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DISTRICT IV

March 25, 2021

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

2019AP1502-CRNM State of Wisconsin v. James T. Schlifer (L.C. # 2016CF78)

Before Kloppenburg, Graham, 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 Jefren Olsen, appointed counsel for James Schlifer, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Schlifer was sent a copy of the report and has filed a response.[2] Upon consideration of the report and the response 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.

Schlifer was charged with multiple drug offenses, all as a repeater. A jury found him guilty of five offenses: (1) manufacturing three grams or less of methamphetamine, (2) disposing of methamphetamine manufacturing waste, (3) possession of drug paraphernalia to manufacture methamphetamine, (4) possession of drug paraphernalia to ingest a controlled substance, and (5) maintaining a place used for manufacturing methamphetamine. The circuit court imposed concurrent sentences on each offense, with the longest sentence consisting of eight years of initial confinement and five years of extended supervision.[3]

The no-merit report addresses sufficiency of the evidence. We agree with counsel that there is no arguable merit to this issue. We 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

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] Schlifer filed a response on January 27, 2020. He filed additional materials on March 9, 2020, and on October 15, 2020. We construe all three filings together as Schlifer's response to the no-merit report.

[3] The circuit court imposed the sentences consecutive to any other sentence Schlifer was presently serving.

(1990). Without reciting all of the evidence here, we are satisfied that it was sufficient as to each offense.

The no-merit report addresses the circuit court's denial of two motions to suppress evidence that Schlifer brought. We agree with counsel that there is no arguable merit to this issue. As explained in the no-merit report, the motions were both resolved against Schlifer based on the court's factual findings. There is no basis to challenge those findings as clearly erroneous. *See* ***Eau Claire Press Co. v. Gordon***, 176 Wis. 2d 154, 160, 499 N.W.2d 918 (Ct. App. 1993) (a circuit court's factual findings will not be overturned unless they are clearly erroneous).

The no-merit report addresses the circuit court's decision to deny Schlifer's request to substitute his appointed trial counsel with retained private counsel. For the reasons we now explain, we agree with no-merit counsel that there is no arguable merit to this issue.

A request to substitute counsel with retained private counsel implicates the defendant's right to counsel of choice. *See* ***State v. Prineas***, 2009 WI App 28, ¶14, 316 Wis. 2d 414, 766 N.W.2d 206. However, "a defendant has only a presumptive right to employ … chosen counsel," and the circuit court retains "'wide latitude'" to balance that right against other considerations. ***Id.*** (quoting ***Gonzalez-Lopez***, 548 U.S. 140, 152 (2006)). "Decisions related to the substitution of counsel are within the sound discretion of the circuit court." ***Prineas***, 316 Wis. 2d 414, ¶13. "An appellate court will search the record for reasons to sustain the circuit court's discretionary decision" and will "affirm discretionary determinations if they have a reasonable basis and are made in accord with the facts of record." ***State v. Thiel***, 2004 WI App 225, ¶26, 277 Wis. 2d 698, 691 N.W.2d 388.

Here, the circuit court did not expressly reference Schlifer's presumptive right to counsel of choice. Nonetheless, the court denied Schlifer's substitution request based on relevant factors established by case law. Those non-exclusive factors include the length of delay; whether competent counsel was presently available and prepared to try the case; the inconvenience to the parties, witnesses, or court system; and whether the delay appeared to be for legitimate reasons or dilatory. *See* ***Prineas***, 316 Wis. 2d 414, ¶13. Of particular note, Schlifer's appointed trial counsel first raised Schlifer's substitution request on the day before trial, and the court's relevant factual findings included a finding that Schlifer was engaging in a delay tactic. The court discredited Schlifer's assertion that he was unable to make his request sooner because he was not aware of his trial date until less than two weeks before trial.[4] We see no basis to set aside the court's factual findings as clearly erroneous, and the court's credibility determination, if challenged, would also not be set aside. *See* ***Noble v. Noble***, 2005 WI App 227, ¶27, 287 Wis. 2d 699, 706 N.W.2d 166 (An appellate court "must accept" the circuit court's "credibility determination.").

Accordingly, we see no arguable merit to a claim that the circuit court unreasonably exercised its discretion when it denied Schlifer's request to substitute counsel. The court's factual findings, in reference to relevant factors, establish a reasonable basis for the court's discretionary decision that could not realistically be challenged on appeal.

