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DISTRICT II

March 3, 2021

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

2019AP240-CRNM State of Wisconsin v. Marcus A. Johnson (L.C. #2013CF660)

Before Reilly, P.J., Gundrum and Davis, 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 Parker Mathers, appointed counsel for Marcus A. Johnson, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Johnson responded. We conclude that this case is appropriate for summary disposition.

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

See WIS. STAT. RULE 809.21. After our independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

Johnson pled guilty to one count of first-degree reckless homicide. He was alleged to have partially placed a child in hot water, causing a serious burn that led to the child's death. The court imposed a sentence of forty years of initial confinement and ten years of extended supervision.

Johnson moved to withdraw his plea on the ground that he did not understand the elements of the offense. The circuit court held an evidentiary hearing at which Johnson and his two trial counsel testified. The court placed the burden of proof on Johnson. The court found that Johnson understood the charge, and it denied the motion.

In the no-merit report, Johnson's current attorney concludes that it would be frivolous to argue that the court's factual finding that Johnson understood the charge was clearly erroneous. Johnson's response to the no-merit report raises several concerns about this issue.

Johnson argues that the plea colloquy did not comply with the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 267, 389 N.W.2d 12 (1986). This argument does not take into account the role that plea colloquy defects play in the analysis. A conclusion that there was a colloquy defect has two legal effects, neither of which is significant for Johnson at this point in the process. One effect is that it entitles the defendant to an evidentiary hearing. ***Id.*** at 272-79. But here, Johnson already had an evidentiary hearing.

The other effect is that it shifts the burden of proof to the State to prove that Johnson understood the charge. ***Id.*** That would be different from the hearing that occurred in this case, in which the court placed the burden on Johnson.

However, there is no reason to believe this difference would affect the outcome of the evidentiary hearing. It is likely that the same witnesses would have testified, on the same subjects. Based on that testimony, the court found that Johnson's testimony about his lack of understanding and the things he claimed his attorneys said to him was not credible. It was not a close decision in which the court's decision hinged on the burden of proof. If the court found the attorneys' testimony credible and Johnson's not credible, the outcome would be the same even if Johnson is correct that the plea colloquy was defective and the State had the burden of proof. Accordingly, there is no merit to an argument on appeal that relies on claimed defects in the plea colloquy.

As to the hearing itself, Johnson points to several ways in which he believes that his postconviction counsel did not sufficiently develop the record at the hearing. However, these points are not properly before us in this appeal. The issue before us now is not whether counsel could go back and litigate a better postconviction motion or hearing on this issue. The question is whether there is a basis for counsel to proceed with an appeal on the record that currently exists. Issues about current counsel's postconviction performance would be raised later through some other procedural device, after the no-merit process has concluded.

Turning now to the circuit court's finding that Johnson understood the charge, we conclude that there is no arguable merit to this issue. Based on the postconviction testimony before it, and in light of the record made at the plea colloquy, it would be frivolous to argue that

the court's decision to credit the testimony of Johnson's attorneys instead of his own was clearly erroneous.

Johnson also asserts that at the plea hearing the circuit court failed to adequately establish that there was a factual basis for his plea. As Johnson appears to recognize, if the colloquy was defective in that manner, it leads to a hearing on whether the defendant's plea was entered knowingly, voluntarily, and intelligently. *See* ***State v. Lackershire***, 2007 WI 74, ¶¶47-56, 301 Wis. 2d 418, 734 N.W.2d 23. As discussed above, Johnson has already had such a hearing. Therefore, there is no arguable merit to this issue.

The no-merit report addresses whether the circuit court erred in denying Johnson's suppression motion. Johnson moved to suppress his recorded statement made on the day of the incident. The court held an evidentiary hearing, reviewed the video recording, and denied the motion. The court concluded that Johnson was in custody, but was not interrogated before the ***Miranda*** warning was given, that he waived his rights, and that all of his statements were voluntary.

In Johnson's response to the no-merit report, he asserts that both the uniformed officer in the room and, arriving later, the detective, asked him questions before the ***Miranda*** warning. Johnson asserts that these questions would qualify as interrogation because they were intended to elicit incriminating information. However, having reviewed the recording, we conclude that it would be frivolous to argue that the uniformed officer asked any such questions. Johnson did most of the speaking without prompting. Occasionally the officer commented or asked a question, but even his questions relating to Johnson's children were only biographical in nature.

As to Johnson's discussion with the detective, most of the detective's pre-warning questions were again biographical in nature, and not directly related to the events of the day. The detective asked one question, shortly before the warning, that might arguably be described as interrogation. This occurred when Johnson referred to his use of alternate disciplines with children, and the detective asked what he meant by alternate disciplines. In the context of this event, that question might arguably have elicited incriminating information to suppress. However, here it did not, and the warning followed soon after.

Therefore, as to this point about interrogation that Johnson raises, we conclude there is no arguable merit. And, further, as to the remainder of the factual and legal issues related to the suppression motion, such as voluntariness, we also conclude that there is no arguable merit.

The no-merit report addresses whether the circuit court erred in denying Johnson's motion for a ruling that the medical examiner's opinion on the cause of death was not admissible under WIS. STAT. § 907.02. This issue appears to have been waived by Johnson's guilty plea. Although there is a statute that permits appellate review of motions to "suppress" evidence after a guilty plea, that statute has not been read to permit review of all pretrial decisions regarding admissibility of evidence. *See* WIS. STAT. § 971.31(10).

In Johnson's response, he argues that his trial counsel were ineffective by not moving for dismissal based on a violation of his right to a speedy trial. His argument focuses on the time period between when he was charged in May 2013 and when the State made its plea offer in August 2015.

To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v.***

Washington, 466 U.S. 668, 687 (1984). In reviewing a speedy trial issue, a court is to apply a four-part balancing test that considers: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." ***State v. Urdahl***, 2005 WI App 191, ¶11, 286 Wis. 2d 476, 704 N.W.2d 324.

We conclude that there is no arguable merit to this issue. The time period involved here is presumptively prejudicial. ***Id.***, ¶12. However, a review of the reasons for the delay would not have supported a motion on this ground. The record shows that the delay was caused mainly by a combination of defense review of discovery, the filing of motions by the defense, and court calendar congestion. Accordingly, counsels' performance was not arguably deficient in not filing a motion to dismiss on this ground.

The no-merit report addresses whether the court erroneously exercised its sentencing discretion. The sentence is within the legal maximum. The standards for the circuit court and this court on exercise of sentencing discretion are well established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

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

Therefore,

IT IS ORDERED that the judgment of conviction and order denying postconviction relief are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Mathers is relieved of further representation of Johnson 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