COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 25, 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. 95-2571-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN A. RUSCH,

Defendant-Appellant,

DENNIS PAUL RUSCH,

Defendant.

APPEAL from a judgment of the circuit court for Milwaukee County: DIANE S. SYKES, Judge. *Affirmed*.

Before Sullivan, Fine and Schudson, JJ.

PER CURIAM. Counsel for Steven Rusch has filed a no merit report pursuant to RULE 809.32, STATS. Rusch has filed a response challenging some of his counsel's conclusions and raising additional issues. 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.

Rusch was charged with arson to a building. After a psychological evaluation, he withdrew his pleas of not guilty and not guilty by reason of mental disease or defect, and pleaded guilty to the charge. Under the terms of the plea bargain, the State recommended a prison sentence but did not make a recommendation as to the length of the sentence. The court sentenced Rusch to ten years in prison.

The no merit report addresses the effectiveness of Rusch's trial counsel, the validity of the guilty plea and the propriety of the ten-year sentence. We agree with counsel's analysis of these issues.

In his response, Rusch states that he was arrested without being advised of his rights and that his trial counsel was ineffective because counsel did not file a motion to suppress Rusch's statements. The record does not establish either deficient performance or prejudice arising from counsel's decision to seek a plea agreement rather than contest the admissibility of the statements *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Detective Haas testified at the preliminary hearing that he advised Rusch of his rights and that Rusch indicated he understood those rights and was willing to waive them by making a statement at that time. A suppression motion would have failed if the court believed Haas's testimony. Furthermore, even if Rusch was not informed of his ***Miranda*** rights, the remedy of suppressing any prior statements would not significantly diminish the State's case. The State had strong evidence of Rusch's guilt regardless of the admissibility of his statements. Negotiating a plea bargain that avoided additional arson charges and did not allow the State to recommend a lengthy prison term was a reasonable strategy under the circumstances.

Rusch argues that his trial counsel was ineffective for failing to litigate Rusch's state of mind. This argument is based on a police officer's decision to take Rusch to a hospital after his arrest because the officer was concerned about Rusch's state of mind. Counsel reasonably encouraged Rusch to drop his insanity plea. The psychological evaluation concluded to a

reasonable degree of medical certainty that Rusch did not meet the criteria for a plea of not guilty by reason of mental disease or defect. In his response, Rusch contends that his counsel should have requested a second opinion because "Dr. Pankiewicz's allege [sic] report wasn't one that could reach a competent decision." The record discloses no basis for challenging the psychiatric report. The concerns of the arresting officer regarding Rusch's state of mind at the time of his arrest do not provide an adequate basis for challenging a psychiatrist's conclusion that Rusch did not suffer from a mental disease or defect that resulted in the lack of substantial capacity to either appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law. *See* § 971.15(1), STATS.

Rusch argues that the trial judge should have disqualified herself because she prejudged him prior to sentencing. While sentencing Rusch's brother for his involvement in the same crime, the court stated "you are not likely to be seeing your brother for quite a period of time in the future." This statement does not establish that Judge Sykes had prejudged Rusch's sentence such that she was required to disqualify herself. Rather, the remark indicates that she had prepared for the sentencing hearing for both of the brothers to be conducted on the same day. She had reviewed the presentence reports and had formed an initial opinion. In light of Rusch's prior record and the forty-year maximum sentence, Judge Sykes was not required to disqualify herself merely for having formed an initial opinion that Rusch would be incarcerated for "quite a period of time."

Finally, Rusch argues that he was not "duly convicted" and alleges that his appellate counsel was merely looking for reasons to "bail out" on appeal. Our independent review of the record discloses no defects in Rusch's conviction and no potential issues that appellate counsel should be required to pursue. Therefore, we relieve Attorney William M. Judge of further representation of Rusch in this matter and affirm the judgment of conviction.

By the Court.—Judgment affirmed.