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October 10, 2017

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

2016AP495-CRNM State of Wisconsin v. Aaron T. Stephens
(L.C. # 2011CF1544)

Before Sherman, Kloppenburg and Fitzpatrick, 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).

Patrick Flanagan, counsel for Aaron Stephens, filed a no-merit report concluding that there would be no arguable merit on appeal to challenging Stephens's conviction for first-degree intentional homicide by use of a dangerous weapon. *See* WIS. STAT. RULE 809.32 and

§ 940.01(1)(a) (2011-12).[1] This no-merit appeal follows a four-day jury trial, after which Stephens was sentenced to life in prison. Stephens has filed a response to the no-merit report raising several challenges to his conviction. Upon review of the record and the submissions from Attorney Flanagan and from Stephens, we are unable to conclude that further proceedings as to trial counsel's effectiveness and the sufficiency of the credible evidence would lack arguable merit. We therefore reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for Stephens to file a postconviction motion.

Stephens asserts in his response to the no-merit report that his trial counsel was ineffective for failing to obtain expert testimony on ballistic and forensic evidence. The record reflects that, at a pre-trial status conference, Stephens's trial counsel asked for an adjournment, stating the following:

> I realized something that I should have acted on a long time ago which is I should have obtained … a ballistics expert because there's a very serious issue in this case of the gun that was found with Mr. Stephens when he was apprehended was matched by one of the Crime Lab analysts to a casing that was found at the scene. And through no fault of anybody else but myself, my lack of diligence I guess in obtaining an expert which I should have done I need time now to do that too.

The prosecutor agreed that Stephens should be permitted time to obtain an expert, noting the seriousness of the case and the potential consequences for Stephens. The circuit court granted the adjournment, acknowledging that the State intended to elicit expert testimony on ballistics and stating, "It's only appropriate to preserve the integrity of the case that the defense have the opportunity to have the issue reviewed by their own ballistics experts as requested[.]"

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

The court further stated, "I know I had some cases where the funding was a big issue[.]" The parties agreed that if there were issues with obtaining the expert they would let the court know. The record is silent on what actions trial counsel took after that to retain an expert, but the transcripts of the jury trial reflect that no expert testimony was presented by the defense. The State presented testimony at trial from firearm and tool mark expert Mark Simonson. Simonson was the final witness to testify at trial before the attorneys made their closing remarks.

The record also reflects that one of the State's witnesses, police officer Theodore Schlitz, testified that two of the State's other witnesses, Teran Griffin and Keenan Gardner, had been lying when Schlitz first spoke with each of them. Schlitz testified, "[I]t appeared they both were lying … I knew they were there, so I believed they were lying to me, and I wanted them to be forthcoming with what happened." Trial counsel did not object. Wisconsin case law provides that testimony from one witness that another witness is telling the truth can interfere with the jury's role and require reversal in the interest of justice. *See* ***State v. Romero***, 147 Wis. 2d 264, 277-78, 432 N.W.2d 899 (1988) (erroneously admitted testimony from social worker and police officer that victim was being honest required a new trial in the interest of justice). Stephens asserts in his no-merit response that officer Schlitz's testimony about Gardner and Griffin's credibility was given additional weight during closing argument when the prosecutor characterized which portions of their statements to police were true and which were false, stating that Gardner lied for "about a half an hour" and that Griffin lied for about twelve minutes.

Stephens also asserts in the no-merit response that his trial counsel was ineffective for failing to object when the prosecutor commented during closing argument on the truthfulness of the testimony of another witness, Kenyon Canady. The State had expected Canady to testify that Stephens pulled out a gun on Canady during another incident about two hours before the

homicide. Instead, Canady denied at trial that Stephens had pulled a gun on him. The prosecutor told the jury during closing argument that "Canady came into the court and just out and out lied." Trial counsel did not object. Stephens asserts in his no-merit response that the testimony from officer Schlitz and the comments of the prosecutor about the truthfulness of other witnesses impermissibly took away from the jury the issue of determining witness credibility.

We cannot conclude, based on the record before us, that it would be "wholly frivolous" under ***Anders v. California***, 386 U.S. 738, 744 (1967), to file a postconviction motion asserting ineffective assistance of counsel as to the issues discussed above. *See* ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. In addition, we note that the scant two paragraphs in the no-merit report devoted to the analysis of the sufficiency of the credible evidence to support the verdict, from a four-day jury trial, does not satisfy us that appellate counsel has complied with the discussion rule under ***State ex rel. McCoy v. Wisconsin Court of Appeals, Dist. 1***, 137 Wis. 2d 90, 100-01, 403 N.W.2d 449 (1987). Beyond a conclusory statement that the "record stands as a sufficient level of credible evidence to meet the elements of the charged offenses[,]" the no-merit report does not reflect any independent review of the record by appellate counsel in its discussion of the sufficiency of the evidence.

We therefore will reject the no-merit report filed by appellate counsel, dismiss this appeal, and extend the deadline for filing a postconviction motion in this matter. Stephens may, of course, pursue postconviction relief on grounds other than those discussed in this order.

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 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.

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

Diane M. Fremgen
Clerk of Court of Appeals