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DISTRICT II

March 11, 2015

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

2014AP1767-CR State of Wisconsin v. Brian I. Harris (L.C. #2011CF797)

Before Brown, C.J., Reilly, and Gundrum, JJ.

Brian I. Harris appeals from a judgment of conviction for burglary, possession of burglarious tools, criminal damage to property, and criminal trespass to a dwelling, for which sentencing was withheld in favor of probation.[1] Harris's appellate counsel has filed a no-merit

[1] Harris was convicted as a repeat offender of all the crimes. The circuit court docket reflects that Harris's probation has been revoked, and he was sentenced after revocation on January 23, 2014. This appeal does not concern the sentencing after revocation.

report pursuant to WIS. STAT. RULE 809.32 (2013-14)[2] and ***Anders v. California***, 386 U.S. 738 (1967). Harris has filed a response to the report. We reject the no-merit report and require appellate counsel to file an advocacy brief on the issue identified in this order.

In the early morning hours of August 13, 2011, Harris was discovered by police in the basement of a home where the removal of copper piping was underway. Having recently been the subject of a sheriff's foreclosure sale, the home was vacant at the time. While Harris was in the back of the squad car, he told the police officer that he was homeless, he frequently sleeps in vacant houses, he was going to sell the copper piping for food money, and he often commits misdemeanor crimes to get items to sell for food. The next morning Harris was brought out into a common area and a detective asked him if he would like to talk or give a statement. Harris replied, "They caught me, man, I got nothing else to say." Harris was not administered his ***Miranda***[3] rights prior to making the statements. A pretrial motion to suppress Harris's statements was denied. The circuit court found the statements voluntary.

A three-day jury trial was held. Harris testified at the trial and presented an intoxication defense. The jury found Harris guilty of all the charges.

The no-merit report first addresses whether the circuit court properly denied the motion to suppress Harris's statements. With respect to Harris's statement to the detective in the common area of the police station, the no-merit report discusses the holding in ***Rhode Island v. Innis***, 446 U.S. 291, 300-01 (1980), that an interrogation is not limited to express questioning

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

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

but includes any word or actions by the police reasonably likely to elicit an incriminating response from a suspect. The report concludes that "[t]he trial court erred in its determination that the statement … was admissible because it was voluntary despite being made while in custody and without Miranda warnings." The report's discussion of applicable law demonstrates that counsel is able to mount a meritorious claim that the statement should have been suppressed. The report then goes on to conclude that the issue lacks merit because "Harris's testimony [at trial] was not significantly different from the statement he gave to [the detective] and, so, the statement attributed to him … is unlikely to have had any impact on the trial." This is essentially an assertion that the error, if any, was harmless error.

In deciding a no-merit appeal, the question is whether a potential issue would be "wholly frivolous." ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915 (citation omitted). This standard means that the issue lacks a basis in fact or law. ***McCoy v. Court of Appeals***, 486 U.S. 429, 438 n.10 (1988). The test is not whether the attorney or court expects the argument to prevail. Although a harmless error analysis may apply, it is the State's burden to prove the error was harmless. ***State v. Sherman***, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500. A defendant may be entitled to advocacy of counsel with respect to the State's burden to prove harmless error. We reject the no-merit report on the issue of whether Harris's statement to the detective should have been suppressed.

Because there is a basis to reject the no-merit report, we have not completed an independent review of the entire record or the transcripts of the jury trial. We have merely reviewed the no-merit report's discussion of other issues and considered the points made in

Harris's response, including the ruling on the ***Batson***[4] objection made after jury selection. Neither the report nor Harris's response gives rise to any other potential issue on which we would reject the no-merit report.[5] By rejecting the no-merit report and requiring an appellant's brief, we do not foreclose appellate counsel from briefing any other issue she now believes has arguable merit or seeking leave to dismiss the appeal in favor of further postconviction proceedings.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected and attorney Kathleen M. Quinn's motion to be relieved of further representation of Brian I. Harris is denied; the case number is now 2014AP1767-CR.

IT IS FURTHER ORDERED that an appellant's brief shall be filed within sixty days of the date of this order.

Diane M. Fremgen
Clerk of Court of Appeals

[4] ***Batson v. Kentucky***, 476 U.S. 79 (1986).

[5] One thing Harris asks this court to consider is that the property had been abandoned for nine months to one year and had no owner. Harris mischaracterizes the evidence. The evidence was that the property had been empty for just one month at the time of the crime because the owners did not seek a new tenant knowing ownership would change at confirmation of the sheriff's sale. Although criminal trespass to a dwelling requires proof that the defendant intentionally entered the dwelling of another, WIS JI—CRIMINAL 1437, the unoccupied home did not cease to be a dwelling. *See* ***State v. Carls***, 186 Wis. 2d 533, 536, 521 N.W.2d 181 (Ct. App. 1994) (adopting the dictionary definition of "dwelling," which means a building used for residence); *see also* ***New Jersey v. Scott***, 776 A.2d 810, 811 (N.J. 2001); ***Hawaii v. Miner***, 637 P.2d 782, 783 (Haw. Ct. App. 1981).