In his response to the no-merit report, Schlifer argues that his appointed trial counsel could have brought the substitution issue to the circuit court's attention two weeks prior to trial because, by that time, Schlifer had informed appointed counsel of his intention to retain private counsel.

[4] Schlifer admitted to consulting with private counsel as much as a year prior to his substitution request, a factor the circuit court reasonably considered.

However, the court considered this argument, and we see no basis to contend that the court's rejection of the argument was unreasonable. As Schlifer's appointed counsel explained to the circuit court on the day before trial, although private counsel had recently emailed appointed counsel, private counsel did not confirm that he was willing to take Schlifer's case or that Schlifer had retained him.[5]

Schlifer next appears to contend that the circuit court should have granted his substitution request because his appointed trial counsel was ineffective in two respects. However, at the same time the court considered Schlifer's motion to substitute counsel, it also considered and rejected Schlifer's arguments regarding his appointed counsel's performance, and we see no arguable merit to a claim that the court erred on this basis. On the contrary, as we now discuss, we see no non-frivolous basis to argue that trial counsel was ineffective in either of the two ways claimed by Schlifer.

To show ineffective assistance of counsel, a defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To establish prejudice, the defendant must show that "there is a reasonable probability that,

[5] After the circuit court's denial of Schlifer's request for substitution of counsel but before trial commenced the following day, private counsel submitted a letter to the court indicating his willingness to take Schlifer's case if the trial was rescheduled. The court considered the letter and concluded that the letter did not change its decision to deny substitution. Adding to its previous findings, the court found that Schlifer's case had been pending for more than eighteen months and that, if the trial was rescheduled, the case would likely not be tried for a minimum of nine more months. We see no basis to argue that these findings are clearly erroneous or that the court unreasonably exercised its discretion on the morning of trial by declining to reconsider its decision to deny Schlifer's substitution request.

but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

First, Schlifer faults trial counsel for failing to move to suppress evidence obtained from a GPS device placed on his vehicle. Schlifer claims that the law enforcement affidavit used to obtain the warrant for the GPS device contained false statements relating to his purchase of incriminating items. However, Schlifer does not show that any of the statements were false. Additionally, even if we assumed that the challenged statements were false, the warrant affidavit still shows probable cause without them. Accordingly, we see no arguable merit to claiming that trial counsel was ineffective by failing to file a suppression motion based on false statements in the affidavit. *See* ***State v. Anderson***, 138 Wis. 2d 451, 464, 406 N.W.2d 398 (1987) ("If with the challenged statements excised the warrant still states probable cause, the warrant is upheld and the evidence is admissible.").

Second, Schlifer also faults trial counsel for declining to subpoena his neighbors as witnesses. Schlifer does not make clear how testimony from his neighbors might have bolstered his defense. It appears that Schlifer believes his neighbors might have testified that law enforcement officers improperly searched and obtained evidence from their property while executing a warrant to search Schlifer's property. However, Schlifer has not provided any specific allegations as to what his neighbors would have said if subpoenaed to testify, let alone any concrete support for such allegations such as an affidavit from his neighbors. Absent more specific or concrete information regarding the neighbors' expected testimony, there is no basis to argue that counsel was ineffective in deciding not to subpoena Schlifer's neighbors as witnesses. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 (explaining that the circuit court need not hold a hearing on a postconviction motion claiming ineffective assistance of counsel "if

the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations").

Moving on to other potential issues, the no-merit report addresses whether there is any issue of arguable merit with respect to: the State's motion to amend the information, the parties' motions in limine, jury selection, the opening statements or closing arguments, the State's expert testimony, Schlifer's decision not to testify, and the jury instructions. We are satisfied that the no-merit report properly analyzes each of these issues as having no arguable merit. Our review of the record discloses no other issues of arguable merit with respect to events before or during trial.

We turn to sentencing. The no-merit report addresses whether there is any arguable merit to challenging Schlifer's sentences. We agree with counsel that there is not. The circuit court discussed the required sentencing factors along with other relevant factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The court did not rely on any improper factors. The sentences were within the maximum allowed, considering Schlifer's repeater status. Schlifer's repeater status was not contested and was adequately proven by information in the presentence investigation report. *See* ***State v. Caldwell***, 154 Wis. 2d 683, 693-95, 454 N.W.2d 13 (Ct. App. 1990) (allowing this manner of proof). We see no other arguable basis for Schlifer to challenge his sentences.

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 Jefren Olsen is relieved of any further representation of James Schlifer 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