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August 30, 2022

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

2020AP609-CRNM State of Wisconsin v. Tyler M. Zimmerman
(L. C. No. 2018CF66)

Before Stark, P.J., Hruz and Gill, 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).

Tyler Zimmerman appeals from his convictions for two counts of first-degree intentional homicide by use of a dangerous weapon. Assistant State Public Defender Thomas Aquino has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20).¹ The no-merit report sets forth the procedural history of the case and addresses

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

Zimmerman’s pleas, his sentences, and a restitution order entered after sentencing. Zimmerman has filed a response asserting that the district attorney made multiple false statements during the sentencing hearing, that Zimmerman’s trial counsel provided ineffective assistance in several respects, and that the judge had a conflict of interest. Aquino has not filed a supplemental no-merit report addressing Zimmerman’s allegations. Having independently reviewed the entire record as mandated by *Anders v. California*, 386 U.S. 738, 744 (1967), we conclude there are no arguably meritorious issues for appeal.

The State charged Zimmerman with two counts of first-degree intentional homicide, one count of attempted first-degree intentional homicide, and three counts of first-degree recklessly endangering safety, each by use of a dangerous weapon. According to the complaint, Zimmerman believed that his girlfriend, whom we will call “Carrie,”² was being unfaithful to him, and he tracked her location through a phone app to the home of a man whom we will call “Peter.” Zimmerman left to retrieve a gun and then returned to Peter’s house where he found Carrie alone in a bed and shot her in the head. Zimmerman then shot two other people, whom we will call “Mary” and “David,” on his way out of the house. Carrie and David died from their injuries, while Mary survived. The police arrested Zimmerman and recovered the murder weapon when Zimmerman returned to Peter’s house a second time to turn himself in. When questioned, Zimmerman confessed to the shootings.

Pursuant to a negotiated agreement, Zimmerman eventually pled guilty to the two first-degree intentional homicide charges. In exchange, the State agreed to recommend that the

² This matter involves the victims of crimes. Pursuant to WIS. STAT. RULE 809.86(4), we use pseudonyms instead of the victims’ names.

circuit court dismiss and read in the remaining four counts, to jointly request a presentence investigation report (PSI), and to recommend that the sentences be concurrent, with the parties free to argue any other terms of the sentences. The court accepted Zimmerman's pleas after reviewing a signed plea questionnaire and waiver of rights form with attached jury instructions and conducting a plea colloquy to ascertain that Zimmerman understood the nature of the charges and the constitutional rights he would be waiving. The court also obtained Zimmerman's personal acknowledgement that the facts in the complaint were "basically what happened" and that they provided a sufficient factual basis for the pleas.

The circuit court held a sentencing hearing at which it heard from the parties, a psychologist hired by the defense to perform an assessment of Zimmerman's recidivism risk, and multiple relatives of the victims. The court indicated that it had also reviewed submitted materials including the PSI, a 911 recording, the defense psychologist's evaluation of Zimmerman, victim impact statements, and character letters from the defense. After discussing relevant factors, the court sentenced Zimmerman to two concurrent life sentences without the possibility of "parole." The court subsequently amended the judgment of conviction to reflect the correct terminology of "extended supervision" and to award restitution in the amount of \$12,625.96.

We agree with counsel's description, analysis and conclusion that any challenge to the plea colloquy, the circuit court's exercise of its sentencing discretion, or the restitution order would lack arguable merit. We turn next to Zimmerman's assertions that he was sentenced based upon inaccurate information, that his trial counsel provided ineffective assistance, and that the circuit court was biased.

1. Accuracy of Sentencing Information

“A defendant has a constitutionally protected due process right to be sentenced upon accurate information.” *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. If a defendant can establish by clear and convincing evidence both that inaccurate information was presented at sentencing and that the court relied upon the misinformation in reaching its determination, the burden shifts to the State to show that the error was harmless. *Id.*, ¶26. A defendant who has been sentenced on inaccurate information that cannot be shown to be harmless is entitled to be resentenced. *State v. Payette*, 2008 WI App 106, ¶¶45-46, 313 Wis. 2d 39, 756 N.W.2d 423. We do not deem information to be “inaccurate” merely because it was contested or incomplete. Rather, the defendant must demonstrate the information was “extensively and materially false.” *State v. Travis*, 2013 WI 38, ¶18, 347 Wis. 2d 142, 832 N.W.2d 491. Actual reliance requires a showing that the court gave explicit attention or consideration to the information, such that it “formed part of the basis for the sentence.” *Tiepelman*, 291 Wis. 2d 179, ¶14 (citation omitted).

