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DISTRICT II

June 22, 2022

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

2020AP1667-CRNM State of Wisconsin v. Kenyatta J. Cursey (L.C. #2018CF847)

Before Gundrum, P.J., Neubauer 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).

Kenyatta J. Cursey appeals a judgment, entered upon his guilty plea, that convicted him of one count of false imprisonment (domestic abuse), as a domestic abuse repeater. Attorney Annice Kelly has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20).[1] Cursey was advised of his right to respond to the no-merit report, and he has filed a response raising multiple issues. Having independently reviewed the

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

entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal, and we summarily affirm. *See* WIS. STAT. RULE 809.21.

A criminal complaint charged Cursey with thirteen offenses, each as an act of domestic abuse, as a repeater, and as a domestic abuse repeater: four counts of battery; four counts of disorderly conduct; one count of false imprisonment; two counts of strangulation and suffocation (with a previous conviction); one count of criminal damage to property; and one count of substantial battery. The complaint alleged that on July 29, 2018, during a car trip between Kenosha, Wisconsin, and Highland Park, Illinois, Cursey repeatedly hit his girlfriend and put his hand around her throat, impeding her normal breathing. The complaint further alleged that on multiple occasions during the trip, Cursey "would turn the car off and take the keys so [the victim] could not leave." The complaint also alleged that at one point during the trip, Cursey took the victim's phone, got out of the car, and threw the phone onto the concrete several times, causing the phone to break into pieces. The complaint also alleged that Cursey burned the victim's arm with the lit end of a cigarette three times. An Information was subsequently filed charging the same thirteen counts as the complaint.

Cursey was represented by five different attorneys during the circuit court proceedings. His first attorney, Hilary Edwards, was permitted to withdraw based on a breakdown in the attorney-client relationship. His second attorney, David Berman, was permitted to withdraw after the circuit court judge stated that he planned to recuse himself based on his close friendship with Berman, and Cursey then indicated that he would rather discharge Berman than have a new judge assigned to the case. Cursey's third and fourth attorneys, Jerold Breitenbach and Frank

Parise, were allowed to withdraw based on disagreements regarding their handling of Cursey's case, after Cursey filed pro se motions to dismiss without consulting them

Attorney Michael Cicchini was then appointed to represent Cursey.[2] Attorney Cicchini moved to dismiss the false imprisonment charge and both of the strangulation and suffocation charges. Before the circuit court could address Cursey's various motions to dismiss, however, the parties reached a plea agreement. The agreement provided that Cursey would enter a plea to the false imprisonment charge (as an act of domestic abuse and as a domestic abuse repeater, but without the ordinary repeater enhancer), and the remaining charges would be dismissed and read in. The parties would be free to argue at sentencing. The State also agreed not to refile any charges or to file any additional charges based on the factual allegations in the complaint and discovery materials. In addition, Cursey agreed to withdraw his pending motions.

Following a plea colloquy, supplemented by a signed plea questionnaire and waiver of rights form, the circuit court accepted Cursey's guilty plea to the false imprisonment charge. The court found that Cursey's plea was made "freely, voluntarily, knowingly and understandingly, and free from any threats, promises, force or coercion." The parties stipulated that the court could rely on the pleadings as the factual basis for Cursey's plea, and the court found that a factual basis for the plea existed.[3]

[2] While Attorneys Edwards and Berman were appointed by the Office of the State Public Defender, Attorneys Breitenbach, Parise, and Cicchini were appointed by the circuit court.

[3] With respect to the domestic abuse repeater enhancer, we note that Cursey expressly acknowledged during the plea colloquy that he had been convicted on two or more separate occasions of offenses for which a court had imposed a domestic abuse surcharge, and that those convictions remained of record and unreversed. *See* WIS. STAT. § 939.621(1)(b).

The circuit court subsequently held a sentencing hearing, during which Attorney Cicchini addressed and corrected several errors in the presentence investigation report. Both sides then made their sentencing recommendations, and Cursey exercised his right of allocution. After hearing from the parties, the court discussed proper sentencing factors, including the gravity of the offense, Cursey's character and criminal record, and the need to protect the public. The court related those factors to proper sentencing objectives, emphasizing Cursey's rehabilitative needs, which the court concluded could be best addressed in a confined setting, and the need to protect the public from further criminal activity. The court then sentenced Cursey to four years' initial confinement, followed by three years' extended supervision, consecutive to any other sentence.

The no-merit report addresses: (1) whether Cursey's guilty plea was knowing, intelligent, and voluntary; and (2) whether the circuit court erroneously exercised its sentencing discretion. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit, and we therefore do not address them further.

Cursey has filed a response to the no-merit report raising multiple issues. In particular, he asserts that his trial attorneys were constitutionally ineffective, for a variety of reasons. Ineffective assistance of counsel may constitute a manifest injustice permitting a defendant to withdraw his or her guilty plea after sentencing. ***State v. Dillard***, 2014 WI 123, ¶¶83-84, 358 Wis. 2d 543, 859 N.W.2d 44. To prevail on an ineffective assistance claim, a defendant must show that counsel's performance was both deficient and prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, a defendant must show that counsel's performance fell outside the wide range of professionally competent assistance. ***Dillard***, 358 Wis. 2d 543, ¶88. To establish prejudice in the context of a request for plea withdrawal, a defendant must demonstrate a reasonable probability that, but for counsel's alleged

errors, the defendant would not have pled guilty and would have insisted on going to trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50 (1996).

Having independently reviewed the record, we conclude that none of Cursey's ineffective assistance claims have arguable merit. First, Cursey appears to argue that Attorneys Edwards, Parise, and Cicchini were ineffective by failing to seek dismissal of the false imprisonment charge on the grounds that there was evidence showing that "the victim [had] some reasonable means of escape." Notably, however, Attorney Edwards *did* move to dismiss the false imprisonment charge during Cursey's initial appearance, arguing the allegations in the complaint did not establish that Cursey had prevented the victim from leaving the vehicle on the day in question. A court commissioner denied that motion. Thereafter, Attorney Cicchini again moved to dismiss the false imprisonment charge, again arguing that Cursey's alleged conduct did not meet the legal standard for false imprisonment. Before the circuit court could address that motion, however, the parties' reached a plea agreement, under which Cursey agreed to enter a plea to the false imprisonment charge and further agreed to withdraw his pending motions. Because Attorneys Edwards and Cicchini *did* seek dismissal of the false imprisonment charge on the grounds that Cursey did not actually prevent the victim from leaving the vehicle, Cursey cannot show that they performed deficiently by failing to do so. Moreover, because Cursey agreed to withdraw his pending motion to dismiss the false imprisonment charge as part of the plea agreement, he cannot show a reasonable probability that, but for his attorneys' alleged

errors, he would not have entered a guilty plea to the false imprisonment charge and would have insisted on going to trial.[4]

Cursey next argues that Attorneys Edwards, Parise, and Cicchini were ineffective by failing to investigate and "depose" two Highland Park police officers who interacted with Cursey and the victim on the day in question. Cursey contends that these officers did not prepare a report following their interaction with Cursey and the victim "because there was nothing to report about." Cursey therefore contends the officers' testimony would have supported his claim that he did not batter, strangle, or falsely imprison the victim.

An ineffective assistance claim on these grounds would lack arguable merit because Cursey cannot show that he was prejudiced by his attorneys' alleged errors. At the time he entered his guilty plea to the false imprisonment charge, Cursey knew that the Highland Park officers had not prepared a report regarding their interaction with Cursey and the victim. Cursey also had personal knowledge of what had happened during that interaction. Based on that knowledge, Cursey believed that the interaction with the Highland Park officers discredited the victim's claims. Nevertheless, he chose to enter a guilty plea to the false imprisonment charge. Given Cursey's preexisting knowledge regarding the interaction with the officers, it is not

[4] To the extent Cursey claims that his attorneys were ineffective by failing to specifically cite certain evidence in support of their motions to dismiss the false imprisonment charge, that claim lacks arguable merit. "A complaint, to be sufficient, must set forth facts within its four corners that, together with reasonable inferences from those facts, would allow a reasonable person to conclude that a crime had been committed and that the defendant was probably the person who committed it." ***State v. Chagnon***, 2015 WI App 66, ¶7, 364 Wis. 2d 719, 870 N.W.2d 27. As the court commissioner properly determined during Cursey's initial appearance, the allegations in the criminal complaint were sufficient to support the false imprisonment charge. Stated differently, the allegations in the complaint were sufficient for a reasonable person to conclude that the crime of false imprisonment had been committed and that Cursey was probably the person who committed it. *See* ***id.***

reasonably probable that any additional information he might have learned had his attorneys sought additional information from the officers would have affected his decision to enter a guilty plea.[5]

Cursey next asserts that the State Public Defender's office in Kenosha County was ineffective by appointing Attorney Berman to represent him because "they should have known of the conflict" posed by Attorney Berman's friendship with the circuit court judge. Cursey provides no legal authority in support of the proposition that a defendant can assert an ineffective assistance of counsel claim against a public defender's office, as a whole, based on that office's decision to appoint a certain attorney to represent the defendant. Moreover, even assuming a defendant could assert such a claim, the record shows that Cursey was not prejudiced by Attorney Berman's appointment. Attorney Berman represented Cursey for less than one month before the conflict stemming from his friendship with the circuit court judge became apparent. The judge disclosed the conflict during the first hearing at which Attorney Berman represented Cursey and stated his intent to recuse himself based on that conflict. Cursey then elected to change attorneys, rather than having the case transferred to a different judge. Attorney Berman was therefore permitted to withdraw, and a new attorney was appointed to represent Cursey. On

[5] Moreover, Cursey fails to provide any legal basis for taking the officers' "depositions." Although Cursey refers to getting additional information from officers as taking "depositions," Wisconsin law does not permit taking depositions of potential witnesses except in very rare circumstances. *See* WIS. STAT. § 967.04. We interpret Cursey's objection to the no-merit finding to be his allegation that trial counsel failed to get more information from the police officers. In any event, Cursey chose to enter a guilty plea even though he knew that his lawyers had not sought additional information. Notably, Cursey did not raise any issue during the plea hearing regarding concerns about his trial attorneys' performance. In particular, he did not alert the circuit court to the fact that he believed his attorneys should have sought additional information from the officers.

this record, there is nothing to suggest that Cursey was prejudiced by Attorney Berman's brief representation of him or by the court's decision permitting Attorney Berman to withdraw.

Cursey also claims that Attorney Parise was "intentionally ineffective" by failing to file motions to dismiss based on ***Franks v. Delaware***, 438 U.S. 154 (1978), and ***Ganzel v. State***, 185 Wis. 589, 201 N.W. 724 (1925). This claim lacks arguable merit because Cursey cannot show that Attorney Parise performed deficiently by failing to file the motions in question. Cursey sought to challenge the criminal complaint on the grounds that the victim had made false, inconsistent, or misleading statements to law enforcement. However, as Attorney Parise explained in a letter dated May 2, 2019, ***Franks*** applies to alleged misstatements made by a complainant or affiant, rather than misstatements made by an informant or witness. *See* ***State v. Marshall***, 92 Wis. 2d 101, 113-14, 284 N.W.2d 592 (1979). "Trial counsel's failure to bring a meritless motion does not constitute deficient performance." ***State v. Wheat***, 2002 WI App 153, ¶23, 256 Wis. 2d 270, 647 N.W.2d 441.

Cursey's reliance on ***Ganzel*** is also misplaced. The ***Ganzel*** court reversed a father's conviction for the rape of his daughter because the court determined that the victim's conduct following the alleged rape was not "the usual and natural conduct of an outraged woman." ***Ganzel***, 185 Wis. at 591. In other words, because the court believed that the victim's conduct was "inconsistent" with what would be expected of a woman who had been raped by her father, the court concluded that her testimony regarding the rape was incredible as a matter of law. *See* ***id.*** at 592. This court has questioned whether ***Ganzel*** remains good law, stating, "We doubt that the supreme court's language in ***Ganzel*** is still viable in this more informed age regarding expected conduct of sexual assault victims." ***State v. C.V.C.***, 153 Wis. 2d 145, 159, 450 N.W.2d 463 (Ct. App. 1989). An attorney does not perform deficiently by failing to raise an argument

where the law is unsettled. *See* ***State v. Breitzman***, 2017 WI 100, ¶49, 378 Wis. 2d 431, 904 N.W.2d 93. Moreover, none of the alleged inconsistencies that Cursey cites regarding the victim's version of events establish that her report to law enforcement was incredible as a matter of law. As such, there would be no arguable merit to a claim that Attorney Parise performed deficiently by failing to file a motion to dismiss based on ***Ganzel***.

Cursey further argues that Attorney Parise was ineffective by sending a letter to Cursey's probation agent regarding the revocation of Cursey's extended supervision in a different case. However, Cursey does not explain—and we cannot discern—how any letter that Attorney Parise may have sent to Cursey's probation agent in a different case could have resulted in prejudice to Cursey in this case. Any ineffective assistance claim on these grounds would therefore lack arguable merit.[6]

Cursey next argues that Attorney Cicchini was ineffective because he was aware of the pro se motions to dismiss that Cursey had filed, but he failed to "investigate and take action to secure potential alibi witnesses for the hearing." None of Cursey's pro se motions, however, asserted an alibi defense. In addition, Cursey does not identify which witnesses Attorney Cicchini should have secured to testify at a hearing on his motions to dismiss, nor does Cursey allege (or provide any documentation showing) that he asked Attorney Cicchini to secure the testimony of any specific witnesses for such a hearing. On this record, there would be no

[6] Cursey's assertion that Attorney Parise was ineffective because his letters have a "childlike signature" also lacks arguable merit. Cursey does not explain what bearing the character of Attorney Parise's signature has on the quality of his representation.

arguable merit to a claim that Attorney Cicchini was constitutionally ineffective by failing to secure the testimony of any unspecified witnesses.

Cursey also argues that Attorney Cicchini was ineffective by failing to notify him that Attorney Parise "had filed an action against [Cursey]" and that an order for payment was entered on August 26, 2019. Any ineffective assistance claim on this basis would lack arguable merit, however, as Cursey cannot show a reasonable probability that he would not have entered his guilty plea absent Attorney Cicchini's alleged error in failing to notify him of Attorney Parise's request for payment.

Cursey next asserts that Attorneys Parise and Cicchini were ineffective because they violated SCR 20:1.4 by failing to keep him reasonably informed and violated SCR 20:1.5 by failing to inform him of the "scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible." *See* SCR 20:1.5(b)(1). Cursey does not specifically explain how he believes that Attorneys Parise and Cicchini violated these rules. Moreover, it is not apparent how these alleged rule violations affected Cursey's decision to enter a guilty plea. As such, even assuming that Attorneys Parise and Cicchini performed deficiently by violating the cited Supreme Court Rules, there is no basis to conclude that Cursey was prejudiced by the alleged errors. Any ineffective assistance claim on these grounds would therefore lack arguable merit.

Finally, Cursey argues that photographs of the victim do not support her version of events; that "the evidence does not support false imprisonment, batteries, [or] any of the charges excluding damage to property"; and that the State omitted material information from the criminal complaint. We have already concluded, however, that there would be no arguable merit to a

claim that Cursey's guilty plea to the false imprisonment charge was not knowing, intelligent, and voluntary. We have also concluded that any claim for plea withdrawal based on the ineffective assistance of Cursey's various trial attorneys would lack arguable merit. A valid guilty plea forfeits all nonjurisdictional defects and defenses, including claimed violations of constitutional rights. *See* ***State v. Kelty***, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886. By virtue of his guilty plea, Cursey has therefore forfeited any claim regarding the sufficiency of the evidence and the State's alleged omission of information from the complaint.

Our independent review of the record discloses no other potential issues for appeal

Upon the foregoing,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Annice Kelly is relieved of any further representation of Kenyatta J. Cursey in this matter pursuant to 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