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August 4, 2016

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

2015AP1507-CRNM State of Wisconsin v. Steven D. Cathey (L.C. # 2011CF116)

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

Steven Cathey appeals a judgment convicting him of pandering, contrary to WIS. STAT. § 944.33(2) (2011-12).[1] Attorney Chris Gramstrup filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and ***Anders v. California***, 386 U.S. 738 (1967), concluding that there are no arguably meritorious issues for appeal. Cathey responded, and Gramstrup filed a supplemental no-merit report. The no-merit report discusses whether the circuit court erred in granting the

[1] All further references in this order to the Wisconsin Statutes are to the 2011-12 version, unless otherwise noted.

State's motions for admission of certain evidence of other crimes or acts. The no-merit report also addresses the potential issues of whether Cathey's plea was knowingly and voluntarily entered, whether the court erred in denying his motion to withdraw the plea, and whether the sentence was the result of an erroneous exercise of discretion. Cathey's response addresses the issue of whether the circuit court judges should have recused themselves and whether his trial counsel's failure to send him the pre-sentence investigation report was a violation of his due process rights. Upon reviewing the entire record, as well as the no-merit report, response, and supplemental report, we conclude that there are no arguably meritorious appellate issues.

Cathey was charged with keeping a place of prostitution, pandering/pimping, and two counts of solicitation of prostitutes, all as a repeat offender. He entered an ***Alford*** plea[2] as to one count of pandering/pimping. Prior to sentencing, Cathey moved to withdraw his plea, asserting that he acted in haste and confusion when he agreed to accept a plea bargain. The circuit court denied the motion and proceeded to sentence Cathey, and Cathey now appeals.

We turn first to the circuit court's ruling that it would admit evidence of Cathey's previous pandering conviction in 1993, as well as testimony of individuals alleging that Cathey set up sexual contact on their behalf in exchange for money in 2008. Evidence of "other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." WIS. STAT. § 904.04(2). However, § 904.04(2) will not exclude other acts evidence when the evidence is "offered for other purposes, such as proof of

[2] An ***Alford*** plea is a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. ***State ex rel. Jacobus v. State***, 208 Wis. 2d 39, 45 n.5, 559 N.W.2d 900 (1997); *see also* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Additionally, the pandering statute specifically provides that "it is competent for the state to prove other similar acts by the accused for the purpose of showing the accused's intent and disposition." WIS. STAT. § 944.33(3).

The question of whether a circuit court erred when it admitted or excluded evidence is subject to an erroneous exercise of discretion standard. ***State v. Nelis***, 2007 WI 58, ¶26, 300 Wis. 2d 415, 733 N.W.2d 619. Here, in weighing the probative value of the proffered evidence, the court considered its reliability, noting that Cathey's previous pandering conduct led to a conviction and that the allegations of arranging sexual contact for money led to the revocation of Cathey's probation by an administrative law judge. The court concluded that these two items of evidence were reliable and highly probative, considering the legislature's specific directive in WIS. STAT. § 944.33(3) that previous pandering activity be permissible for showing intent and disposition. The court acknowledged that there was a danger of prejudice to Cathey, but concluded that it was outweighed by the probative value of the evidence. We will sustain an evidentiary ruling if we find that the circuit court "examined the relevant facts; applied a proper standard of law; and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." ***State v. Sullivan***, 216 Wis. 2d 768, 780, 576 N.W.2d 30 (1998). The record demonstrates that the circuit court did so here, such that there would be no merit to challenging its evidentiary ruling.

We also agree with counsel's assessment that there would be no arguable merit to challenging Cathey's plea. Cathey conceded at the hearing on his motion for plea withdrawal that the plea colloquy was thorough and not deficient in any way. We agree, and upon our independent review of the record, we are satisfied that the circuit court followed the procedure

for accepting a plea set out in ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). We turn, then, to the issue of whether the court erred in denying Cathey's motion to withdraw his plea prior to sentencing. A defendant may withdraw a plea prior to sentencing upon showing any fair and just reason for his change of heart, beyond the simple desire to have a trial, so long as the prosecution has not been substantially prejudiced by reliance on the plea. *See* ***State v. Garcia***, 192 Wis. 2d 845, 861-62, 532 N.W.2d 111 (1995); ***State v. Shanks***, 152 Wis. 2d 284, 288-90, 448 N.W.2d 264 (Ct. App. 1989). Here, Cathey's motion for plea withdrawal alleged that Cathey acted "in haste and confusion when agreeing to accept a plea bargain." The court held an evidentiary hearing on the motion, at which Cathey testified that the reason he wanted to withdraw his plea was that he was innocent and had given the matter more thought. He testified that he was "rushing" himself when he entered the plea, was nervous, and was not thinking clearly.

