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February 18, 2022

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

2018AP2112-CRNM State of Wisconsin v. Brandon Lord Newson (L.C. # 2015CF4987)

Before Brash, C.J., Donald, P.J., and Dugan, J.

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).

Brandon Lord Newson appeals a judgment of conviction entered after a jury found him guilty of seventeen felonies following a two-week jury trial. Newson's appellate counsel, Attorney Leonard D. Kachinsky, filed a no-merit report, Newson filed a response, and

Attorney Kachinsky filed a supplemental no-merit report in reply. *See* WIS. STAT. RULE 809.32 (2019-20).[1] Following an inquiry from this court, Attorney Kachinsky determined that two transcripts had not been prepared. He thereafter requested preparation of those transcripts and filed a second supplemental no-merit report to address them. We granted Newson the opportunity to file an additional response to the no-merit reports, and his current response deadline is May 16, 2022. We now conclude, however, that we do not require a further response from Newson regarding the existence of arguably meritorious issues. Upon review of the record, the no-merit reports, and the response that Newson has already filed, we conclude that issues exist for further postconviction and appellate proceedings that would not be frivolous. Accordingly, we reject the no-merit reports, dismiss this appeal without prejudice, and extend the time for Newson to file a postconviction motion or notice of appeal on the merits.

The State charged Newson with committing eighteen crimes arising out of a series of carjackings during the period from May 24, 2015, through May 30, 2015. The specific charges were: seven counts of armed robbery, six as a party to a crime; seven counts of possession of a firearm by a person previously adjudicated delinquent for a felonious act, one such count as a party to a crime; one count of first-degree recklessly endangering safety by use of a dangerous weapon; one count of second-degree recklessly endangering safety by use of a dangerous weapon; one count of fleeing an officer; and one count of operating a motor vehicle without the owner's consent, as a party to a crime. On the first day of trial, the State dismissed the charge of second-degree recklessly endangering safety by use of a dangerous weapon. The State proceeded on the remaining seventeen charges, presented to the jury as counts 1-4, and counts 6-

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

18. The jury found Newson guilty as charged. The circuit court imposed an aggregate sentence of forty-one years of initial confinement and eighteen years of extended supervision.

Attorney Kachinsky concludes that no potential issue has arguable merit for postconviction or appellate proceedings. When issues are not preserved for review, they normally must be pursued under the rubric of ineffective assistance of counsel. *See* ***State v. Benson***, 2012 WI App 101, ¶17, 344 Wis. 2d 126, 822 N.W.2d 484. A claim of ineffective assistance of counsel requires the defendant to show that counsel's performance was deficient and that the deficiency prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Upon our independent review, we conclude that the record and the submissions demonstrate that the following issues, if considered under the rubric of ineffective assistance of counsel, would not be frivolous.

1. *Suggestive lineup*. Under a due process analysis, "'identification evidence infected by improper police influence' may be excluded when 'there is a very substantial likelihood of irreparable misidentification' unless 'the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances.'" ***State v. Roberson***, 2019 WI 102, ¶26, 389 Wis. 2d 190, 935 N.W.2d 813 (citation, brackets, and some quotation marks omitted). In this case, L.M., the victim of armed robbery and first-degree reckless injury on May 29, 2015, testified that when he selected a suspect other than Newson from a photographic array, the detective conducting the procedure told L.M. that he "picked the wrong person." L.M. went on to say that he subsequently viewed a live line-up and recognized one of the participants as having been included in the photo array. The form that L.M. marked after viewing the live line-up reflects that he selected Newson as the suspect, then crossed out the selection. Trial counsel did not move to suppress evidence of the line-up and stated during the course of the

proceedings that the decision was strategic. In the no-merit report, appellate counsel similarly asserts that trial counsel's actions were strategic.

Although courts presume that counsel's strategic choices are professionally reasonable, *see* ***Strickland***, 466 U.S. at 690, exploration of those choices may nonetheless be warranted. Counsel's assertion that a choice "was strategic does not insulate review of the reasonableness of that strategy." *See* ***State v. Coleman***, 2015 WI App 38, ¶27, 362 Wis. 2d 447, 865 N.W.2d 190. Our independent review of the record here persuades us that further pursuit of this issue in postconviction proceedings would not be frivolous.

