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DISTRICT IV

January 22, 2019

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

2017AP1030-CRNM State of Wisconsin v. Juan Aguilar-Vargas (L.C. # 2015CF787)

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).

Attorney Dennis Schertz, appointed counsel for Juan Aguilar-Vargas, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16).¹ Aguilar-Vargas received a copy of the report and was advised of his right to file a response, but has not done so. On September 6,

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

2018, this court issued an order noting the absence in the record of a transcript of a pre-trial status conference held on June 23, 2016, at which it appears from docket entries that trial exhibits were discussed. We have now received counsel's response, which indicates that neither trial counsel, the circuit court, nor the district attorney was able to produce any additional documentation about the status conference other than what appears in the circuit court docket entry. Counsel further informs us that Aguilar-Vargas does not wish to challenge any circuit court decision made at that conference.

We have completed our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738, 744 (1967), and we are unable to conclude that further proceedings as to trial counsel's effectiveness would lack arguable merit. Therefore, we reject the no-merit report, dismiss the instant appeal without prejudice, and extend the deadline for filing a postconviction motion.

Aguilar-Vargas was convicted after a five-day jury trial of one count of first-degree intentional homicide and one count of hiding a corpse, both as a party to a crime. The court imposed a life sentence on the homicide count, and two years of initial confinement and two years of extended supervision for hiding a corpse.

On the third day of the jury trial, the State elicited testimony from officer William Hendrickson, who served as the lead detective in the investigation of the homicide in this case. Hendrickson testified that, as part of his duties in preparation for the trial, he assisted in preparing a timeline of events that allegedly occurred on the day of the homicide. The prosecutor did not move the timeline into evidence, but he positioned the timeline in such a way that both Hendrickson and the jury could see it. The prosecutor also provided Hendrickson with

a pointer, which Hendrickson used to point out items on the timeline as he testified. Hendrickson testified regarding several of the events on the timeline before the circuit court called counsel up for a bench conference outside the hearing of the jury.

The circuit court stated after the bench conference that the timeline was “totally inadmissible” and based on hearsay. The prosecutor agreed with the court that the timeline was hearsay. The court further stated that use of the timeline had the effect of “commenting on other witness[es]’ credibility” because it accepted some witnesses’ version of the events but did not include contradictory information from other witnesses’ testimony. *See State v. Maday*, 2017 WI 28, ¶34, 374 Wis. 2d 164, 892 N.W.2d 611 (jury is the sole judge of witness credibility, and a witness who comments on the veracity of another witness usurps this role).

Defense counsel stated that he believed that the timeline was going to be used for the opening statement. However, defense counsel did not object to Hendrickson’s testimony or the use of the timeline during Hendrickson’s direct examination, nor did defense counsel move to strike the testimony about the timeline. The court eventually told the jury that “all the testimony about the timeline is stricken.” However, it is unclear from the record how long the timeline exhibit remained in the view of the jury. Defense counsel did not request a curative instruction. Only the standard jury instruction for stricken testimony, WIS JI—CRIMINAL 150, was given, after both sides had rested their cases.

The no-merit report asserts in a conclusory fashion that there would be no arguable merit to a claim for ineffective assistance of counsel. A convicted person alleging ineffective assistance of counsel must show that counsel’s performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We are not

convinced that it would be wholly frivolous to assert that trial counsel was ineffective for failing to object to, prevent the admission of, or request a curative instruction regarding the timeline. We therefore will reject the no-merit report, dismiss this appeal, and extend the deadline for filing a postconviction motion in this matter. Aguilar-Vargas may, of course, pursue postconviction relief on grounds other than those discussed in this order.

Additionally, the trial transcript reflects that jury instruction WIS JI—CRIMINAL 140 was given to the jury at trial. On November 13, 2018, the Wisconsin Supreme Court granted a petition for review in *State v. Trammell*, 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018), to address whether the holding in *State v. Avila*, 192 Wis. 2d 870, 532 N.W.2d 423 (1995), *overruled on other grounds*, *State v. Gordon*, 2003 WI 69, ¶5, 262 Wis. 2d 380, 663 N.W.2d 765—that it is “not reasonably likely” that WIS JI—CRIMINAL 140 reduces the State’s burden of proof—is good law; or whether *Avila* should be overruled on the ground that it stands rebutted by empirical evidence. Consequently, an issue of arguable merit exists from the use of WIS JI—CRIMINAL 140 at Aguilar-Vargas’s trial. Until *Trammell* is decided, it cannot be determined whether further appellate proceedings on that issue would lack arguable merit.

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

IT IS FURTHER ORDERED that the time for Aguilar-Vargas to file a postconviction motion or notice of appeal is extended to 60 days from the date the Wisconsin Supreme Court issues a decision in *Trammell*, 2017AP1206-CR.

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

Sheila T. Reiff
Clerk of Court of Appeals