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DISTRICT IV

October 22, 2018

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

2017AP832-CRNM State of Wisconsin v. Bruce A. Thompson (L.C. # 2014CF362)

Before Sherman, Blanchard, and Kloppenburg, 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).

Bruce Thompson appeals a judgment convicting him of thirteen counts of possession of child pornography, after a two-day jury trial. Attorney Michael Rosenberg has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2015-16)¹ and

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

Anders v. California, 386 U.S. 738, 744 (1967). Thompson has filed two responses to the no-merit report raising several challenges to his conviction, and Rosenberg has filed a supplemental no-merit report in the form of an affidavit. Upon review of the record and the submissions from Attorney Rosenberg and from Thompson, we are unable to conclude that further proceedings as to trial counsel's effectiveness would lack arguable merit. We therefore reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for Thompson to file a postconviction motion.

Thompson asserts in his responses to the no-merit report that his trial counsel was ineffective for failing to call Anna Marie Chrzas as a witness. Chrzas lived with her on-again, off-again boyfriend, Daniel Bender, at the same hotel where Thompson resided for the time period relevant to this appeal. Bender and Chrzas reported to law enforcement that they had found images on Thompson's computer that appeared to be child pornography. In executing a search warrant at Thompson's apartment unit, police seized compact discs containing sexually explicit images of children. The images on the discs were the basis for all charges in this case. Bender testified at Thompson's trial, but Chrzas did not. The record and the submissions from Attorney Rosenberg and Thompson do not contain information about what steps trial counsel took to secure Chrzas's testimony, or why ultimately she was never called.

According to Thompson, Chrzas could have provided testimony helpful to his theories of defense—namely, that the child pornography did not belong to Thompson and that Bender set him up. The record reflects that Chrzas was on the State's pretrial witness list, and that Thompson also intended to call her as witness. The prosecutor informed the court at the final pre-trial status conference that no subpoena had yet been served on Chrzas, and that the State

anticipated that it might be difficult to serve her. The prosecutor further informed the court that the State planned to move forward with the trial even if Chrzas was not served.

Thompson asserts that his counsel did not contact Chrzas until the evening of the first day of trial. The record reflects that, after the State had rested its case on the second day of trial, defense counsel stated that she was expecting a call from Chrzas and was “still trying to work on transportation” to get her to court. When the court asked what Chrzas would testify about, defense counsel replied, “Her knowledge of Mr. Bender’s use of my client’s computer and his access—Mr. Bender’s access to my client’s room and, I guess, opportunity and motive of Mr. Bender.” The court recessed for lunch and, when it reconvened, defense counsel stated that there would be no defense witnesses appearing. The record does not contain any indication that defense counsel requested more time to try to secure Chrzas’s appearance.

During closing argument, defense counsel emphasized that Thompson kept his door unlocked and allowed others to use his computer, including Bender and Chrzas, that Thompson had “no clue” what was on the computer, and that Thompson did not know what other people did when he allowed them to use it. Defense counsel also referred to testimony from Bender that Bender suspected something had been going on romantically between Chrzas and Thompson because Chrzas was in Thompson’s room at all hours of the night.

Thompson asserts in his no-merit responses that his friendship with Chrzas gave Bender a motive to set up Thompson—because Bender was jealous—and that testimony from Chrzas could have further supported this theory, which he believes was underdeveloped by his trial counsel. Specifically, Thompson argues that Chrzas could have bolstered the testimony of another witness, Michael Folz, that there was a “possibility” that Bender was trying to set

Thompson up, and that Bender had “been known to cause a lot of problems” and “get other people in trouble and generally cause a lot of misconduct.”

Thompson further asserts that Chrzas could have testified to the fact that Bender maintained a list of people on whom he wished to exact revenge. Indeed, a private investigator’s report attached to Attorney Rosenberg’s supplemental no-merit report indicates that, when interviewed by the investigator, Chrzas admitted that Bender was vindictive and that he maintained a list of people he wanted to get revenge on, but that Thompson was not on the list. Thompson argues that testimony about the list nonetheless would have been helpful to his case because it would have supported an inference that Bender was the type of person to maintain such a list and to methodically pursue revenge on people.

In the supplemental no-merit report, Attorney Rosenberg concludes,

Although trial counsel appeared to be deficient in not subpoenaing or contacting Anna Chrzas earlier than the night before trial, it is not prejudicial as required under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984) and *State v. Thiel*, 2003 WI 111, ¶18, 264 Wis. 2d 571, 665 N.W.2d 305.

Rosenberg bases this conclusion at least in part on a statement in the private investigator’s report that Chrzas said she saw a picture of a little girl on a bed on Thompson’s computer. Attorney Rosenberg asserts that, if Chrzas had testified, her testimony would have helped the State and not Thompson.

We are unpersuaded that testimony from Chrzas so clearly would not have been helpful to Thompson. Thompson’s trial turned largely on issues of credibility. The sole evidence tying Thompson to the child pornography contained on the discs was testimony from a police officer

that the discs were seized from a bookcase above the computer in Thompson's apartment. Two of the State's key witnesses, Bender and Folz, were impeached with evidence of their past crimes and character. The jury was permitted to perform its role as finder of fact and weigh their testimony. The jury had no such opportunity as to Chrzas even though she, along with Bender, was one of two accusers who reported him to law enforcement, and she apparently had potentially pertinent information regarding Bender.

Given all of these facts, we are not persuaded that a postconviction motion alleging that defense counsel was ineffective for failing to obtain testimony from Chrzas would be "wholly frivolous" under *Anders*. 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. Thompson may, of course, pursue postconviction relief on grounds other than those discussed in this order.

Therefore,

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice. Attorney Rosenberg or a successor appointed by the State Public Defender shall continue to represent Thompson.

IT IS FURTHER ORDERED that the time for Thompson to file a postconviction motion or notice of appeal is extended to sixty days from the date of this order.

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

Sheila T. Reiff
Clerk of Court of Appeals