In considering whether a fair and just reason for plea withdrawal exists, the circuit court may assess the credibility of the proffered explanation for the requested plea withdrawal. ***State v. Kivioja***, 225 Wis. 2d 271, 291, 592 N.W.2d 220 (1999). The court did so here, and did not find Cathey's reasons to be credible. The court noted that Cathey had initiated plea discussions with the State, had called the court's attention to the distinction between a guilty plea and an ***Alford*** plea, and on several occasions was given the opportunity to express concern about haste or about not having enough time to go over evidence or confer with his attorney. Generally, we will not overturn credibility determinations on appeal, and nothing in the record or the submissions of Cathey or his counsel suggests that doing so is warranted here. *See* ***Global Steel Prods. Corp. v. Ecklund Carriers, Inc.***, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269 (credibility determinations will not be overturned unless inherently or patently incredible or

in conflict with the uniform course of nature or with fully established or conceded facts). Accordingly, we agree with counsel's assessment that there would be no arguable merit to challenging the circuit court's denial of Cathey's motion for plea withdrawal.

We turn next to Cathey's argument in his response to the no-merit report that the two circuit court judges who presided over his case, Todd Bjerke and Scott Horne, should have been disqualified because they each acted as prosecutors in other matters in which Cathey was the defendant. This argument is without arguable merit. The record does not support an argument that any of the objective bases for disqualification under WIS. STAT. § 757.19(2)(a) through (f) exist in this case as to Judge Bjerke or Judge Horne. Although WIS. STAT. § 757.19(2)(c) provides that a judge shall disqualify himself when that judge "previously acted as counsel to any party in the same action or proceeding," that subsection does not prohibit a judge from presiding in a trial in a case different from the one in which he represented a litigant, as is the case here.

As to Judge Bjerke, we note that he presided over the case only through the preliminary hearing, after which Cathey filed a request for substitution, which was granted. To the extent that Cathey believes that Judge Horne should have made a subjective determination to recuse himself under WIS. STAT. § 757.19(2)(g), that subsection does not require disqualification in a situation where someone other than the judge believes there is an appearance that the judge is unable to act in an impartial manner. ***State v. American TV & Appliance of Madison, Inc.***, 151 Wis. 2d 175, 183, 443 N.W.2d 662 (1989). The subjective determination of the existence of a judge's actual or apparent inability to act impartially in a case is for the judge to make. ***Id.*** Our review is limited to establishing whether the judge made a determination requiring

disqualification. ***Id.*** at 186. The record reflects that Judge Horne did so on the record, such that there would be no arguable merit to challenging his failure to recuse himself.

Finally, we agree with counsel's assessment that there would be no arguable merit to a claim that the circuit court improperly exercised its sentencing discretion. In imposing its sentence, the court considered the seriousness of the offense, Cathey's rehabilitative needs and his failure to adhere to the rules of supervision in the past, the need to protect the public, and Cathey's criminal history. The court imposed a sentence of four years of initial confinement and five years of extended supervision, which was within the maximum penalty range. *See* WIS. STAT. § 944.33(2) (classifying pandering as a Class F felony), § 939.50(3)(f) (maximum of twelve and one-half years of imprisonment for a Class F felony). Under these circumstances, it cannot reasonably be argued that Cathey's sentence is so excessive as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Cathey argues in his response that his due process rights were violated when his trial counsel failed to send him the pre-sentence investigation (PSI) report, citing ***State v. Parent***, 2006 WI 132, 298 Wis. 2d 63, 725 N.W.2d 915. This argument is without arguable merit on appeal. Under WIS. STAT. § 972.15(4m), a defendant who is not represented by counsel is entitled to view the PSI report, but may not keep a copy of the report. Cathey was represented by counsel, and the circuit court confirmed on the record with defense counsel and with Cathey, at the beginning of the sentencing hearing, that they had the opportunity to review the PSI report. Cathey's counsel informed the court of factual additions and corrections. Nothing in the record, the no-merit reports, or Cathey's response suggests that the statutory procedure for accessing the PSI report was not complied with, or that any other arguably meritorious issue exists.

Accordingly,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Chris Gramstrup is relieved of any further representation of Cathey in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals