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March 10, 2017

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

2015AP2645-CRNM State of Wisconsin v. Unquail T. Kennedy (L.C. # 2013CF1153)

Before Brennan, P.J., Kessler and Brash, JJ.

Unquail T. Kennedy appeals a judgment of conviction entered after a jury found him guilty of one count of first-degree reckless homicide and one count of possessing a firearm as a person previously adjudicated delinquent for a felonious act. *See* WIS. STAT. § § 940.02(1)

(2013-14), 941.29(2)(b) (2013-14).[1] The circuit court imposed an aggregate sentence of twenty-three years of initial confinement and twenty years of extended supervision. Attorney Marcella De Peters filed a no-merit report stating that no arguably meritorious issues exist for appeal. *See* WIS. STAT. RULE 809.32; ***Anders v. California***, 386 U.S. 738 (1967). Kennedy filed a response, and, at our request, Attorney De Peters filed a supplemental no-merit report. Upon review of the record and the submissions from Attorney De Peters and Kennedy, we are unable to conclude that further proceedings would lack arguable merit. Therefore, we reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for Kennedy to file a postconviction motion.

State's cross-examination of Kennedy. At trial, Kennedy did not dispute that he was at the scene when the victim in this case was fatally shot. On direct examination, he testified about why he did not realize the victim had been shot, stating he believed a shooting would be like "a movie. Like when somebody get shot, blood is everywhere. Like on the walls, on people clothes. I didn't see none of that. [*Sic*.]" On cross-examination, the prosecutor asked a series of questions about whether, when Kennedy was "a kid," he witnessed the homicide of his sister's boyfriend. Kennedy said that he had not previously witnessed a homicide. The prosecutor twice asked him to confirm that he "told the detectives" something different. Kennedy first answered that he had not said anything inconsistent to the detectives, then said he did not recall doing so.

[1] All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Cross-examination questions must have a good faith basis. *See* ***State v. Yang***, 2006 WI App 48, ¶15, 290 Wis. 2d 235, 712 N.W.2d 400. In the response to the no-merit report, Kennedy complains that no basis existed for the cross-examination described above and that his trial counsel was ineffective for failing to object. A person receives ineffective assistance of counsel if the lawyer's conduct is deficient and the deficiency prejudices the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). We asked Attorney De Peters to address Kennedy's complaints regarding the prosecutor's actions and the absence of any objection. Attorney De Peters's response reflects that she was unable to identify a source for the questions, which seem aimed at Kennedy's credibility as a witness and the actions he took in response to the shooting. Credibility is always a relevant inquiry when the facts are in dispute, *see* ***State v. Vonesh***, 135 Wis. 2d 477, 492, 401 N.W.2d 170 (Ct. App. 1986), and a defendant's after-the-fact conduct is relevant to determining whether the defendant acted with the utter disregard for human life necessary to prove first-degree reckless homicide, *see* ***State v. Burris***, 2011 WI 32, ¶41, 333 Wis. 2d 87, 797 N.W.2d 430, and WIS. STAT. § 940.02(1). It thus appears that Kennedy can pursue an arguably meritorious claim based on the prosecutor's cross-examination and trial counsel's failure to object.

Right to counsel of choice. Retained counsel, Attorney Michael Chernin, represented Kennedy at trial. Shortly before sentencing, Attorney Peter Kovac filed a letter in which he moved to substitute as Kennedy's counsel. With the letter, Attorney Kovac submitted a substitution of counsel request signed by Kennedy. Attorney Kovac asked to adjourn the sentencing to give him additional time to prepare and advised the circuit court that the State did not object to an adjournment. Attorney Kovac went on to say that "[i]f the sentencing hearing cannot be rescheduled, I am still willing to represent Mr. Kennedy."

At the outset of the sentencing hearing, the circuit court questioned Kennedy about the request for substitution. Kennedy responded that he wanted new counsel and felt he should be represented by Attorney Kovac. Although the record shows that Attorney Kovac was present in the courtroom, the circuit court apparently did not question him about his readiness to proceed. After establishing that Attorney Chernin was prepared for sentencing, the circuit court concluded that Kennedy failed to provide a sufficient reason to substitute counsel and denied the request for substitution.

"[T]he right to counsel derived from the Sixth Amendment includes 'the right of a defendant who does not require appointed counsel to choose who will represent him.'" ***State v. Peterson***, 2008 WI App 140, ¶7, 314 Wis. 2d 192, 757 N.W.2d 834 (citing ***United States v. Gonzalez-Lopez***, 548 U.S. 140, 144 (2006)). The right to counsel of choice applies at sentencing. *See* ***Mulkovich v. State***, 73 Wis. 2d 464, 474, 243 N.W.2d 198 (1976). We asked Attorney De Peters to address whether Kennedy suffered a violation of his right to counsel of choice at sentencing. Attorney De Peters advises that, in her view, "it was fair for the [circuit] court to assume that if Mr. Chernin wasn't alleging a problem," then he could continue as Kennedy's counsel. Further, she advises that she discounts as "illusory" Attorney Kovac's claim that he was prepared to proceed. She concludes that the circuit court properly balanced the request for new counsel against the inconvenience of rescheduling the matter, particularly because "Attorney Chernin tried the case [and] was familiar with the facts."

The Sixth Amendment "commands ... that the accused be defended by the counsel he believes to be best." ***Gonzalez-Lopez***, 548 U.S. at 146. The right is not absolute, but a presumption exists in favor of a defendant's choice of counsel. ***State v. Miller***, 160 Wis. 2d 646, 652, 467 N.W.2d 118 (1991). '"Deprivation of the right is 'complete' when the defendant is

erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received.'" ***State v. Gonzalez-Villarreal***, 2012 WI App 110, ¶7, 344 Wis. 2d 472, 824 N.W.2d 161 (citation omitted). Refusal to honor the right is improper when based "solely on the trial judge's belief that trial counsel would better represent the defendant [at sentencing] than the attorney the defendant desired." ***Mulkovich***, 73 Wis. 2d at 473-74. Under the circumstances here, the foregoing case law suggests that Kennedy has an arguably meritorious claim that he suffered a violation of his Sixth Amendment right to counsel of choice at sentencing. Other cases may also be relevant.

When appointed counsel 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, cmt. (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).

We cannot conclude that further proceedings in this matter would lack arguable merit. We therefore will reject the no-merit report filed by appellate counsel. We observe that the potential issues we discuss are not currently preserved for appellate review because no

postconviction motion was filed raising them. We therefore will dismiss this appeal and extend the deadline for filing a postconviction motion in this matter.[2]

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Kennedy, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Kennedy or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Kennedy to file a postconviction motion 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 new counsel for Kennedy or that new counsel will not be appointed.

Diane M. Fremgen
Clerk of Court of Appeals

[2] Kennedy may, of course, pursue postconviction relief on grounds in addition to those discussed in this order.