First, Zimmerman claims the district attorney inaccurately stated that Zimmerman shot Carrie while she was sleeping, while Zimmerman contends that Carrie was awake when he shot her. However, what the district attorney actually stated was that Carrie woke up “slightly, but remain[ed] in a somewhat fetal position sleeping with her hands between her legs, between her knees.” A crime scene photograph supported the district attorney’s assertion regarding Carrie’s position when shot. Zimmerman himself told police that Carrie was “sleepy and not very responsive” when he spoke to her just before shooting her. Thus, the circuit court’s subsequent description of Carrie having been shot in bed while “sleeping” was a fair characterization, not inaccurate information. Furthermore, regardless of whether Carrie was actually asleep at the

precise moment when Zimmerman shot her, the relevant point was that she was in a vulnerable position in bed and was not fully awake or able to defend herself.

Second, Zimmerman claims the district attorney inaccurately stated that it took Zimmerman one and one-half hours to get his gun and return to Peter's house after tracking Carrie there. Zimmerman asserts his trip took closer to fifteen minutes—which he contends was not enough time for him to think clearly about his actions. It was undisputed, however, that Zimmerman had to drive thirty-two miles to get his gun and then thirty-two miles back to Peter's house, with a stop at a gas station along the way. The district attorney's estimate that the trip would have taken about one and one-half hours is far more accurate than Zimmerman's assertion that it would have taken only fifteen minutes. Moreover, even a fifteen-minute trip would have been sufficient to demonstrate premeditation as an aggravating factor.

Third, Zimmerman claims the district attorney inaccurately stated that Zimmerman bought the murder weapon for the "exact reason" of killing Carrie. Zimmerman claims he bought the gun for his own safety; that he told the person from whom he bought the gun that someone was after him; and that there were "threats concerning [his] work place." What the district attorney actually said, however, was that Zimmerman was not a hunter and that one of Carrie's friends had pointed out that Zimmerman "purchased the gun during a time when his relationship with [Carrie] was in trouble." The circuit court could fairly infer from those facts that Zimmerman had purchased the gun with the idea of shooting Carrie. The court was not required to accept Zimmerman's contrary, self-serving assertion that he bought the gun for protection.

Fourth, Zimmerman claims the district attorney inaccurately stated that if Zimmerman had more bullets he would have killed more people. Zimmerman asserts that he actually had thirty additional bullets “in his possession,” but he made no attempt to reload his gun. Zimmerman, however, does not dispute that the magazine in his gun was out of rounds when recovered by police shortly after the shootings. Additionally, Zimmerman himself told police that he had fired all six rounds in the magazine. Thus, it was accurate to state that Zimmerman fired the gun until he was out of bullets, and it was fair for the district attorney to argue that if there had been more bullets in the gun, Zimmerman would have continued firing shots at Mary or into the room where Peter was hiding with his children.

Fifth, Zimmerman claims the district attorney inaccurately stated that Mary ran out of the house to get away from Zimmerman, whereas neither Mary nor Zimmerman said as much in their statements to police. What the district attorney actually said, however, was that Mary “ran away” from Zimmerman as he shot at her, not that she ran out of the house. That statement was clearly supported by the fact that Mary was struck in the buttocks.

Sixth, Zimmerman claims the district attorney inaccurately characterized him as “violent” because he “started a physical altercation at the jail with another inmate.” Zimmerman contends that he merely defended himself after he “jokingly” poured water on another inmate who then physically attacked him. We are satisfied, however, that Zimmerman’s act of pouring water on another inmate could be fairly characterized as what started the physical altercation between the two men.

Seventh, the district attorney stated that Zimmerman told police he was thinking clearly on the night of the murders, but Zimmerman disputes having made that statement. The district

attorney's statement, however, was based directly upon police reports. The fact that Zimmerman disputed the police reports does not establish that the account contained therein was false.

In sum, none of the statements identified by Zimmerman were so "extensively and materially false" as to constitute inaccurate information under the Due Process Clause. While Zimmerman disagrees with some of the inferences and characterizations made by the district attorney, the statements were premised upon facts in the record.

2. Ineffective Assistance of Counsel

Zimmerman first contends that his trial counsel should have recognized the alleged inaccuracies he identified in the district attorney's statements based on the discovery materials, and he claims that counsel provided ineffective assistance by failing to challenge any of those statements. Given our determination above that none of the statements challenged by Zimmerman constitute inaccurate information, Zimmerman cannot demonstrate prejudice based on counsel's failure to challenge those statements. *See State v. Swinson*, 2003 WI App 45, ¶58, 261 Wis. 2d 633, 660 N.W.2d 12.

Zimmerman next asserts that his trial counsel inaccurately informed him prior to the plea hearing that his earliest eligibility for extended supervision would be after twenty-five years' initial confinement and that he did not learn until the sentencing hearing that the circuit court could set eligibility for extended supervision after only twenty years' initial confinement.³

³ At the sentencing hearing, Zimmerman's trial counsel commented that if justice were always about the most severe form of punishment, "we wouldn't have a law that allows for parole after 25 years in homicide cases." The district attorney subsequently clarified for the circuit court that the minimum amount of time before extended supervision eligibility was twenty years rather than twenty-five years, pursuant to WIS. STAT. § 973.014(1g)(a)1.

Zimmerman claims that he “would never [have taken] the deal” if he had the correct information about his eligibility for extended supervision. It makes no sense, however, that Zimmerman would be willing to enter pleas with a chance at extended supervision after twenty-five years, but he would not have been willing to enter pleas with a chance at extended supervision after only twenty years. Moreover, Zimmerman was correctly advised that the circuit court could determine that Zimmerman would not be eligible for extended supervision at all, which is what the court ultimately decided. Therefore, Zimmerman cannot demonstrate prejudice from the misinformation allegedly provided by his counsel.

Zimmerman also asserts that his trial counsel never told him that he could try “for a lesser charge.” He does not, however, point to any evidence that the State ever offered a lesser charge as part of the plea negotiations or that it would have been willing to accept such a deal. We further note that the facts of the case plainly supported first-degree intentional homicide, and trial counsel was able to negotiate the dismissal of four additional charges to be read in at sentencing.

Zimmerman also asserts that his trial counsel never explored whether Zimmerman might have a viable defense of not guilty by reason of mental disease or defect (NGI) based upon the effects of multiple concussions. Trial counsel did, however, obtain an evaluation as to whether Zimmerman was competent to stand trial. The psychologist who performed the evaluation noted that Zimmerman reported having suffered two major concussions in his life, but Zimmerman denied experiencing any significant problems resulting from the concussions. Zimmerman has not identified any additional information or expert opinion supporting an NGI defense that counsel could have discovered with additional research.

3. Judicial Bias

Zimmerman also contends that the circuit court judge had “some conflict of interest” based on his “prior experience with [Carrie’s] mother.” We assume the prior experience to which Zimmerman refers is having previously presided over a criminal case involving Carrie’s mother, where the judge chose not to impose a prison or jail sentence. Zimmerman offers no explanation as to how that prior interaction would have influenced the judge against him, and we note that it would not have required recusal under WIS. STAT. § 757.19(2).

Our independent review of the record discloses no other potential issues for appeal.⁴ We conclude that any further appellate proceedings would be wholly frivolous within the meaning of *Anders*. Accordingly, counsel shall be allowed to withdraw, and the judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Assistant State Public Defender Thomas Aquino is relieved of any further representation of Tyler Zimmerman in this matter pursuant to WIS. STAT. RULE 809.32(3).

⁴ We note that Zimmerman’s pleas forfeited the right to raise other nonjurisdictional defects and defenses, including claimed violations of constitutional rights prior to the entry of the pleas. *See State v. Kely*, 2006 WI 101, ¶18 & n.11, 294 Wis. 2d 62, 716 N.W.2d 886; *see also State v. Lasky*, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals