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DISTRICT III

April 29, 2014

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

2014AP29-CRNM State of Wisconsin v. Richard S. Gardipee (L. C. #2012CF794)

Before Hoover, P.J., Mangerson and Stark, JJ.

Counsel for Richard Gardipee filed a no-merit report concluding there is no arguable basis for Gardipee to challenge orders denying his motions to suppress evidence, the sufficiency of the evidence to support guilty verdicts or the sentences imposed for first-degree intentional homicide and obstructing an officer. Gardipee was advised of his right to respond to the report and has not responded. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable basis for appeal.

Gardipee was charged with fatally stabbing Wendy Garcia and obstructing an officer who was dispatched to check on Garcia's welfare. After the circuit court denied Gardipee's motions to suppress the fruits of an alleged illegal detention and frisk, the search of his house and Gardipee's inculpatory statements, Gardipee was tried by a jury and found guilty of both offenses. The court sentenced Gardipee to life imprisonment with the opportunity for extended supervision on February 8, 2055, and imposed a nine-month concurrent sentence on the obstruction charge.

SUPPRESSION MOTIONS

Any challenge to the court's orders denying the suppression motions would lack arguable merit. First, Gardipee alleged he was illegally detained and frisked. No evidence was introduced as a result of the frisk. In addition, the detaining officer had an adequate basis for detaining Gardipee. The officer was dispatched to Gardipee's house based on a report that Gardipee, covered in blood and crying, told a friend he hurt Garcia. When the officer arrived at his house, she observed Gardipee and a small boy at the residence. Gardipee refused to give his name, but admitted he lived at the residence. When the officer informed Gardipee of the reason for her presence, Gardipee ran around the side of the house. The officer told Gardipee to stop, but he failed to do so. He was ultimately captured and arrested for obstructing the officer. Under the circumstances, the officer had the right to detain Gardipee for a reasonable period of time

pursuant to WIS. STAT. § 968.24 (2011-12),[1] and had sufficient grounds to arrest him for obstruction under WIS. STAT. § 968.07.

Gardipee's second motion sought to suppress the fruits of the search of the residence. The search was justified under the community caretaker doctrine. When Gardipee was detained, the officer noticed a cut on his hand. Gardipee's attempt to flee, coupled with the report from his friend that Gardipee said he hurt Garcia, created an exigent circumstance justifying the officer's limited sweep of the residence to look for Garcia. The circuit court properly determined that the public need and interest in checking on Garcia's welfare outweighed the intrusion on Gardipee's privacy. *See* ***State v. Anderson***, 142 Wis. 2d 162, 169-70, 417 N.W.2d 411 (Ct. App. 1987).

Gardipee's third motion sought to suppress statements he made to the police in which he admitted killing Garcia. The circuit court found ***Miranda***[2] warnings were given and Gardipee indicated he understood them. Gardipee stated he "thought it might be good for someone to be there with him." That statement does not constitute an unequivocal or unambiguous invocation of his right to counsel. *See* ***State v. Jones***, 192 Wis. 2d 78, 94-97, 532 N.W.2d 79 (1995). A request for counsel is a statement in which the person expresses his desire to deal with police only through counsel. ***Id.*** at 94. Gardipee's observation that he thought it might be good for someone to be there with him does not meet that test. *See* ***State v. Jennings***, 2002 WI 44, ¶44, 252 Wis. 2d 228, 647 N.W.2d 44. The circuit court also questioned whether the officers were required to repeat the ***Miranda*** warnings when questioning continued the next day. It is not

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

[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

necessary to repeatedly recite ***Miranda*** warnings during an investigation of the same person for the same crime. ***Jones***, 192 Wis. 2d at 99. In addition, any error in admitting Gardipee's inculpatory statements was harmless in light of other overwhelming evidence of his guilt.

SUFFICIENCY OF THE EVIDENCE

The record discloses no arguable basis for challenging the sufficiency of the evidence. Rapheal Scott, Gardipee's long-time friend, testified he received a text message from Gardipee shortly after noon on June 30, 2011, asking "How many years you get for murder?" About two hours later Gardipee arrived at Scott's residence crying and covered with blood, and told Scott he had "screwed up." When Gardipee left, Scott called the police.

Officer Kamra Krueger described her encounter with Gardipee at his house, his subsequent arrest, and her discovery of Garcia's body in the basement. Evidence technicians and crime lab analysts described knives retrieved from the kitchen sink and blood found in the sink and at various places around the house. DNA testing determined it was Garcia's blood in the kitchen sink, on a knife, on a seat cushion, on a sneaker and on a pair of shorts.

The medical examiner testified Garcia died from a stab wound to her left chest, but also had been stabbed on the left side of her neck. Garcia had also suffered blunt-force trauma to her neck consistent with strangulation, and had a wound to the side of her mouth and other injuries on her face.

An emergency medical physician also testified he examined Gardipee for a hand injury. Gardipee told him he received the injury from punching somebody earlier that day.

The defense called no witnesses. The court conducted a proper colloquy regarding Gardipee's decision not to testify. Gardipee repeated his decision not to testify after he was advised that, without his testimony, evidence would not be received regarding Garcia's history of violence. That evidence would only be admissible to establish Gardipee's knowledge of specific incidents or Garcia's reputation for the purpose of showing Gardipee's mental state if he claimed self-defense. *See* ***State v. Daniels***, 160 Wis. 2d 85, 93, 465 N.W.2d 633 (1991). Because Gardipee did not testify, his mental state was not at issue.

This court must review the evidence in the light most favorable to the State and conviction and may reverse a conviction only if the evidence 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 (1989). Gardipee's counsel contended there was insufficient evidence to establish intent to kill. The court instructed the jury on first-degree and second-degree intentional homicide. The jury convicted Gardipee of first-degree intentional homicide, finding sufficient evidence of intent to kill. The number and location of Garcia's wounds and Gardipee's conduct after the killing sufficiently support the jury's finding.

EFFECTIVE ASSISTANCE OF COUNSEL

Having waived his right to testify, Gardipee put up no defense. Failure to present a defense does not establish ineffective assistance of trial counsel. To establish ineffective assistance of counsel, Gardipee must show deficient performance and prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). The record does not suggest that Gardipee had any

valid defense to the charges. Therefore, he established neither deficient performance nor prejudice from his counsel's failure to present a defense.

THE SENTENCES

The record discloses no arguable basis for challenging the sentencing court's discretion. The court appropriately considered the gravity of the offenses, Gardipee's character and rehabilitative needs and protection of the public. *See* ***State v. Harris***, 119 Wis. 2d 612, 623, 350 N.W.2d 633 (1984). The court sentenced Gardipee to the mandatory life sentence, but allowed release on extended supervision in 2055. It imposed the maximum sentence of nine months in jail on the obstructing charge, to run concurrently. The court considered no improper factors and the sentence is not arguably so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). The court properly exercised its discretion.

Our independent review of the record discloses no other potential issue for appeal. Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Timothy O'Connell is relieved of his obligation to further represent Gardipee in this matter. WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals