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DISTRICT II/IV

April 12, 2018

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

2017AP393-CRNM State of Wisconsin v. Ty Turner (L.C. # 2015CF209)

Before Lundsten, P.J., Sherman 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).

Angela Henderson, counsel for Ty Turner, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). The no-merit report addresses whether the circuit court erroneously exercised its discretion as to pretrial

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

rulings, whether Turner made a valid waiver of his right not to testify at trial, whether the evidence at trial was sufficient to support the convictions, whether the jury instructions were proper, and whether the circuit court erroneously exercised its sentencing discretion. Turner was sent a copy of the report but has not filed a response. Upon our independent review of the record and no-merit report, we conclude that there are no arguably meritorious appellate issues.

Turner was convicted, following a jury trial, of second degree sexual assault and burglary, both as repeaters. The court imposed a sentence of seven years and six months of initial confinement and seven years and six months of extended supervision on the sexual assault count, and three years of initial confinement and four years of extended supervision on the burglary count.

Prior to trial, Turner moved twice for his appointed counsel to withdraw from representing him, and for the appointment of new counsel. The court denied both motions, but stated that if Turner wished to retain private counsel, he was free to do so. For each of the motions, the court inquired about the basis for the request from both Turner and his counsel, considered the timing of the motions, and considered whether current counsel could present an adequate and fair defense. *See* ***State v. Lomax***, 146 Wis. 2d 356, 359, 432 N.W.2d 89 (1988) (setting forth factors for courts to consider in exercising discretion as to whether to allow appointed counsel to withdraw and new counsel to be appointed). We are satisfied that the record demonstrates that the circuit court properly exercised its discretion in denying the motions for counsel to withdraw, such that any assertion to the contrary would be without arguable merit on appeal.

Counsel asserts in the no-merit report that it would be frivolous to challenge a pretrial evidentiary ruling about the admissibility of testimony from the victim about a conversation that took place in the victim's garage, prior to the date of the assault, between her and a white male who matched Turner's description. Turner opposed admission of the testimony. The court initially ruled at a pretrial hearing that it would allow the testimony as rebuttal testimony under certain circumstances. However, when the issue came up at trial, the court excluded the testimony as improper other acts evidence, applying the analytical framework in ***State v. Sullivan***, 216 Wis. 2d 768, 772-73, 576 N.W.2d 30 (1998). Counsel argues in the no-merit report that, because the court ultimately excluded the testimony, any challenge to its earlier ruling to conditionally allow the testimony as rebuttal evidence would be frivolous, and we agree.

We turn next to the issue of whether the circuit court obtained a proper waiver of Turner's right not to testify at trial. The record reflects that the court engaged in a sufficient colloquy with Turner to ascertain that his waiver was made knowingly, voluntarily, and intelligently, and nothing in the record or the no-merit report suggests otherwise. *See* ***State v. Denson***, 2011 WI 70, ¶8, 335 Wis. 2d 681, 799 N.W.2d 831 (best practice is for court to conduct a colloquy on waiver of the right to testify). Thus, we agree with counsel's conclusion that there would be no arguable merit to this issue on appeal.

Counsel also asserts in the no-merit report that any challenge to the sufficiency of the evidence would be frivolous. When reviewing the sufficiency of the evidence to support a conviction, the test is whether "the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501,

451 N.W.2d 752 (1990). Credibility of witnesses is an issue for the trier of fact. ***Id.*** at 504. Without attempting to recite the evidence here, we conclude that the victim's testimony, if believed, was sufficient to establish the elements of the charges. Although Turner recited a different version of the events in his own testimony, the jury elected to believe the victim's account. There is nothing in the record or the no-merit report that would support a conclusion that the victim's testimony was inherently incredible. Accordingly, we conclude that any challenge to the sufficiency of the evidence on appeal would be without arguable merit.

During the jury instruction conference, counsel for both sides agreed on which instructions would be given. The record reflects that the court read the instructions and that no objections were made. Therefore, we agree with counsel that any argument that the jury was improperly instructed would be frivolous.

A challenge to Turner's sentence also would be frivolous. The standards for the circuit court and this court on sentencing issues are well-established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result well within the range permitted by law, such that there would be no arguable merit to challenging the circuit court's exercise of its sentencing discretion.

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1, 786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

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

IT IS FURTHER ORDERED that Angela Henderson is relieved of any further representation of Ty Turner in this matter pursuant to WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals