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DISTRICT III

May 19, 2020

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

2018AP890-CRNM State of Wisconsin v. Darryl Ripkoski (L. C. No. 2015CF1223)

Before Stark, P.J., Hruz and Seidl, 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).

Counsel for Darryl Ripkoski has filed a no-merit report concluding no grounds exist to challenge Ripkoski's convictions for fifteen counts of possession of child pornography, contrary to WIS. STAT. § 948.12(1m) (2017-18).[1] Ripkoski filed a response challenging the effectiveness

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

of his trial counsel, and counsel filed a supplemental no-merit report addressing Ripkoski's concerns. Upon our independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The State initially charged Ripkoski with ten counts of possessing child pornography. One week later, the complaint was amended to include an additional twenty counts of the same crime. On April 21, 2016, Ripkoski demanded a speedy trial, and a trial was initially scheduled to begin on June 1, 2016. One week before the scheduled trial, defense counsel raised the issue of Ripkoski's competency to proceed. Ripkoski agreed to withdraw his speedy trial demand, and the circuit court ultimately granted counsel's request for a competency hearing. An examiner's report opined that Ripkoski was competent to proceed. At a hearing, Ripkoski expressed his belief that he was competent, and the court, consistent with the examiner's opinion, found Ripkoski competent to proceed.

Ripkoski subsequently opted to enter ***Alford***[2] pleas to fifteen of the crimes charged. In exchange, the State agreed to recommend that the remaining counts be dismissed and read in. The State also agreed to cap its sentence recommendation at ten years' initial confinement and ten years' extended supervision. Out of a maximum possible 375-year sentence, the circuit court imposed consecutive and concurrent sentences resulting in an aggregate sentence consistent with

[2] An ***Alford*** plea is a guilty or no-contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. ***State ex rel. Jacobus v. State***, 208 Wis. 2d 39, 44-45, 559 N.W.2d 900 (1997); *see also* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

the State's recommendation. The court also required Ripkoski to register as a sex offender for twenty years. Ripkoski filed a postconviction motion to amend the length of time he must comply with sex offender registration to fifteen years, asserting it is the maximum allowed by statute. The court granted the motion and amended the judgment accordingly.

Although the no-merit report does not specifically address it, we conclude there is no arguable merit to challenge the circuit court's competency determination. "No person who lacks substantial mental capacity to understand the proceedings or assist in his or her defense may be tried, convicted, or sentenced for the commission of an offense so long as the incapacity endures." ***State v. Byrge***, 2000 WI 101, ¶28, 237 Wis. 2d 197, 614 N.W.2d 477 (citation omitted). To determine legal competency, the circuit court considers a defendant's present mental capacity to understand and assist at the time of the proceedings. ***Id.***, ¶¶30-31. A circuit court's competency determination should be reversed only when clearly erroneous. ***Id.***, ¶46.

An examining psychologist submitted a report outlining her clinical findings and the reasoning behind her opinion that, to a reasonable degree of professional certainty, Ripkoski did not lack the "mental capacity to understand the proceedings or to assist in his defense." At the competency hearing, Ripkoski insisted he was competent to proceed, despite defense counsel's reservations. Based on the psychologist's report, the circuit court found Ripkoski competent to proceed. The record supports the court's determination.

The no-merit report addresses whether Ripkoski knowingly, intelligently and voluntarily entered ***Alford*** pleas and whether the circuit court properly exercised its sentencing discretion. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that any challenge to Ripkoski's pleas or sentences would lack arguable merit. The no-merit report

sets forth an adequate discussion of these potential issues to support the no-merit conclusion, and we need not address them further.

In his response to the no-merit report, Ripkoski raises several challenges to the effectiveness of his trial counsel. To establish ineffective assistance of counsel, Ripkoski must show that his counsel's performance was not within the wide range of competence demanded of attorneys in criminal cases and that the deficient performance resulted in prejudice. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove prejudice, Ripkoski must demonstrate "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty [or no contest] and would have insisted on going to trial." *See* ***Hill v. Lockhart***, 474 U.S. 52, 59 (1985).

Ripkoski argues counsel was ineffective by failing to challenge the search warrant relevant to this case. To the extent Ripkoski asserts that law enforcement did not have a search warrant for his residence, a copy of the search warrant is attached to counsel's supplemental no-merit report. Counsel properly notes that a search warrant shall issue "if probable cause is shown." *See* WIS. STAT. § 968.12(1). To support a determination that probable cause exists, the magistrate must be "apprised of 'sufficient facts to excite an honest belief in a reasonable mind that the objects sought are linked with the commission of a crime, and that the objects sought will be found in the place to be searched.'" ***State v. Higginbotham***, 162 Wis. 2d 978, 989, 471 N.W.2d 24 (1991) (citation omitted). Ripkoski would bear the burden of establishing insufficient probable cause to support the warrant. *See* ***State v. Schafer***, 2003 WI App 164, ¶5, 266 Wis. 2d 719, 668 N.W.2d 760.

