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December 3, 2020

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

2019AP1386-CRNM State of Wisconsin v. Sean G. Moore (L.C. # 2017CF101)

Before Blanchard, Kloppenburg, and Nashold, 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 Leonard Kachinsky, appointed counsel for Sean Moore, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738 (1967). Moore was sent a copy of the report, and before

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

his recent death he filed a response and an additional document that we accepted as a supplemental response. Counsel filed a supplemental no-merit report, and Moore then submitted additional documents that we accepted as additional responses. Counsel has since informed this court that Moore died on October 7, 2020. Because Moore's right to appeal his conviction continues despite his death, this appeal is not moot. See *State v. McDonald*, 144 Wis. 2d 531, 536-37, 424 N.W.2d 411 (1988). Upon consideration of the report, the supplemental report, Moore's responses, and an independent review of the record, we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we affirm.

Moore was charged with four offenses: repeated sexual assault of a child, child enticement, incest, and causing a child to view sexually explicit conduct. At a bench trial, the circuit court found Moore guilty of all four charges. The circuit court imposed concurrent prison terms for each offense, with the longest term consisting of thirty years of initial confinement and eight years of extended supervision.

The no-merit report first addresses sufficiency of the evidence. We agree with counsel's assessment that there is no arguable merit to this issue. When addressing sufficiency of the evidence, an appellate court will not overturn a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law 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). Without reciting the trial evidence here, we are satisfied that it was sufficient as to each of the four offenses.

The no-merit report addresses whether the circuit court properly ruled that four child witnesses, including the victim, could testify by closed circuit television pursuant to WIS. STAT. § 972.11(2m). We agree with counsel that there is no arguable merit to this issue. However, as we now explain, our analysis of this issue differs somewhat from counsel's analysis in the no-merit report.

WISCONSIN STAT. § 972.11(2m)(a) provides the circuit court with discretion to allow a child to testify by closed circuit television in a criminal prosecution "on its own motion or on the motion of any party." Here, prior to trial, an attorney for Juneau County and the Juneau County Department of Human Services filed a motion on behalf of four child witnesses, including the victim, requesting that all four children be allowed to testify by closed circuit television. Moore opposed the motion and argued that the County lacked standing to bring it.

In the no-merit report, counsel appears to conclude that there is no arguable merit to challenging the County's standing because (1) the circuit court correctly determined that the victim had standing, and (2) the court acted on its own motion with respect to the other three children. Counsel asserts: "The court correctly found that [the victim] could file the motion and that as to the other children, the court could take the motion as advice and make its own motion." Based on our independent review of the record, our analysis differs from counsel's analysis on this point. We conclude that the circuit court determined that, regardless of the victim's standing, the court would act on its own motion as to all four children. The circuit court stated:

With regard to standing, I think it is clear the County is entitled to file this motion on behalf of [the victim]. The question regarding [the other three children] is more complicated. But as we've discussed here, the complications can be easily mitigated by the Court taking the County's motion regarding [the other three children] as advice. And the Court could make its own motion on

this matter under 972.11(2m)(a), so that is how I take it. *And, in fact, I take it that way with regard to [the victim] as well*, although I think in [her] case the question of standing is much simpler.

(Emphasis added.)

Because the circuit court stated that it would act on its own motion as to all four children, we need not consider whether there is arguable merit to challenging the County's standing or, for that matter, the victim's standing. These potential standing questions would not affect the circuit court's authority to act on its own motion, and we agree with no-merit counsel's ultimate conclusion that there is no arguable basis here to challenge the circuit court's exercise of its discretion to allow testimony by closed circuit court television under WIS. STAT. § 972.11(2m).

Other issues addressed in the no-merit report include (1) whether Moore properly waived his right to a jury trial, (2) whether trial counsel was ineffective by failing to call two witnesses, (3) whether trial counsel was ineffective by failing to seek recusal of the circuit court judge presiding over Moore's case, and (4) whether Moore was deprived of his right to a speedy trial. We are satisfied that the no-merit report properly analyzes each of these issues as having no arguable merit.

The no-merit report addresses Moore's sentencing. Because Moore is deceased, a challenge to his prison sentence is moot. Regardless, we agree with counsel's assessment that there would be no arguable merit to challenging Moore's sentence.

Moore's responses raise a number of issues in addition to those already addressed in our discussion above. The responses are not always clear as to the issues Moore wished to raise, but we conclude that the responses can be fairly read as raising the following additional issues: (1) whether an expert report was erroneously not placed in the record at trial, (2) whether the

circuit court judge had a conflict of interest based on the court's involvement in Moore's CHIPS or TPR cases, (3) whether Moore was given sufficient access to material from those cases for purposes of his defense, (4) whether the prosecution failed to disclose exculpatory evidence, (5) whether a law enforcement officer gave perjured testimony at the preliminary hearing, and (6) whether Moore's brother was wrongfully excluded from the room in which the victim testified by closed circuit television.

Counsel addresses each of these issues in the supplemental no-merit report, and we agree with counsel's assessments on each issue that none have arguable merit. Neither the record nor the allegations in Moore's responses provide an arguable basis to pursue further proceedings on these issues.

Our review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that Attorney Leonard Kachinsky is relieved of any further representation of Sean Moore 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