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

2014AP2988-CRNM State of Wisconsin v. Justin W. Van Dera (L.C. #2012CF293)

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

Justin W. Van Dera appeals from a judgment of conviction for homicide by negligent operation of a vehicle, second-degree recklessly endangering safety, operating after revocation (OAR) causing death, obstructing an officer, and three counts of misdemeanor bail jumping. His appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),¹

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

and *Anders v. California*, 386 U.S. 738 (1967). Van Dera has filed a response to the no-merit report. RULE 809.32(1)(e). We required appellate counsel to file a supplemental no-merit report addressing Van Dera's assertion that a child witness's trial testimony was inconsistent with the child's recorded interview which was supposed to be played at trial but was not. We are not satisfied that the supplemental no-merit demonstrates there is no merit to Van Dera's concerns that the child's interview was not played for the jury. We reject the no-merit report, dismiss the appeal, and extend the time for Van Dera to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30.

Larry Lambrecht was killed as a result of a two-car accident on Highway 44 in Winnebago County. Van Dera was not involved in the accident but had been driving on Highway 44 in the opposite direction of Lambrecht. Van Dera had a nine-year-old child in the car with him. Witnesses testified that Van Dera's vehicle pulled out to pass in a no passing zone and forced Lambrecht to take evasive action resulting in Lambrecht's loss of control of his vehicle after it hit the gravel shoulder. Lambrecht's vehicle overcorrected and ended up in the opposite lane of traffic where it was T-boned by another vehicle causing Lambrecht to be ejected from the vehicle. Van Dera's theory of defense was that Lambrecht caused the accident because Lambrecht's vehicle crossed the centerline of the highway causing Van Dera to take evasive action. A jury found Van Dera guilty of all charges. Van Dera was sentenced to the maximum on the homicide conviction and other consecutive sentences for a total of eleven years, three months' initial confinement and ten years' extended supervision. A motion for postconviction

discovery was filed to have a blood specimen tested. The motion was later withdrawn when counsel determined that the information from the testing would not be useful to Van Dera.²

The no-merit report addresses whether the circuit court properly exercised its discretion in permitting an amendment six weeks before trial of the OAR charge to OAR causing death, in refusing to allow specific evidence of the accident history of Lambrecht's vehicle, the sufficiency of the evidence for each of the convictions, whether Van Dera's waiver of his right to testify was valid, and whether the sentence was a proper exercise of discretion. Van Dera has filed a lengthy response which challenges counsel's no-merit conclusion on the first three issues listed but largely focuses on Van Dera's assessment of the evidence at trial and how it could have been interpreted in his favor for acquittal. Within the discussion of the evidence at trial, Van Dera draws attention to the testimony of the nine-year-old child who was a passenger in his car. The circumstances relating to the child's testimony follow.

Just six days after the accident, the child passenger was interviewed by a forensic examiner and the interview was videotaped. The supplemental no-merit report attaches a sheriff detective's narrative report on the statements made by the child during the interview.³ The detective's report confirms what Van Dera indicates in his response to the no-merit report—that the child said that a vehicle passed over the line and Van Dera's vehicle moved over to the gravel

² This information is derived from extension motions appointed counsel filed in this court. The no-merit report does not discuss the postconviction discovery motion.

³ The record includes a DVD of the recorded interview that was furnished to the circuit court when motions in limine were heard. The circuit court told the parties that it was not able to play the recording on the court's computer. No transcript of the interview was offered by either party. In the supplemental no-merit report counsel indicates that she did not view the video and did not pursue obtaining a copy of the video because the detective's report on the interview provides significant detail.

and that the other driver ““caught gravel.”” The child also said Van Dera was going the speed limit.

At the beginning of the trial, the parties stipulated that the child’s recorded forensic interview would be played for the jury with two portions redacted. During opening argument the defense told the jury that Van Dera claimed that Lambrecht’s vehicle crossed into Van Dera’s lane of travel and Van Dera’s version of what occurred was consistent with the testimony that would be given by the driver of the vehicle that struck Lambrecht’s vehicle. Defense counsel then told the jury:

Bryce [C.], the nine-year-old who was awake and aware of what was going on was also interviewed at length after the accident. Bryce told investigators that he also remembered a situation where Lambrecht’s vehicle veered into the westbound lane of traffic. He remembers his seat belt locking and he remembers Justin Van Dera swerved to avoid a head-on collision. [Bryce] indicated this at a forensic interview which occurred shortly after the accident. Bryce [C.’s] testimony is consistent with both [the other driver] and Van Dera. You will have an opportunity to take a look at the interview that occurred between Bryce [C.] and the forensic interviewer, which is very informative.

On day two of the jury trial, the prosecution offered the video interview. When it came time to play the child’s video to the jury, it skipped and the circuit court stopped the playback and excused the jury. The court asked the parties to determine outside of court whether the playback problem could be fixed. The prosecutor indicated that if he was unable to play the video he would have the child appear for testimony the next day. When the jury returned the court advised it that it was unacceptable to play the video with skips or delays and that the parties were going to try and correct the issue with playback or use some other mechanism to get that testimony in. The court found that no substantive portion of the child’s interview had been played for the jury.

The next day the child testified. His direct examination focused on what occurred after Van Dera's vehicle broke down on the highway shortly after the accident happened.⁴ On cross-examination, the child testified he did not remember the car trip, did not remember looking at the speedometer that day, and did not remember any incident on the highway that day where a car swerved. There was no further attempt to play the child's video interview.

Van Dera's response suggests that the child's testimony at trial was inconsistent with the recorded interview the child gave just six days after the accident. He asserts the testimony "never was anything close to his first recollection" in May 2012. Based on Van Dera's assertions about the content of the video interview and trial counsel's promise that the jury would see the video, we required appointed appellate counsel to file a supplemental no-merit report addressing whether there was arguable merit to a claim that the child's recorded interview should have been presented as a prior inconsistent statement or that trial counsel should have pursued playback of the recorded interview.

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. 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. Also, because appointed counsel's no-merit report seeks counsel's discharge from the duty of representation, we must independently determine whether a potential ineffective assistance of trial

⁴ The prosecution elicited the child's testimony that after Van Dera's car broke down, Van Dera and the child ran away from the highway, through backyards, and over or under a fence. It was an attempt to show a consciousness of guilt.

counsel claim has sufficient merit to require appointed counsel to file a postconviction motion and request a *Machner*⁵ hearing.

Counsel's supplemental no-merit concedes that in the video interview the child made statements that were exculpatory because he said that a car veered into Van Dera's lane and Van Dera was traveling the speed limit. However, counsel concludes no issue of merit exists from the failure to play the interview for the jury because the child also made statements that detracted from the value of those exculpatory statements. Specifically counsel points out that the child said he did not actually see the other car veer into their traffic lane but Van Dera told him it happened. Counsel also points to the child's statements that he did not know what the speed limit was on the road they were traveling, what speed Van Dera was actually travelling, and that Van Dera told the child to lie to police about where they had been. Counsel concludes that prejudice would have resulted from playing the interview in its entirety for the jury because it gave an appearance that the child had been coached by Van Dera and Van Dera had asked the child to lie.

We cannot accept the no-merit conclusion. The parties stipulated to playing the child's video interview with two portions redacted. It is not known whether or not the portions to be redacted would have included any parts appellate counsel relies on for the prejudice conclusion. We cannot assess what impact redacting portions of video would have had on its potentially prejudicial nature.

⁵ A *Machner* hearing addresses a defendant's ineffective assistance of counsel claim. See *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

Further, trial counsel wanted to utilize the video interview to support the theory of defense, a decision which was presumably made with awareness of the potentially prejudicial portions of the child's interview. We are left to wonder why trial counsel abandoned the strategy of allowing the jury to see the child's video interview and whether that decision was based on a sufficient consideration of the facts and law. See *State v. Coleman*, 2015 WI App 38, ¶20, ___ Wis. 2d ___, ___ N.W.2d ___ (simply calling a lawyer's decision trial strategy does not end the inquiry because decisions must be based upon facts and law upon which an ordinarily prudent lawyer would have then relied).

Trial counsel told the jury that it would see the child's video interview. We are unable to assess whether issues that might arise from the broken promise to play the video lack merit. See *Coleman*, 2015 WI App 38, ¶30 ("If counsel says something will happen that does not, without explanation, counsel necessarily damages both his own, and potentially his client's, credibility."). See also *United States ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003) ("[W]hen the failure to present the promised testimony cannot be chalked up to unforeseeable events, the attorney's broken promise may be unreasonable, for 'little is more damaging than to fail to produce important evidence that had been promised in an opening.'" (citation omitted)); *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) ("[C]ounsel's opening primed the jury to hear a different version of the incident. When counsel failed to produce the witnesses to support this version, the jury likely concluded that counsel could not live up [to] the claims made in the opening.").

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion or notice of appeal is reinstated and extended to sixty days after remittitur.

Diane M. Fremgen
Clerk of Court of Appeals