Here, the search warrant application and accompanying affidavit set out the objects sought by law enforcement as well as the objects' link to the commission of the crime of possession of child pornography. A law enforcement officer trained in the "investigation of computer facilitated exploitation of children" averred that during an online investigation, the officer downloaded 115 images of suspected child pornography from an IP address linked to an apartment in Green Bay. The warrant affidavit described three of the images viewed therein as involving "two females under the age of 18" exposing their genitalia "in a provocative manner." The investigating officer applied for a warrant to search the apartment for items including computer processing units, and other computer hardware and software. Given the specificity of the information provided in the warrant application and the link between the suspected child pornography and the physical address of the apartment, Ripkoski could not meet his burden of showing there was no probable cause to issue the warrant.

Ripkoski nevertheless asserts that the warrant was invalid because it listed the incorrect township of the residence searched. The warrant stated the place to be searched is in the Village of Bellevue in Brown County, but the address listed is a Green Bay address. Counsel avers that, using the United States Postal Service website, a search of the specific address utilizing either Green Bay or Bellevue yielded the same zip code, suggesting the United States Postal Service would consider the listing with either Bellevue or Green Bay as a proper address. Moreover, even if the township was technically incorrect on the application, the error would be subject to the good faith exception. *See* ***State v. Dearborn***, 2010 WI 84, ¶36, 327 Wis. 2d 252, 786 N.W.2d 97 (exception to exclusionary rule applies when police act in good faith, or in "objectively reasonable reliance" on a subsequently invalidated search warrant).

The supplemental no-merit report also addresses whether there are any grounds to argue the warrant was invalid because it was based on stale information. The warrant issued on May 5, 2014, was based on information downloaded from a computer on March 20, 2014. In ***State v. Gralinski***, 2007 WI App 233, ¶26, 306 Wis. 2d 101, 743 N.W.2d 448, this court rejected a staleness challenge to a search warrant in a child pornography case when there was evidence the defendant made an online child pornography purchase two and one-half years prior to the warrant application. The time between the download and the warrant in the instant case is significantly shorter. Moreover, as the warrant affidavit explained, a forensic examination of a computer will still show evidence that child pornography was stored on the computer even after it has been deleted. Any claim that trial counsel was ineffective for failing to challenge the search warrant would therefore lack arguable merit.

Ripkoski additionally asserts his trial counsel was ineffective by failing to timely file a motion in limine to limit videos and images of child pornography at trial. While the circuit court noted that the motion was not timely filed under the local rules, it nevertheless ruled on the motion. The court denied the motion on grounds that it was the State's burden to prove the allegations beyond a reasonable doubt. The court, however, cautioned that if it appeared the State was "belaboring it," or if it appeared "overwhelming to the jury," it would entertain a motion to impose some limitations on the State's presentation of the evidence at that time. Because the court heard the motion despite its untimely filing, Ripkoski cannot establish that he was prejudiced by this claimed deficiency of his trial counsel.

Ripkoski also claims counsel was ineffective by failing to file the suppression motion Ripkoski wanted him to file. The supplemental no-merit report recounts that Ripkoski was initially charged with possessing child pornography in Brown County Circuit Court case

No. 2014CF813. In that case, trial counsel moved to suppress Ripkoski's statements to law enforcement on the ground that they were made in violation of ***Miranda***.[3] The circuit court granted the motion, and that case was later dismissed. The charges were refiled in the case that is the subject of this appeal, and the State subsequently moved for reconsideration of the suppression ruling made in the earlier case. The court denied the State's request; therefore, Ripkoski's statements could not have been used against him at trial. Thus, Ripkoski was not prejudiced by counsel's failure to file the suppression motion Ripkoski requested.

In his response to the no-merit report, Ripkoski does not specify on what other basis counsel should have moved to suppress evidence, and the record does not suggest nonfrivolous alternative grounds. Any challenge to the effectiveness of counsel with respect to the suppression motion therefore lacks arguable merit. To the extent Ripkoski contends trial counsel "refused to address evidence at trial," there was no trial because Ripkoski opted to enter ***Alford*** pleas. Further, an ***Alford*** plea waives all nonjurisdictional defects and defenses, including alleged violations of constitutional rights. ***State v. Kazee***, 192 Wis. 2d 213, 219, 531 N.W.2d 332 (Ct. App. 1995).

Claiming that the circuit court was biased against him, Ripkoski additionally argues counsel should have filed a motion for a change of venue. There is nothing in the record, however, to suggest judicial bias or prejudice against Ripkoski. To the extent Ripkoski asserts counsel was ineffective by failing to challenge the prosecutor's decision to include additional charges, a prosecutor generally has discretion whether to bring one or several charges and

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

whether to join all offenses in a single prosecution or to bring successive prosecutions. *See* ***State v. Krueger***, 224 Wis. 2d 59, 67-68, 588 N.W.2d 921 (1999). Although there are limits upon the State's prosecutorial discretion to avoid arbitrary, discriminatory or oppressive results, *see* ***id.*** at 68, nothing in the record suggests that Ripkoski's trial counsel could have raised a nonfrivolous challenge to the prosecutor's charging discretion. Our review of the record and the no-merit report discloses no other basis for challenging trial counsel's performance and no other potential issue for appeal.

Therefore,

IT IS ORDERED that the judgment is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that attorney Ellen J. Krahn is relieved of her obligation to further represent Darryl Ripkoski in this matter. *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