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DISTRICT I

February 7, 2023

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

2020AP97-CRNM State of Wisconsin v. Adrian Combs (L.C. # 2016CF1744)

Before Brash, C.J., Donald, P.J., and White, 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).

Attorney Jay R. Pucek, as appointed counsel for Adrian Combs, filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Combs responded to the report, and counsel filed a supplemental no-merit report. In response to an order of this court, counsel also filed a second supplemental no-merit report. We conclude

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

that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. After our independent review of the record, as mandated by ***Anders***, we conclude that there is no arguable merit to any issue that could be raised on appeal.

Combs pled guilty to one count of possession of more than fifty grams of heroin with intent to deliver with the use of a dangerous weapon and one count of felon in possession of a firearm. The court imposed sentences totaling twelve years of initial confinement and eight years of extended supervision.

The no-merit report addresses whether Combs' pleas were entered knowingly, voluntarily, and intelligently. The plea colloquy sufficiently complied with the requirements of ***State v. Brown***, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, and WIS. STAT. § 971.08 relating to the nature of the charge, the rights Combs was waiving, and other matters. The record does not show a basis to withdraw the pleas due to a defect in the colloquy.

In his response to the no-merit report, Combs argues that he should be permitted to withdraw his pleas because the State failed to fulfill its constitutional duty to provide him with exculpatory evidence that was in its possession. More specifically, Combs argues that the State was required to provide him with police reports related to the controlled purchases that the State used as the basis to obtain a search warrant. Combs asserts that he was not involved in these sales. Combs wants to use these reports or, if the State determines that no such reports actually exist, the lack of such reports, as the basis for a suppression motion arguing that the search warrant affidavit provided false information to the reviewing magistrate. If Combs were to establish that the search warrant affidavit was false, this might also be evidence to impeach the credibility of the officer who prepared the affidavit, if he testified at trial.

It is important to note, however, that Combs was not charged in connection with the controlled purchases. As a result, when he requested discovery of these reports under WIS. STAT. § 971.23(1), the circuit court determined that they need not be provided, because they were not relevant to the charges he was actually facing.

We conclude that there is no arguable merit to a constitutional claim on this basis. For constitutional purposes, exculpatory evidence is that which is favorable to the defendant and material either to guilt or to punishment. ***State v. Harris***, 2004 WI 64, ¶12, 272 Wis. 2d 80, 680 N.W.2d 737. The evidence is material if there is a reasonable probability that the result of the proceeding would have been different. ***Id.***, ¶14.

Here, Combs has a major obstacle to showing that the evidence is material, because he has not shown that the claimed exculpatory evidence actually exists. The State has not provided him with the police reports for the controlled purchases, and it has not stated that such reports exist. Combs' argument is, at this point, based on only speculation about these reports. As a result, there is no basis for him to argue that material exculpatory evidence actually exists.

As to whether the circuit court erred by denying Combs' discovery motion for the police reports related to the controlled buys, there is no basis for such an argument. As above, Combs argues that the police reports were exculpatory evidence subject to discovery under WIS. STAT. § 971.23(1)(h). However, at the time of the motion, as now, Combs did not actually know whether the reports existed or what their content was. As a result, he could not present to the circuit court any basis for that court to conclude that the material was, in fact, exculpatory. The best that he could argue was that it *might* be exculpatory, depending on whether it existed and what it said. This is not a basis to compel discovery under the statute.

Combs also argues that his trial counsel was ineffective by not filing a suppression motion based on the theory that the search warrant affidavit provided false information about the controlled purchases. To establish ineffective assistance of counsel a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. ***Id.*** at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. ***Id.***

Here, it would be frivolous to argue that Combs was prejudiced by the lack of such a suppression motion, because he has not established that there was a reasonable probability that such a motion would have been successful. As argued by Combs, the focus of the motion, and of any related evidentiary hearing, would have been on establishing that the controlled purchases described in the search warrant affidavit did not occur. This argument would have been based on Combs' own assertion that they did not occur, and on what he asserts is the failure of the search to recover evidence related to the purchases, such as pre-recorded currency or the phone that was used to arrange them. However, this evidence, by itself, is not sufficient to show a reasonable probability that a court would find that the affidavit was false, because Combs can only speculate as to what the police testimony about the controlled purchases would have been.

The no-merit report next addresses whether the circuit court erred by denying Combs' pretrial suppression motion. That motion argued that the search warrant affidavit failed to establish probable cause because the confidential informant who made the controlled purchases was not reliable due to having a criminal record and being involved in illegal drug activity.

Combs did not provide specific case law in support of that argument, and we conclude that the argument would be frivolous on appeal for the reasons identified in the no-merit report.

The no-merit report next addresses Combs' sentences. As explained in the no-merit report, the sentences are within the legal maximum. As to discretionary issues, the standards for the circuit court and this court are well-established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

Our review of the record discloses no other potential issues 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 Pucek is relieved of further representation of Combs in this matter. *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