



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

September 29, 2014

To:

Hon. Charles F. Kahn, Jr.
Circuit Court Judge
Milwaukee County Courthouse
901 N. 9th St.
Milwaukee, WI 53233

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Scott D. Obernberger
310 W. Wisconsin Ave., Ste. 1220E
Milwaukee, WI 53203

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

James Lee Eady, Jr. 312713
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

Jeremy C. Perri
First Asst. State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202

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

2013AP2441-CRNM State of Wisconsin v. James Lee Eady, Jr. (L.C. #2011CF5864)

Before Fine, Kessler and Brennan, JJ.

A jury found James Lee Eady, Jr., guilty of robbery of a financial institution. *See* WIS. STAT. § 943.87. The victim identified in the case is U.S. Bank. Pursuant to § 943.87, “[w]hoever by use of force or threat to use imminent force takes from an individual or in the presence of an individual money or property that is owned by or under the custody or control of a financial institution is guilty of Class [sic] C felony.” The statute includes a definition of ‘financial institution’ providing, as relevant here that the term means, “a bank, as defined in s.

214.01(1)(c), a savings bank, as defined in s. 214.01(1)(t), a savings and loan association, a trust company, a credit union, as defined in s. 186.01(2), a mortgage banker, as defined in s. 224.71(3)(a), or a mortgage broker, as defined in s. 224.71(4)(a), whether chartered under the laws of this state, another state or territory, or under the laws of the United States[.]” See WIS. STAT. § 943.80(1).

Eady is pursuing an appeal with the assistance of Scott D. Obernberger, Esq., who filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Eady has filed several responses. At our request, Obernberger filed a supplemental no-merit report discussing an issue raised at the close of the evidence in this case, namely, whether Eady was entitled to an acquittal or to dismissal of the charge on the ground that the State failed to prove that U.S. Bank has a charter. The circuit court rejected Eady’s motion, stating that pictures of the robbery site showed a premises that “ha[d] the look and feel of being a bank.” In the supplemental no-merit report, Obernberger says that, although he found no testimony in the record that U.S. Bank has a charter, nonetheless, the record and inferences from the record permitted the jury to find that Eady robbed a financial institution. Obernberger explains:

U.S. Bank has a significant presence in the greater Milwaukee area. It is incorporated in the state of Delaware under the name US Bancorp. U.S. Bank has approximately 25 branches in the greater Milwaukee area. The tallest building in the State of Wisconsin, located in downtown Milwaukee, is the “U.S. Bank Building,” whose logo can be seen atop same.

The court is not satisfied that the foregoing demonstrates that Eady is unable to pursue arguably meritorious claims that a bank must be chartered to meet the applicable definition of a financial institution, and that the State in this case failed to prove that the bank has a charter.

When an appointed lawyer 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 lawyer 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 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. *See McCoy v. Court of Appeals*, 486 U.S.429, 436 (1988).

Eady is entitled to postconviction and appellate proceedings that analyze the potential issues. Therefore, we reject the no-merit report, dismiss this appeal without prejudice, and extend the deadline for Eady to file a postconviction motion or a notice of appeal.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender for the appointment of a new lawyer for Eady, such appointment to be made within forty-five days.

IT IS FURTHER ORDERED that the Office of the State Public Defender shall notify this court within five days after a new lawyer is appointed for Eady.

IT IS FURTHER ORDERED the deadline for Eady to file a postconviction motion or notice of appeal is extended until forty-five days after the date on which this court receives notice from the public defender's office that it has appointed a new lawyer for Eady.¹

Diane M. Fremgen
Clerk of Court of Appeals

¹ Eady's lawyer is free, of course, to take whatever steps the lawyer believes is appropriate in pursuit of postconviction and appellate relief for Eady on grounds in addition to those discussed in this order.