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October 3, 2013

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

2012AP1853-CRNM State of Wisconsin v. Chevea D. Foster
(L.C. #2011CF615)

Before Curley. P.J., Fine and Kessler, JJ.

Chevea D. Foster appeals from a corrected judgment convicting him of one count of attempted armed robbery (use of force) and one count of first-degree sexual assault (use of a dangerous weapon), contrary to WIS. STAT. §§ 939.32, 943.32(2), 940.225(1)(b) (2009-10).[1] On

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the count of attempted armed robbery, the circuit court ordered Foster to serve a ten-year sentence comprised of five years of initial confinement followed by five years of extended supervision. On the count of first-degree sexual assault, the circuit court ordered Foster to serve a twenty-five year sentence comprised of fifteen years of initial confinement followed by ten years of extended supervision. The sentences were ordered to run concurrent to each other and to the period of probation Foster was serving at the time. Appellate counsel, Mark S. Rosen, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967). Foster responded. Because we conclude that Foster could pursue an arguably meritorious challenge based on the alleged ineffective assistance of trial counsel, we reject the no-merit report, dismiss the instant appeal without prejudice, and extend the deadline for filing a postconviction motion.

The no-merit report analyzed the sufficiency of the evidence and the circuit court's exercise of sentencing discretion. Foster filed a response to the report challenging Attorney Rosen's conclusion as to the sufficiency of the evidence and further arguing that he received ineffective assistance of trial counsel. After independently reviewing the record, the no-merit report, and Foster's response, we directed counsel to file a supplemental report addressing a potential claim that Foster's trial counsel gave him ineffective assistance by not calling Mario Burks as a witness.

At trial, the victim testified that she left her home around midnight on August 25, 2010, to visit a friend, Burks. As the victim walked to Burks's house, she saw a man dressed in all black behind her. She then heard the sound of footsteps approaching; it was the man, holding something silver in his hand, but she could not see what it was. He had a hood over his head with the drawstring pulled tight around his face. The man ordered the victim to turn around, so

that she was facing away from him, and she felt an object, which she believed was a gun, pressed to her back. The victim was forced to walk up a hill toward the back of a house. On the way to the back of the house, the victim threw the $5 she had into the bushes nearby. The man then felt in her pockets, stating: "I will kill you back here if you ain't got nothing." While still feeling what she believed was a gun pressed to her back, the victim told the man that she did not have anything and asked that he let her go. He told her to pull her pants down, which she did. The victim testified that the man licked her vagina and then made her perform oral sex on him. After he ejaculated in her mouth, the man told her to turn around. When she did, he ran away. The victim ran to Burks's house, and Burks's mother took her home. Once she was at home, the victim's mother called the police.

The victim never identified Foster, but his DNA was found on her clothing and at the crime scene.

Foster testified on his own behalf. He acknowledged that on ten occasions he had either been adjudicated delinquent or convicted of committing crimes. He testified that on August 25, 2010, around 11:30 p.m., he left his home to see the victim, whom he had first met on a chatline two weeks earlier. According to Foster, earlier on August 25th, he had a chatline conversation with the victim, who wanted money in exchange for sex. When Foster met her and asked if she was comfortable going behind a house with him, she agreed. Foster testified: "I asked if she can give me a blow job, she agreed, and I told her that I do the same to her and pay her." Foster denied ever having a gun. He said he was to pay the victim $30; however, after the victim performed oral sex on him and he ejaculated in her mouth, Foster said he walked away without paying. He denied the victim's account of what had transpired and claimed she fabricated what had happened because he did not pay her.

The victim provided rebuttal testimony. She acknowledged that she had used chatlines in the past, but denied that she had been on a chatline prior to leaving her house on August 25, 2010. She also denied Foster's account of what had happened that night.

Thus, as described by Foster's trial counsel in his opening statement, this case was one of "he said/she said."

In his response to the no-merit report, Foster writes:

> I made a request to my trial counsel … to call as a witness[,] Mario Burks. He was to give testimony regarding how and when he met [the victim], contrary to how she testified, which would go toward the witnesses' credibility—including my own—which was to be determined by the jury. Trial counsel made the decision not to call this witness without ascertaining the worth of Mario Burks['s] potential testimony, against my expressed desire for Burks to be called.

