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DISTRICT I

February 24, 2021

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

2019AP956-CRNM State of Wisconsin v. Darrick H. Williams (L.C. # 2017CF3411)

Before Brash, P.J., Dugan and White, 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).

Darrick H. Williams appeals a judgment of conviction, entered upon a jury's verdict, convicting him of two counts of robbery of a financial institution. Attorney Steven W. Zaleski filed a no-merit report and a supplemental no-merit report concluding that further postconviction

or appellate proceedings would lack arguable merit. *See* WIS. STAT. RULE 809.32 (2017-18).¹ Williams did not file a response.² Upon review, we conclude that Williams could pursue an arguably meritorious claim that his trial counsel was ineffective. Accordingly, we reject the no-merit report, dismiss this appeal without prejudice, and extend the deadline for filing a postconviction motion.

The State charged Williams in 2017 with two counts of robbery of a financial institution, both of which arose in 2013. *See* WIS. STAT. § 943.87. “Financial institution” is defined in WIS. STAT. § 943.80. In conformity with that definition, WIS. JI—CRIMINAL 1522, first approved in 2016, reflects that the first element the State must prove to obtain a conviction for robbery of a financial institution is: “1. [Name financial institution] is a financial institution. ‘Financial institution’ means a (bank) (savings bank) (savings and loan association) (trust company) (credit union) (mortgage banker) (mortgage broker) chartered under the laws of this state, another state or territory, or under the laws of the United States.” *See id.*; *see also* § 943.80. The instruction includes a footnote explaining that “the court of appeals apparently agreed with the defendant’s contention that ‘chartered’ status was an element of the crime.” *See* WIS. JI—CRIMINAL 1522 n.ii, citing *State v. Eady*, 2016 WI App 12, 366 Wis. 2d 711, 875 N.W.2d 139.

¹ All subsequent references to the Wisconsin statutes are to the 2013-14 version unless otherwise noted.

² Williams requested an opportunity to respond to the supplemental no-merit report. We granted the request, but the deadline passed without a submission from Williams.

In this case, the circuit court did not instruct the jury regarding the State’s obligation to prove the bank’s chartered status, and trial counsel did not request such an instruction. Appellate counsel did not address these omissions in the no-merit report, and we directed him to do so in a supplemental non-merit report. In the supplement, Attorney Zaleski discusses whether Williams might pursue a claim that his trial counsel was ineffective under the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (providing that to prove ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and the deficiency prejudiced the defense). Appellate counsel’s discussion assumes without analysis that Williams could satisfy the deficiency prong of the *Strickland* test but concludes that Williams could not make an arguably meritorious showing that he suffered prejudice as a result of trial counsel’s errors. Specifically, Attorney Zaleski advises that, in his view, no “reasonable probability [exists] that, but for counsel’s [un]professional errors, the result of the proceeding would have been different.”

In support, Attorney Zaleski first takes note of this court’s holding in *Eady* that circumstantial evidence can establish a bank’s chartered status. *See id.*, 366 Wis.2d 711, ¶10. Second, appellate counsel emphasizes the testimony of a trial witness who told the jury that she was a bank teller and responded to questioning from the State as follows:

- Q: The money that you gave to the suspect, who did it belong to?
- A. The bank.
- Q. And that’s TCF Bank?
- A. Yes, TCF Bank.
- Q. Is that an FDIC insured bank?
- A. It is.

Assuming, as does Attorney Zaleski, that the teller's testimony established that the bank was FDIC-insured, appellate counsel does not discuss why the testimony was so compelling that it would be frivolous to argue the existence of a reasonable probability that a jury would reject the testimony. Further, appellate counsel does not discuss why it would be frivolous to argue the existence of a reasonable probability that evidence of FDIC insurance alone would be deemed insufficient to prove that a bank has a domestic charter. In the absence of such discussion, we are not satisfied that the arguments would be wholly frivolous.

When resolving an appeal under WIS. STAT. RULE 809.32 (2017-18), the question is whether a potential issue would be "wholly frivolous." *State v. Parent*, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988). Here, it appears that Williams could pursue an arguably meritorious claim that trial counsel performed deficiently in regard to the jury instructions in this case, and that the deficiencies prejudiced Williams. We emphasize that we do not reach any conclusion that such arguments would or should prevail, only that the arguments would not be frivolous within the meaning of RULE 809.32 (2017-18), and *Anders v. California*, 386 U.S. 738 (1967).

Because we cannot conclude that further proceedings to challenge trial counsel's effectiveness would be wholly frivolous, we must reject the no-merit report filed in this case. We add that our decision does not mean we have reached a conclusion in regard to the arguable

merit of any other potential issue in the case. Williams is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Williams, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Williams or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Williams to file a postconviction motion is extended until forty-five days after the date on which this court receives notice from the State Public Defender's office advising either that it has appointed new counsel for Williams or that new counsel will not be appointed.

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

Sheila T. Reiff
Clerk of Court of Appeals