2. *Denial of counsel at a post-arrest line up.* When adversary judicial proceedings have begun, an in-person lineup is a critical stage of the prosecution at which the defendant is entitled to counsel. *See* ***United States v. Wade***, 388 U.S. 218, 237 (1967); *see also* ***State v. Taylor***, 60 Wis. 2d 506, 522-23, 210 N.W.2d 873 (1973). Here, on June 16, 2015, Newson participated in a live lineup in regard to a May 30, 2015 carjacking involving D.T. Newson asserts in his response to the no-merit report that he has an arguably meritorious claim that the evidence developed at the lineup should have been suppressed because he was wrongly denied counsel.

Attorney Kachinsky acknowledges that Newson invoked his right to counsel at the post-arrest line up, that evidence developed at the lineup was inculpatory, and that trial counsel did not move to suppress that evidence notwithstanding the denial of counsel. Further, Attorney Kachinsky agrees that, as of June 16, 2015, the State had charged Newson with crimes arising out of the incident involving D.T. and that Newson therefore "would have been entitled to counsel" at the lineup. Attorney Kachinsky goes on to assert that "[t]here may have been deficient performance by [trial counsel's] failure to file a motion to suppress the live lineup."

Attorney Kachinsky maintains, however, that further pursuit of this issue would lack arguable merit in light of other evidence presented in regard to the three crimes at issue. We are not persuaded, however, that it would be frivolous to claim that the identification evidence was consequential and that Newson was therefore prejudiced by trial counsel's failure to pursue a suppression motion. *Cf.* ***Strickland***, 466 U.S. at 687.

3. *Multiplicitous charges*. "Multiplicity exists when the defendant is charged in more than one count for a single offense." ***State v. Hirsch***, 140 Wis. 2d 468, 471, 410 N.W.2d 638 (Ct. App. 1987). "This court recognizes that submitting multiplicitous charges to a jury may prejudice a defendant[.]" ***State v. Kennedy***, 134 Wis. 2d 308, 324, 396 N.W.2d 765 (Ct. App. 1986). Here, the State charged Newson with seven counts of possessing a firearm as a person previously adjudicated delinquent for an act that would be a felony if committed by an adult. *See* WIS. STAT. § 941.29(2)(b) (2013-14). Each count was associated with an armed robbery. Three counts arose on the same day. The State did not offer a gun in evidence but argued that the victims of the armed robberies described seeing "a small caliber firearm."

The elements of WIS. STAT. § 941.29(2)(b) (2013-14) are that: (1) the defendant possessed a firearm; and (2) the defendant was adjudicated delinquent for a felonious act on or after April 21, 1994, and before the date of possession. *See* ***State v. Berry***, 2016 WI App 40, ¶11, 369 Wis. 2d 211, 879 N.W.2d 802. Thus, "there are no temporal limitations in [§ 941.29(2)]. It does not specify what length of time a felon must possess the firearm in order to violate the statute." ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 624 N.W.2d 363. We conclude that it would not be frivolous for Newson to pursue a claim that trial counsel performed deficiently by failing to assert that some or all of the possession charges were multiplicitous and that Newson was prejudiced by trial counsel's failure.

In addition to the matters discussed above, we have considered a variety of inquiries from the circuit court throughout the proceedings questioning trial counsel's choices, actions, and omissions, including, among others, counsel's limited cross-examinations, counsel's handling of the State's evidence regarding cigarette butts that a lay witness said that she found in a victim's stolen vehicle, and counsel's limited evidentiary challenges. We will not catalog all of those inquiries here.

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 (quoting ***Anders v. California***, 386 U.S. 738, 744 (1967)). 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 that the 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 Newson could pursue several claims of ineffective assistance of counsel that would not be frivolous. Further, the record suggests a basis to explore whether justice for any reason miscarried. *See* WIS. STAT. § 752.35. We emphasize that we do not reach any conclusion that Newson would or should prevail, only that the record and the submissions reflect that pursuit of claims on the merits would not be frivolous within the meaning of RULE 809.32, and ***Anders***.

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.

Newson 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, on the court's own motion, we reconsider the order extending Newson's deadline for filing a supplemental response to the no-merit reports, and we deny the extension as unnecessary.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Newson, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the Office of the State Public Defender shall notify this court within five days after either a new lawyer is appointed for Newson or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Newson to file a postconviction motion under WIS. STAT. RULE 809.30 is extended until sixty days after the date on which this court receives notice from the Office of the State Public Defender advising either that it has appointed new counsel for Newson 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