We note that in his closing argument, Foster's trial counsel seemed to imply that the victim met Burks on the internet and that "the question is what was [the victim] going to be doing with this man [i.e., Burks], and we never heard from him because while he was listed as a possible witness, he wasn't called[,] while we did talk about him."

As stated, we directed Attorney Rosen to file a supplemental report addressing a potential claim that Foster's trial counsel gave him ineffective assistance by not calling Burks as witness. With his supplemental report, Attorney Rosen submits an affidavit of Foster's trial counsel. According to Attorney Rosen, the affidavit makes clear that trial counsel's decision not to call Burks as a witness was the product of a strategic trial decision.

Trial counsel's affidavit provides, in relevant part:

> 5. That prior to the trial, I had reviewed all of the discovery in this matter. As I recollect, this discovery included the statement of Anna Duck to the Milwaukee Police Department. She was the mother of Mario Burks. In this statement, she had told the police that the victim … had arrived at her door following the alleged rape. She saw the victim with her son, Mario. According to her statement, this son had told her that the victim had stated to him that she had just been raped. The victim, at that time, was moaning, clearly upset, and not speaking.
>
> 6. I had reviewed the transcript of the testimony of Anna Duck[,] the mother of Mario Burks. I do not remember Chevea Foster asking me to subpoena Mario Burks to testify at trial. I do remember the police reports on the mother's activities, that she testified to. At no time would I have considered putting Mario Burks on as a defense witness. Nothing he could say would be helpful to my client.
>
> 7. My client maintained that this was a consensual encounter. I was never sure what my client was going to say, if he did testify. Mario Burks['s] possible testimony, would have only corroborated the victim's position that she was raped. For all of the above, to include trial tactics and strategy, I would not have called Mr. Burks, even if asked.

We are not convinced that the foregoing reflects a strategic trial decision. It is difficult for this court to understand how trial counsel could conclude that Burks had nothing helpful to offer without ever having spoken to Burks.

It is well established that counsel has a duty to make a reasonable investigation of potential witnesses or make a reasonable decision that makes the particular investigation unnecessary. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and *strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation*." ***Strickland v. Washington***, 466 U.S. 668, 690-91 (1984) (emphasis added). That is: "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any

ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." ***Id.***

In ***State v. Domke***, 2011 WI 95, 337 Wis. 2d 268, 805 N.W.2d 364, our supreme court held that trial counsel's performance was deficient when he called a witness at trial without having fully investigated what she would say on the stand. ***Id.***, ¶¶50-53. There, counsel did not provide any reason for failing to speak with the witness before trial, and thus had not made a strategic decision. ***Id.***, ¶52. The court said that "[a] reasonable attorney ... would have done some investigation when faced with the risk of calling a witness who may provide either extremely useful or extremely damaging testimony." ***Id.***

Domke's holding—that a trial attorney's presumption of a witness's testimony without actual investigation is deficient performance—gives us pause. Without knowing more about what Burks would have testified to, this court cannot analyze whether Foster was prejudiced by trial counsel's decision not to call Burks as a witness. ***Id.***, ¶34 ("Counsel will be said to have provided constitutionally inadequate representation if the defendant can show that counsel performed deficiently and that such deficient performance prejudiced the defendant.").

When an attorney files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See* ***Anders***, 386 U.S. at 744. The test is not whether the attorney should expect the argument to prevail. *See* SCR 20:3.1, comment (action is not frivolous even though the lawyer believes his or her client's position ultimately will not prevail). Rather, the question is whether the potential

issue so lacks a basis in fact or law that it would be unethical for the attorney to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988).

Upon review of the no-merit report, the response, the supplemental no-merit report and affidavit, we conclude a challenge based on whether Foster's trial counsel gave him ineffective assistance by not calling Burks as a witness would not lack arguable merit. As such, we reject the no-merit report.[2]

IT IS ORDERED that the no-merit report filed by Attorney Mark S. Rosen is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender for the possible appointment of new counsel, with any such appointment to be made within fifteen days.

IT IS FURTHER ORDERED that the deadline to file a postconviction motion or notice of appeal is extended to sixty days from the date of this order.[3]

Diane M. Fremgen
Clerk of Court of Appeals

[2] Because we conclude there is arguable merit to this issue that requires rejection of the no-merit report, we do not consider whether there is arguable merit to the other issues raised.

[3] Counsel may, if necessary, move to extend this deadline. *See* WIS. STAT. RULE 809.82(2)(a).