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DISTRICT IV

September 3, 2014

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

2012AP1561-CRNM State of Wisconsin v. Joseph A. Bohman (L.C. #2011CF25)

Before Blanchard, P.J., Lundsten and Sherman, JJ.

Attorney Philip Brehm, appointed counsel for Joseph Bohman, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Several supplements and responses have followed. After our independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal.

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

Pursuant to a plea agreement, Bohman pled no contest to one count of first-degree sexual assault of a child. The court imposed a sentence of 25 years of initial confinement and 15 years of extended supervision.

We previously ordered appellate counsel to further review an issue raised by Bohman in this appeal. Since then, counsel filed a supplemental no-merit report concluding that the issue is frivolous; Bohman filed a further response; counsel filed a second supplemental no-merit report; and Bohman filed a response to that report.

The issue relates to charges similar to those in this case, which were previously filed against Bohman in a different case that was dismissed. The supplemented record in the current appeal shows that in the earlier case, No. 2010CF240, Bohman was charged with the same two counts, child sexual assault and bail jumping, that were later charged in this case.

At the preliminary hearing in the earlier case, the State's attempts to introduce statements of the alleged child victim through her mother were excluded as hearsay, and the State did not call the alleged victim herself to testify. Based on that record, the court found probable cause for only the bail jumping count, and declined to bind over on the sexual assault count. The State later moved for dismissal of the entire complaint, and the court granted that motion and dismissed the complaint without prejudice. The complaint that commenced the present case appears to be identical in content to the complaint that was previously dismissed.

The issue now before us relates to WIS. STAT. § 970.04: "If a preliminary examination has been had and the defendant has been discharged, the district attorney may file another complaint *if the district attorney has or discovers additional evidence*." (Emphasis added.) Also relevant is WIS. STAT. § 970.03(10): "In multiple count complaints, the court shall order

dismissed any count for which it finds there is no probable cause.… Section 970.04 shall apply to any dismissed count."

Bohman argued in his first no-merit response that the child sexual assault charge could not properly have been refiled because the State did not present additional evidence. In our earlier order directing counsel to further review this issue, we noted that the no-merit report did not directly state whether the State had additional evidence for the second charging. Counsel appeared to be saying that the State was free to refile the charge because it was dismissed without prejudice. However, that analysis did not take the above statutes into account.

In the first of the newly filed supplemental no-merit reports, counsel acknowledges that, under WIS. STAT. § 970.04, the State was required to produce additional evidence to properly recharge the sexual assault count. However, counsel concludes that "the defense conceded the issue by waiving the preliminary hearing" in the second case. Counsel provides no further discussion of this point beyond that one sentence.

The transcript of the hearing at which Bohman waived the preliminary hearing does not show that any discussion of this issue occurred, or that Bohman personally waived this issue. We cannot conclude from the record that Bohman's waiver of the preliminary hearing was also a knowing, voluntary, and intelligent waiver of this specific issue.

However, the issue *was* considered waived by Bohman's later no contest plea. Bohman did not raise the issue of "additional evidence" before the plea, whether at a preliminary hearing, by motion, or in some other manner. Normally the failure to raise an issue before pleading guilty or no contest is considered a form of waiver. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434-35, 362 N.W.2d 439 (Ct. App. 1984).

However, that waiver is not the end of the inquiry. Instead, it merely leads to a next question, which is whether trial counsel was ineffective in some manner by allowing that waiver to occur. Bohman himself raised that question in his response.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

To address ineffective assistance, counsel has now filed a second supplemental no-merit report. Counsel's discussion remains devoid of references to case law discussing WIS. STAT. § 970.04 and, in particular, what that statute means when it says the State may refile the dismissed charge if it "has or discovers additional evidence." Our research shows that "additional evidence" means "new or unused evidence." ***State v. Johnson***, 231 Wis. 2d 58, 65, 604 N.W.2d 902 (Ct. App. 1999). New or unused evidence does not include evidence that is merely cumulative or corroborative, but does include previously presented evidence that was not considered by the court in its initial decision. ***Id.*** at 68.

Current counsel concludes in the second supplemental no-merit report that it would be frivolous to allege Bohman's trial counsel was ineffective by not pressing the State to present "additional evidence" for the second prosecution. Counsel concludes that, even if we assume trial counsel's performance was deficient in some way, Bohman would not be able to show prejudice. Counsel refers to a police interview with the victim, which is described in the complaint. Counsel

also refers to the DNA analysis report. Counsel asserts that, in light of the above evidence, it "is speculative to assume the State would not have been able to establish probable cause for the sexual assault charge if the preliminary hearing had been held."

We first discuss the DNA report. The date of that report is two months *after* the filing of the complaint in this case, and one month after Bohman waived the preliminary hearing. Therefore, this report does not appear to be relevant to whether Bohman could have successfully used the preliminary hearing as a way to press the State to present additional evidence because the report would not have been available to the State at that time.

We next consider the police interview with the victim. We agree with current counsel that there is no reason to believe, based on the information we currently have, that, if a preliminary hearing had been held in the present case, the State would have been unable to present additional evidence from the victim. That evidence might have been in the form of testimony by the alleged victim herself, or by using police testimony or the report about her statement to police. Under the above standard, it appears that all of those forms of evidence would qualify as "additional evidence" under WIS. STAT. § 970.04 because they were new or unused evidence.

We can conceive of no reason why the State would have been unable to present either the direct testimony of an alleged victim or the police account of the victim's statement, if the State was properly prepared for the hearing. Normally, if the alleged victim is unavailable as a witness, an officer is able to testify about the witness's statement, or the report can be used. Bohman has not suggested any reason, whether factual or legal, that leads us to believe some other result might have occurred at the preliminary hearing if his trial counsel had pressed the State to present "additional evidence" under WIS. STAT. § 970.04 for the second prosecution.

In Bohman's response to counsel's second supplemental no-merit report, he focuses on whether the second *complaint* described additional evidence, but that is not the test. We have found nothing in the applicable law that limits the analysis of this issue to comparing only the contents of the two complaints. Therefore, based on the above analysis, we are unable to see a basis on which there would be arguable merit to this issue.

The no-merit report addresses whether Bohman's pleas were entered knowingly, voluntarily, and intelligently. The plea colloquy sufficiently complied with the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 255-73, 389 N.W.2d 12 (1986), and WIS. STAT. § 971.08 relating to the nature of the charge, the rights Bohman was waiving, and other matters.

In Bohman's response, he asserts that trial counsel "coerced" him into accepting the plea offer "without diligently reviewing all records and evidence." More specifically, Bohman asserts that counsel advised him without reviewing with him the DNA report. Bohman describes the report as "inconclusive," and states that, if he had known this, he would not have accepted the plea offer and would have gone to trial.

This argument lacks merit for two reasons. First, the report was not inconclusive. It reported the possible presence of saliva in the victim's vaginal area, and the presence of Bohman's DNA in her chest area. Both of these were consistent with the victim's account. Second, Bohman does not clearly explain how the DNA report would have made him more likely to go trial than he was when he pled no contest. This report would encourage a trial only if Bohman originally believed the DNA report would inculpate him even further than it eventually did. Bohman does not state that he held such a belief, or what such a belief would have been based on.

The no-merit report addresses whether the circuit court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

Our review of the record discloses no other potential issues for appeal.

Therefore,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Philip Brehm is relieved of further representation of Joseph Bohman in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals