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DISTRICT I

April 16, 2021

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

2019AP1194-CRNM State of Wisconsin v. Daniel D. Moore (L.C. # 2016CF2208)

Before Dugan, Donald 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).

Daniel D. Moore appeals a judgment of conviction, entered upon a jury's verdict, convicting him of first-degree recklessly endangering safety by use of a dangerous weapon and possessing a firearm as a felon. His appellate counsel, Attorney Angela Conrad Kachelski, 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 (2019-20).[1] Moore did not file a response. Upon review, we conclude that Moore could pursue an arguably meritorious claim that the circuit court impaneled a "numbers jury" without making the findings or taking the precautionary steps required by ***State v. Tucker***, 2003 WI 12, 259 Wis. 2d 484, 657 N.W.2d 374, and that his trial counsel was ineffective for failing to object or otherwise seek a remedy for limiting juror information. Accordingly, we reject the no-merit report, dismiss this appeal without prejudice, and extend the deadline for filing a postconviction motion.

A circuit court impanels a "numbers jury" when the circuit court restricts the juror information that is placed on the record by identifying the jurors by numbers only. *See* ***id.***, ¶11. The practice "raises serious concerns regarding a defendant's rights to an impartial jury and a presumption of innocence." ***Id.***, ¶19. Attorney Kachelski acknowledges in her supplemental no-merit report that the circuit court impaneled a "numbers jury" n this case. Counsel concludes, however, that "[t]he 'numbers jury' happened accidently," that any error was harmless because the evidence was overwhelming, and that if trial counsel erred by failing to object, Moore suffered no prejudice because the jurors were unaware that their identifying information was limited.

We have reviewed the record in light of ***Tucker***. We are not persuaded that it would be frivolous to argue either that a "numbers jury" was deliberately impaneled, or that an inadvertent error warrants objection and redress. We are also not persuaded that it would be frivolous to

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

argue that the jurors were aware of the limited information solicited from them or that trial counsel should have requested an instruction or other remedy in regard to the limitation. Finally, we are not persuaded that the evidence was so compelling that it would be frivolous to argue that Moore was prejudiced by errors affecting juror impartiality.

When resolving an appeal under WIS. STAT. RULE 809.32, 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 Moore could pursue an arguably meritorious claim that trial counsel performed deficiently in failing to object to the restriction of juror information and that Moore was prejudiced by the deficiency. 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, 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 reports 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. Moore 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 Moore, any such appointment to be made within forty-five days after the date of 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 Moore or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Moore 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 Moore 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