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DISTRICT I

September 10, 2021

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Circuit Court Judge
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Clerk of Circuit Court
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1531-CRNM State of Wisconsin v. Matthew R. Senner (L.C. # 2019CF2883)

Before Donald, 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).

Matthew R. Senner appeals a judgment of conviction entered after he pled guilty to first-degree reckless homicide as a party to a crime. His appellate counsel, Attorney Carl W. Chesshir, filed a no-merit report and several supplemental no-merit reports concluding that

further postconviction or appellate proceedings would lack arguable merit. *See* WIS. STAT. RULE 809.32 (2019-20).[1] Upon review, we conclude that Senner could pursue an arguably meritorious claim for additional sentence credit and an arguably meritorious claim that his trial counsel was ineffective for failing to seek suppression of an incriminating statement. We therefore reject the no-merit report and extend the time for Senner to file a postconviction motion under WIS. STAT. RULE 809.30.

The materials in the record and provided by appellate counsel show that police executed a search warrant at Senner's home on December 6, 2018, after D.D.C. was found dead of a heroin overdose on December 5, 2018. Following the search, police arrested Senner, and then released him on or about December 10, 2018. Senner was charged in July 2019 with first-degree reckless homicide, as a party to a crime, and convicted on November 28, 2019. Senner did not receive an award of sentence credit for his time in custody in December 2018. The court concludes that Senner could pursue an arguably meritorious claim that he is entitled to sentence credit for his time in custody from the date of his arrest on December 6, 2018, until he was released on or about December 10, 2018. *See* WIS. STAT. § 973.155.

Additionally, appellate counsel states that he investigated and determined that, notwithstanding the obligations imposed by ***County of Riverside v. McLaughlin***, 500 U.S. 44 (1991), Senner did not receive a judicial determination of probable cause during the time that he remained in custody from December 6, 2018, through December 10, 2018. "The appropriate remedy for a ***Riverside*** violation may be suppression of evidence that is obtained as a result of

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

the violation." ***State v. Golden***, 185 Wis. 2d 763, 769, 519 N.W.2d 659 (Ct. App. 1994). The materials in the record coupled with documents provided by counsel show that on or about December 10, 2018, while Senner remained in jail, he made statements to another inmate. Appellate counsel describes the statements as a confession. The police subsequently questioned the second inmate about Senner's statements and apparently used them to further the investigation against Senner. The record shows that trial counsel did not seek to suppress the statements. The court concludes that Senner could pursue an arguably meritorious claim that trial counsel was ineffective for failing to seek suppression of the incriminating statements. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984).

When resolving an appeal under WIS. STAT. RULE 809.32, the question is whether a potential issue would be "wholly frivolous." *See* ***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. (stating that an 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 Senner could pursue two arguably meritorious claims. We emphasize that we do not reach any conclusion that Senner would or should prevail, only that the claims 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 would be wholly frivolous, we must reject the no-report 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.

Senner 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 Senner, 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 Senner or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Senner to file a postconviction motion under WIS. STAT. RULE 809.30 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 Senner 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