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DISTRICT IV

December 22, 2015

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

2013AP2550-CRNM State of Wisconsin v. David H. B. Ennenga (L.C. #2012CF237)

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

Attorney Farheen Ansari has filed a no-merit report seeking to withdraw as appellate counsel for appellant David Ennenga. *See* WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Ennenga was sent a copy of the report and has filed a

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

response, and Ansari has filed a supplemental no-merit report. On May 26, 2015, successor counsel, Reed Cornia, was notified that this no-merit appeal would proceed unless counsel notified the court within ten days that he planned to withdraw the no-merit report. He did not. Because the no-merit report does not establish that further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and RULE 809.32, we reject the no-merit report.

Ennenga pleaded not guilty to eleven counts arising from a domestic incident involving D.E., his estranged wife, and asked for a jury trial on eight of the counts.[2] During his trial testimony, Ennenga conceded the elements of four of the counts,[3] but he directly denied the remaining four: he denied strangling or suffocating D.E., sexually assaulting her, damaging her property, and falsely imprisoning her. During closing argument, defense counsel conceded Ennenga's guilt on seven of the counts but argued that he was not guilty of sexual assault:

> Now I'm not even going [to] argue about Counts 2 through 8. That's a waste of time. I think [the prosecutor's] wasting his time arguing about those.
>
> But on Count 1, that sexual assault. That's why we're here.
>
> And there they haven't got the proof. It didn't happen, and I think the charge was made because of everything else that happened.…
>
> ....
>
> So on that count, on Count 1, Mr. Ennenga is not guilty. He didn't do it.

[2] Ennenga asked that three charges of bail jumping be tried to the circuit court; the circuit court found him guilty of the three counts outside the presence of the jury. The judgment of conviction incorrectly states that Counts 8, 10, and 11 were tried to the jury; those counts were tried to the court.

[3] Ennenga conceded the elements of the two disorderly conduct counts, the obstructing count, and the battery count.

> He was a jerk that night. He was a man out of control.… But on that count he is not guilty. They haven't proved it, and they cannot prove it under any circumstances.

The jury returned guilty verdicts on six counts, including two counts that Ennenga had denied but that trial counsel had conceded: strangulation or suffocation, and false imprisonment. The consecutive sentences imposed on those two counts were the maximum for each count; together they accounted for eight of the total nine and one-half years of the initial confinement portion of Ennenga's sentence.

The no-merit report addresses whether there would be arguable merit to a challenge to (1) the sufficiency of the evidence to support the jury verdicts; (2) errors in the trial procedure that would entitle Ennenga to a new trial; or (3) the sentence imposed by the court. The no-merit report concludes that there is no issue of arguable merit on any of these issues. Ennenga's response to the no-merit report identifies numerous issues that he argues have merit, including the argument that defense counsel "attack[ed] me personally during his closing statement to the jury. He did not defend me[;] he helped convict me." The supplemental no-merit report does not address this issue.

The question in a no-merit appeal is whether further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32. Here, the no-merit report has not addressed why it would be wholly frivolous to argue that Ennenga was deprived of his constitutional right to effective assistance of counsel when trial counsel conceded Ennenga's guilt on counts on which Ennenga had maintained his innocence. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel "must show that counsel's performance was deficient ... [in that] counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and also that

"the deficient performance prejudiced the defense," that is, that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"). Nor has the no-merit report addressed why it would be wholly frivolous to argue that trial counsel's concessions to the jury deprived Ennenga of his constitutional right to plead not guilty to those charges. *See* ***State v. Albright***, 96 Wis. 2d 122, 129-30, 291 N.W.2d 487 (1980) (recognizing that certain constitutional rights of a criminal defendant, including the decision whether to plead guilty, are "so fundamental that they are deemed to be personal rights which must be waived personally by the defendant").

The Wisconsin Supreme Court has held that where defense counsel makes concessions during closing argument that do not conflict with the defendant's own testimony, counsel's conduct may constitute "a reasonable tactical approach under the circumstances" that does not fall below an objective standard of reasonableness and may not be prejudicial. ***State v. Gordon***, 2003 WI 69, ¶26, 262 Wis. 2d 380, 663 N.W.2d 765. Gordon's case, the court noted, was distinguishable from one in which "a concession [was] made in direct conflict with the defendant's testimony." ***Id.***, ¶27. In this case, that is what happened. Accordingly, we are not persuaded that further proceedings would be wholly frivolous.

By this discussion, we do not mean to suggest that we have determined that it is the only seemingly non-frivolous issue arising in this case. Rather, we provide this discussion to explain our conclusion that the no-merit report has not demonstrated that there are no issues of arguable merit in this case. Because we determine that there is at least one issue in this case that would have arguable merit, we reject the no-merit report.

Therefore,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice. Attorney Cornia or a successor appointed by the State Public Defender shall continue to represent Ennenga.

IT IS FURTHER ORDERED that the time for Ennenga to file a postconviction motion or notice of appeal is extended to sixty days from the date of this opinion and order.

Diane M. Fremgen
Clerk of Court of Appeals