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DISTRICT II

January 12, 2022

To:

Hon. Jeffrey S. Froehlich
Circuit Court Judge
Electronic Notice

Connie Daun
Clerk of Circuit Court
Calumet County
Electronic Notice

Winn S. Collins
Electronic Notice

Michael E. Covey
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Nathan F. Haberman
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Evan S. Schultz, #395686
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2021AP116-CRNM State of Wisconsin v. Evan S. Schultz (L.C. #2018CF101)

Before Neubauer, Grogan and Kornblum, 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).

Evan S. Schultz appeals from a judgment of conviction, entered following a jury trial, for first-degree reckless homicide by delivery of a controlled substance, contrary to WIS. STAT. § 940.02(2)(a) (2019-20).¹ Schultz's appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Schultz was advised of his right to file a response and requested that his appellate counsel seek an

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

extension of time for him within which to file a response. The extension motion was granted but Schultz has not filed a response. Upon consideration of the no-merit report and an independent review of the record as mandated by *Anders* and RULE 809.32, we conclude there is no arguable merit to any issue that could be raised on appeal and summarily affirm the judgment. *See* WIS. STAT. RULE 809.21(1).

Schultz was charged with first-degree reckless homicide by the delivery of a controlled substance (carfentanil), as well as one count of delivery of narcotics. He waived his right to a preliminary hearing and was bound over for trial. At the inception of the trial, the State moved to voluntarily dismiss the delivery of narcotics charge due to a venue problem. Schultz proceeded to a jury trial on the reckless homicide charge.

At trial, Mark Heimerl testified that his fiancée, Kristy Austin, disappeared from their house in Menasha between approximately 2:30 a.m. and 3:45 a.m. on April 16, 2017. Austin had a known heroin addiction, and when Heimerl ultimately located Austin, he could tell she was “really high” and “completely out of it.” Heimerl later discovered Austin unresponsive in their garage at approximately 7:00 a.m. He administered CPR and Narcan but was unable to revive her. Based on the results of a toxicological analysis² of Austin’s tissues, the forensic pathologist identified her cause of death as carfentanil toxicity.³

² The toxicology report prepared by an out-of-state laboratory was introduced through the forensic pathologist who performed Austin’s autopsy. Any Confrontation Clause challenge to the admissibility of the toxicology report on this basis would have lacked arguable merit pursuant to *State v. Mattox*, 2017 WI 9, 373 Wis. 2d 122, 890 N.W.2d 256.

³ Carfentanil is a fentanyl analog that is estimated to be 10,000 times more potent than morphine. It is typically used in veterinary medicine to tranquilize large animals like elephants. In recent years, it began appearing in illicit drug markets in Wisconsin, usually mixed with heroin.

In the garage, police recovered a syringe and long sock, which they regarded as consistent with intravenous drug use. Nearby, police also discovered that one of Austin's slippers had a container inside with residue that tested positive for quinine, heroin, carfentanil, and fentanyl. After one of Austin's friends learned of her death, he exchanged text messages with Schultz, in which Schultz said Austin had purchased four bindles of heroin the previous night. Upon being told Austin had died, Schultz replied, "I didn't serve her."

In the early morning hours of April 16, 2017, Schultz had told the driver of the vehicle he was in that he needed to meet someone in Menasha. Schultz was dropped off at the Kwik Trip near the intersection of South Appleton Road and Midway Road in Menasha. Surveillance video from a different Kwik Trip, which was located on Oneida Street in Appleton near Austin's residence and about one mile from the Midway Road location, showed Austin, apparently sober, entering and leaving the building at approximately 2:45 a.m., and then lingering outside as though waiting for someone. Just before 3:00 a.m., she departed heading west, in the direction of the Midway Road Kwik Trip. Surveillance video from the Midway Road location showed Schultz arriving at 2:51 a.m., talking on his phone, meeting Austin briefly at approximately 3:10 a.m., and ultimately departing at 3:15 a.m. Cell phone data corroborated Austin's and Schultz's movements during that time period, and also indicated that Austin had not deviated from her course, stopped along the way, or departed from her residence after she returned there following her meeting with Schultz.

Schultz had told a friend that he had met Austin at a Kwik Trip just before her death and he had given her "some shit." Later, he told police that he had provided Austin with heroin on occasion, but he denied selling any to her at the Kwik Trip on the morning of April 16, 2017. An individual incarcerated with Schultz testified that Schultz had admitted to supplying Austin with

heroin just before her death. Schultz told this individual he was supposed to give Austin four bindles but he had only two, so he cut the heroin with a carfentanil product that his drug supplier had ordered off the internet.

Schultz testified in his own defense. He admitted that Austin had called him “looking for stuff” and that he was present at the Midway Road Kwik Trip at the same time as Austin on April 16, 2017. He claimed that this was a chance meeting and denied supplying Austin with any drugs or cutting drugs with carfentanil. Schultz also denied that he had told the other trial witnesses anything to the contrary. The jury found Schultz guilty and the circuit court sentenced him to ten years’ initial confinement and ten years’ extended supervision, consecutive to the sentence he was serving on another crime.

The no-merit report concludes that no potentially meritorious challenge exists to the sufficiency of the evidence or to the circuit court’s exercise of its sentencing discretion. Our independent review of the appellate record satisfies us that the no-merit report properly concludes that any argument on those grounds would lack arguable merit. Appellate counsel also concludes that no other potentially meritorious issue appears based on his review of the record and communications with Schultz. Our independent review of the appellate record likewise reveals no other potentially meritorious issue 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 Michael F. Covey is relieved from further representing Evan S. Schultz in this appeal. *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