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September 18, 2017

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

2017AP630-CRNM State of Wisconsin v. Pedro Gallegos-Lopez (L.C. # 2015CF5111)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Pedro Gallegos-Lopez, by Attorney Dennis Schertz, appeals a judgment of conviction pursuant to the no-merit procedure set forth in WIS. STAT. RULE 809.32 (2015-16).¹ A jury found Gallegos-Lopez guilty of two counts of engaging in repeated acts of sexual assault of the same child. *See* WIS. STAT. § 948.025(1). Attorney Schertz filed a no-merit report asserting that further proceedings would be frivolous within the meaning of *Anders v. California*, 386 U.S. 738 (1967). Gallegos-Lopez did not file a response. Upon review of the record and the no-merit report, we conclude that at least one arguably meritorious issue exists. Accordingly, we reject the no-merit report, dismiss the appeal without prejudice, and extend appellate deadlines.

In November 2015, the State filed a complaint alleging in count one that Gallegos-Lopez engaged in repeated acts of sexual assault of his step-daughter B.M.A. and alleging in count two that he engaged in repeated acts of sexual assault of his daughter I.L.G.A. The matter proceeded to trial in June 2016. At the outset of the trial, counsel for Gallegos-Lopez gave an opening statement suggesting that the children's accusations were the consequence of arguments he had with their mother, his former wife, during the late fall of 2015 concerning his child support payments. On the second day of trial, the State advised that one of its witnesses, B.M.A.'s school guidance counselor, had arrived at the courthouse with the contents of her file concerning B.M.A. The file included a letter that B.M.A wrote in January 2015 regarding sexual and physical abuse she said she had suffered, notes of statements that B.M.A made in 2013 concerning inappropriate touching, and the counselor's notes about her sessions with B.M.A.

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

Gallegos-Lopez objected to admitting the above-described documents as evidence on the ground that the State had violated its duty to produce the material in discovery prior to trial. Further, he argued that he had not seen the documents and could not obtain them outside of the discovery process because doing so required assistance from the complainant's mother, who had not been willing to cooperate with the defense. Gallegos-Lopez went on to argue that he was prejudiced by the late disclosure because he was unable to conduct an appropriate investigation regarding the time periods reflected in the material. Further, he expressed concern that the jury's view of the defense would be adversely affected by counsel's failure in the opening statement to account for B.M.A's earlier disclosures, and counsel asserted that he would have approached the opening statement differently had he been aware of the documents.

The State responded that, although the police reports reflected the existence of the documents, they were not in the State's possession prior to trial. The State acknowledged that it could have obtained the documents earlier but asserted it had no obligation to do so.

The circuit court found that the documents at issue were "highly relevant" and that the material in the guidance counselor's file "goes to the heart of the defense that this all arose out of a fight about money post divorce." The circuit court further agreed with Gallegos-Lopez that he was not able to obtain the materials independently because the witnesses were "free to block [his] investigator's attempts to get" the documents. The circuit court considered declaring a mistrial but rejected that option as "not a good use of resources." The circuit court went on to determine that the State had no obligation to produce the documents in advance of trial and, accordingly, concluded that no reason existed to exclude the material from the trial. The State subsequently presented the information in the counselor's file and cross-examined Gallegos-Lopez about his theory of defense in light of that information.

In the no-merit report, appellate counsel opines, without citation to authority, that the State “had no affirmative duty” to produce the material in the guidance counselor’s file before trial began. This court’s review of the record reveals, however, that B.M.A and the school guidance counselor were both named on the State’s witness list. We observe that, pursuant to Wis. STAT. § 971.23(1)(d), the State is required to disclose to the defendant upon demand within a reasonable time before trial, “any relevant written or recorded statements of a witness named on a [witness] list.” Further, the circuit court, the State, and defense counsel all signed a pretrial order addressing reciprocal discovery obligations. As relevant, here, the order provided that, by the prosecutor’s signature, the State “certifies that it has provided all currently available materials required by Sec. 971.23(1), Wis. Stats. to the defense and that it will continue to provide any additional statutorily required materials as they become available.” The order further provided: “[b]y signature on this document, the parties each acknowledge an obligation to diligently seek and provide discoverable materials in a timely manner.”

Under these circumstances, this court is satisfied that Gallegos-Lopez could pursue arguably meritorious postconviction claims based on the admission of witness statements that were not disclosed to him until mid-way through the trial. See *State v. White*, 2004 WI App 78, ¶¶9, 23, 271 Wis. 2d 742, 680 N.W.2d 362 (stating that a prosecutor “has an affirmative duty to make reasonable inquiry and may not assert that he or she did not know of those things within the ambit of § 971.23 that could have been reasonably discovered,” and that where a prosecutor has “signed the [circuit] court’s pre-trial order and, by virtue of h[is] signature on that order, ‘acknowledge[d] an obligation to diligently *seek* and provide discoverable materials in a timely manner,’ ... [the defendant’s] lawyer was entitled to rely on this acknowledgment”).

When resolving an appeal under WIS. STAT. RULE 809.32, 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. 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 regard to the mid-trial production of the guidance counselor’s file would be wholly frivolous. Therefore, we must reject the no-report report filed in this case. We add that our decision does not mean we have reached a conclusion about the arguable merit of any other potential issue in the case. Gallegos-Lopez is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

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 Gallegos-Lopez, 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 Gallegos-Lopez or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Gallegos-Lopez 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 advising either that it has appointed new counsel for Gallegos-Lopez or that new counsel will not be appointed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals