OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

October 24, 2018

To:

Hon. Michael J. Aprahamian
Circuit Court Judge
Waukesha County Courthouse-Br. 9
515 W. Moreland Blvd.
Waukesha, WI 53188

Gina Colletti
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Donna Odrzywolski
6650 W. State St., Unit D, #234
Wauwatosa, WI 53213

Susan Lee Opper
District Attorney
515 W. Moreland Blvd., Rm. G-72
Waukesha, WI 53188-2486

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Raymond Polinske, #208438
Winnebago Corr. Center
P.O. Box 219
Winnebago, WI 54985-0219

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

2017AP1373-CRNM State of Wisconsin v. Raymond Polinske (L.C. #2013CF1055)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Raymond Polinske appeals from a judgment convicting him after a jury trial of one count of manufacturing or delivering heroin (<= 3 grams) as a second or subsequent offense and one count of maintaining a drug-trafficking place. Appellate counsel has filed a no-merit report

pursuant to WIS. STAT. RULE 809.32 (2015-16)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Polinske filed a response. Upon consideration of the no-merit report and response and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we conclude there are no issues with arguable merit for appeal and therefore summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

City of Waukesha police made arrangements with a confidential informant (CI) to purchase heroin from Polinske on August 8 and 12, 2013. Video recordings were made of the buys. The first transaction was in a public parking lot, the second inside Polinske's residence.

A few weeks later, someone happened to find a wallet and turned it over to the Waukesha Police Department. It was Polinske's. Police contacted him to come and retrieve it. An officer interviewed Polinske about his drug activity in the community. He at first denied it but then admitted that, to support his own habit, he would buy heroin in Milwaukee and sell or give it to friends in the Waukesha area. Unbeknownst to Polinske, the officer video-recorded the interview with a handheld device.

Polinske was charged with two counts of manufacturing or delivering heroin (<= 3 grams) as a second or subsequent offense and one count of maintaining a drug-trafficking place. The matter went to a jury trial. The three video recordings were entered into evidence and published to the jury. The August 8 and 12 videos were of poor quality. The August 8 one was bolstered by the testimony of an officer who watched the parking lot transaction from his unmarked car. The August 12 one, which corresponded to count two, the second delivery

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

charge, had no corroborating testimony as it was filmed inside Polinske's residence. The jury convicted Polinske on counts one and three and acquitted him on count two. On count one, Polinske was sentenced to seven years', six months' initial confinement and five years' extended supervision. On count three, he received three years', six months' IC and one year, six months' ES, consecutive to count one. This no-merit appeal followed.

The no-merit report addresses the potential issues of whether the evidence admitted at trial was sufficient to support a conviction on counts one and three and whether the sentence was unduly harsh or otherwise the result of an erroneous exercise of discretion. As our review of the record satisfies us that the no-merit report properly and thoroughly analyzes these issues as without merit, we address them no further.

Polinske raises four issues in his response: (1) ineffective assistance of trial counsel; (2) prosecutorial errors; (3) erroneous trial court information; and (4) ineffective assistance of appellate counsel. None of the issues have arguable merit.

Polinske contends trial counsel rendered ineffective assistance by failing to: (1) contact or interview "any and all witnesses" that either were listed in police reports or that he named as character or alibi witnesses, or to give him an exact date of when the count one offense took place so that he could present an alibi; (2) adequately prepare for trial, such as investigating "missing police reports," how the CI came to work for the police, or why the CI was not searched by a female officer before the buys; (3) ascertain whether he was given his ***Miranda***[2] rights before the recorded "custodial interrogation" at the police station and prevent admission of

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

the inculpatory video; (4) advise him to enter a guilty or no-contest plea rather than go to trial; and (5) file a motion on the "false information" in the PSI.

A postconviction ***Machner***[3] hearing is a prerequisite to a claim of ineffective assistance of counsel. ***State v. Curtis***, 218 Wis. 2d 550, 555, 582 N.W.2d 409 (Ct. App. 1998). Beyond that, Polinske's own response and exhibits underscore the weakness of his points. For example, he frankly admits that the reason trial or appellate counsel did not look into his alibi was because he "never gave either one of them names of people to talk to [to] confirm his alibi." He also asserts that the reason the CI came to work for the police "seemed" to have come from a "possible" unlawful traffic stop. Furthermore, he was not in custody when the officer interacted with him when he went to retrieve his wallet. In addition, Polinske includes in his appendix a letter to him from appellate counsel advising him that she spoke with his trial counsel "at length," and in her opinion, any testimony trial counsel "would give in response to an ineffective assistance claim would not support such a claim and may actually be harmful to your appeal."

Polinske also complains of prosecutorial misconduct, specifically, that the prosecutor withdrew a proffered plea agreement, initially indicated an intent not to show the videos of the buys, and did not establish that he was given ***Miranda*** warnings. The record does not reflect that the State ever tendered a plea agreement; further, Polinske does not assert that, if one was offered, he took any action in reliance on it. As to the videos, Polinske does not indicate how any change in the State's strategy harmed him. If his complaint is that they were of poor quality, that was for the jury to wrestle with. Indeed, the jury acquitted him of the August 12 incident.

[3] *See* ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

He asserts that the police station video does not establish that he was read his ***Miranda*** rights when he went to retrieve his lost wallet. He did not need to be: he was not in custody, and he voluntarily offered the police incriminating information.

Polinske next asserts that the trial court erred because it relied on inaccurate information in the PSI, allowed him to be convicted on insufficient evidence of maintaining a drug-trafficking place, and sentenced him too harshly. The court asked Polinske if he took issue with any information in the PSI; Polinske said no. And, as noted above, appellate counsel properly examined the sufficiency of the evidence and the court's exercise of sentencing discretion. His contentions are without merit.

Polinske claims he received ineffective assistance of appellate counsel. He contends she was not "devoted to his case," did not respond to his letters as promptly as he wished, and failed to investigate all possible issues. We will not review a claim of ineffective appellate counsel on direct appeal. *See* ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). Such a claim must be pursued by a petition for a writ of habeas corpus in this court. ***Id.*** at 522.

Our independent review of the record discloses no other potentially meritorious issue for appeal. Accordingly, this court accepts the no-merit report and affirms his conviction. Therefore,

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

IT IS FURTHER ORDERED that Attorney Donna Odrzywolski is relieved from further representing Polinske in this appeal. *See* 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