an appeal from a judgment of conviction under the procedures set forth in *Anders v. California*, 386 U.S. 738 (1967) and

WIS. STAT. RULE 809.32 (2021-22).¹ Attorney Moorshead filed a no-merit report, Carter filed a response, and Attorney Moorshead filed a supplemental no-merit report and supporting affidavit. Upon review of the record, the no-merit reports, and Carter's response, we conclude that Carter could pursue further postconviction proceedings that would not be wholly frivolous. Accordingly, we reject the no-merit report, dismiss this appeal without prejudice, and extend the time for Carter to file a postconviction motion or a notice of appeal on the merits.

The record reflects that a speeding vehicle struck and killed a pedestrian on November 11, 2018. The driver did not stop. Investigation led police to conclude that the striking vehicle was owned by R.E.C., who lived with Carter and his girlfriend, Francisca Hodges. Police spoke to Hodges, who said that she had telephoned Carter shortly before the crash. According to police, Hodges also told a detective that Carter admitted during the telephone conversation that he had taken R.E.C.'s car. The State charged Carter with second-degree reckless homicide and with hit-and-run causing death. Carter retained trial counsel, and in due course he pled no contest to the latter charge.

Represented by postconviction counsel, Carter filed a postconviction motion claiming that his trial counsel was ineffective and requesting an evidentiary hearing to prove his claim. To prove that trial counsel is ineffective, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To support his claim here, Carter alleged that Hodges had provided certain information to trial counsel during the pretrial period. This included information that police had

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

misrepresented Hodges' statements; that Hodges never told an officer that Carter had admitted to taking R.E.C.'s car on the night of the crash; and that Hodges did not know who was driving R.E.C.'s vehicle on the night of the crash. Carter further alleged that his trial counsel failed to tell him that, at trial, Hodges would have testified both that: (1) "she did not know who had the car when the crash occurred"; and (2) "she never told police that Mr. Carter told her that he had the car that night."

Carter argued that his trial counsel performed deficiently for failing to "provide [Carter] with this favorable evidence. Counsel had an obligation to recognize the significance of the information Hodges provided to him and to inform Carter of this important development in the evidence in his case." Carter also argued that he was prejudiced because he wanted to proceed to trial and would have done so had he known that Hodges would testify favorably to the defense.

The circuit court scheduled Carter's postconviction motion for an evidentiary hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Before the hearing date, however, Carter's original postconviction counsel took a leave of absence. Assistant State Public Defenders Moorshead and Sarah Barwise Joseph were jointly appointed as successor counsel for Carter. Attorney Joseph subsequently notified the circuit court that Carter was withdrawing the postconviction motion. Attorney Joseph then left her position with the public defender's office, and Attorney Moorshead filed a no-merit notice of appeal and a no-merit report on Carter's behalf.

In the no-merit report, Attorney Moorshead advises this court that she reviewed the postconviction motion filed by Carter's original postconviction counsel and then directed Attorney Joseph to interview Hodges. According to Attorney Moorshead, Hodges

acknowledged during the interview that she discussed her version of events with Carter before he entered his plea. Attorney Moorshead therefore determined that Carter could not argue that he “was unaware prior to his plea that Hodges would dispute the statements attributed to her in the police report and would, instead, give exculpatory testimony. [Attorney Moorshead] concluded that the [postconviction] motion lacked arguable merit.”

We are not persuaded that Attorney Moorshead’s conclusion is correct. She indicates that it is based on Hodges’ acknowledgement that Hodges discussed information with Carter. However, the postconviction motion turns on allegations that *trial counsel* failed to discuss information with Carter. Specifically, Carter claimed that his trial counsel performed deficiently by failing to recognize the significance of Hodges’s information and alert Carter to its evidentiary ramifications; and that Carter was prejudiced by trial counsel’s failure, because if trial counsel had advised him properly, he would have insisted on going to trial. Attorney Moorshead does not identify anything in the record that refutes the claim that Carter presented in his postconviction motion, nor does she cite any authority that defeats the postconviction motion as a matter of law.

When resolving an appeal under WIS. STAT. RULE 809.32, the question is whether a potential issue would be “wholly frivolous.” *State v. Parent*, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915 (quoting *Anders*, 386 U.S. at 744). The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (stating that an action is not frivolous even though the lawyer believes that the client’s position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988). Here, the circuit court scheduled Carter’s postconviction claim for an evidentiary

hearing. Carter advises in his response to the no-merit report that he wants to have that hearing and pursue his claim. We see nothing that permits this court to conclude now that Carter's claim lacks arguable merit. We emphasize that we do not reach any conclusion that Carter would or should prevail, only that the record and the submissions reflect that pursuing the claim would not be frivolous within the meaning of RULE 809.32 and *Anders*.

Because we cannot conclude that further proceedings would be wholly frivolous, we must reject the no-merit report filed in this case. We add that our decision does not mean that we have reached a conclusion in regard to the arguable merit of any potential issue that we have not discussed. Carter is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for Carter to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30 is extended through the date sixty days after this matter is remitted to the circuit court.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals