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DISTRICT IV

July 20, 2023

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

2021AP823-CR

State of Wisconsin v. Brennen Ray Smith-Morales
(L.C. # 2017CF404)

Before Blanchard, P.J., Graham, and Nashold, 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).

Smith-Morales appeals a judgment of conviction of two counts of first-degree sexual assault of a child. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹
We affirm.

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

On May 9, 2016, when Smith-Morales was a 16-year-old high school student, the Sparta Police Department received a report that he had engaged in inappropriate sexual conduct directed at two younger students who lived in his neighborhood and rode his school bus. Smith-Morales turned 17 on September 12, 2016. The State did not file criminal charges against Smith-Morales until after his 17th birthday, meaning that he was no longer subject to the jurisdiction of the juvenile court. WIS. STAT. § 938.12(1). If charged, Smith-Morales would have to be tried as an adult. WIS. STAT. § 938.02(10m) (providing that persons who are 17 years of age or older are subject to criminal proceedings); *State v. Sanders*, 2018 WI 51, ¶3, 381 Wis. 2d 522, 912 N.W.2d 16 (a “defendant’s age at the time [the defendant] was charged, not [their] age at the time [they] committed the underlying conduct, determines whether the circuit court has statutory competency to hear [the] case” as a criminal or juvenile matter). Smith-Morales ultimately pled no contest to the two counts of sexual assault pursuant to a plea agreement and was found guilty on both counts. The court withheld sentence and ordered a substantial period of probation.

Prior to his pleas and sentencing, Smith-Morales filed a motion to dismiss the charges, alleging that the State’s delay in bringing charges until after he turned 17 violated his due process rights. Specifically, the motion alleged that the State would be unable to, in the words of *Becker*, “affirmatively show[] that the delay was not for the purpose of manipulating the system to avoid juvenile court jurisdiction.” *State v. Becker*, 74 Wis. 2d 675, 678, 247 N.W.2d 495 (1976). If the State failed to satisfy its burden of proof at an evidentiary hearing, Smith-Morales would be entitled to dismissal of the charges. *See id.*

The circuit court held evidentiary hearings on the motion, at which the State introduced the testimony of the two police officers who conducted the pre-charging investigation into Smith-Morales’s alleged misconduct. The following timeline is based on the officers’ testimony

and the documentary evidence introduced at the hearing. Officer Ethan Schroeder was the officer who initially responded to the report of Smith-Morales's alleged misconduct on May 9, 2016, and Schroeder completed his investigation and documented it in a report that same day. Schroeder then handed the matter over to Officer Kyle Seubert, who was the school resource officer. During his investigation, Seubert interviewed Smith-Morales, who admitted that he had engaged in inappropriate sexual conduct directed at both victims. Seubert completed his investigation and finished drafting his report on May 10, 2016.

However, for reasons that were not explained with any clarity at the hearing, Schroeder did not sign his report until June 27, 2016; Seubert did not sign his report until July 27, 2016; and the officers did not submit their reports to their supervisor for approval and referral to the county department of human services for consideration of juvenile proceedings until late July 2016. Although there was testimony about events that occurred after the officers submitted their reports to their supervisor, that testimony is not germane to the issues considered in this opinion.

Both officers testified that they were unaware of any specific reason for the delay between the completion of their investigation and reports in early May 2016 and the submission of their reports to their supervisor in late July 2016. Schroeder testified that he has a heavy caseload at times, and that it can be difficult to find time to write reports, but he did not specifically attribute the delay in this case to a heavy caseload. He testified: "I'm not sure exactly what the delay would have been." For his part, Seubert did not "recall anything specific" that stood out "in [his] mind as to why there would be that delay in the investigation or the submitting of the report." He testified that the end of the school year is a busy time, but when asked about his caseload in May 2016, he testified: "I don't recall right offhand specifically what

it would [have] be[en].” When asked whether “overall” there was “anything about this particular case that stands out that would have caused any unusual delays,” Seubert responded “No.”

As stated, under existing law, the State has the burden to prove lack of manipulative intent. However, the State’s burden is limited to showing a lack of “intentional delay by the State,” or in other words, the absence of a “conscious effort on the part of the State to avoid juvenile court jurisdiction.” *State v. Montgomery*, 148 Wis. 2d 593, 595, 596-97, 436 N.W.2d 303 (1989). In *Montgomery*, our supreme court rejected a standard that had been articulated in a prior case that would have required the State to act “with due dispatch” in initiating a prosecution under circumstances like these. *Id.* at 601-603 (disavowing language from *State v. Avery*, 80 Wis. 2d 305, 259 N.W.2d 63 (1977)). Under that standard, a juvenile offender’s due process rights could be violated by law enforcement’s “negligent failure” to “bring a charge promptly” before the juvenile offender reached an age at which the charges could be brought only in criminal court. *Id.* (citation omitted). Then in *Velez*, our supreme court acknowledged that the burden of proof is on the State, but at the same time the court disavowed the idea that there is a “rebuttable presumption of the State’s manipulative intent whenever an adult is arrested [or charged] for a crime committed when the adult was still a juvenile.” *State v. Velez*, 224 Wis. 2d 1, 16, 589 N.W.2d 9 (1999).

Turing back to Smith-Morales’s case, following the evidentiary hearing, the circuit court denied his motion to dismiss. In so doing, the court characterized law enforcement’s delay as “substantial.” However, the court determined that the State met its burden to prove a lack of manipulative intent. Among other things, the court found that the officers “seemed unaware of the issue regarding juvenile court jurisdiction versus adult court jurisdiction,” and that “[t]here was no testimony by the officers that the Court found credible that indicated that the officers

engaged in any kind of ... determination or intent to avoid Mr. Smith Morales's protections under the juvenile court jurisdiction."²

Smith-Morales's plea hearing, the entry of his judgment of conviction, and his sentencing hearing all followed the circuit court's denial of his motion to dismiss. At sentencing, the circuit court withheld sentence and placed Smith-Morales on probation for ten years with twelve months of conditional jail time. This sentencing disposition was consistent with the joint sentencing recommendation agreed to in the plea agreement.

Following his conviction, Smith-Morales's appointed postconviction counsel filed a no-merit notice of appeal and no-merit report pursuant to WIS. STAT. RULE 809.32. The report represented that, based on counsel's review of the record, there were no non-frivolous issues that could be raised on appeal. After conducting our own independent review, as required by RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967), we identified one issue of arguable merit—whether the State failed to satisfy its burden of proof on lack of manipulative intent at the evidentiary hearing—and we issued an order rejecting the no-merit report and ordering briefing to proceed in the appeal. Counsel then filed a motion asking us to dismiss the appeal and extend

² The court also made two other findings that may have been clearly erroneous. First, the court found that the officers were not aware of Smith-Morales's birthday, despite Seubert's testimony that he was aware of Smith-Morales's age and was "probably" aware of his birthday. Second, the court found that "[t]he delay in completing the reports appears to be related to the procedural process used by the Sparta Police Department." It is not clear what the court intended to find on this topic, but in any case, there was no evidence offered at the hearing about any process that would result in a two-and-a-half-month delay between the time the officers finished their reports and the time they submitted them to their supervisor for approval. The only testimony about a potential process-related delay was that, once a report was submitted to a supervisor, it might take up to two weeks for the supervisor to approve it.

Smith-Morales’s deadline for filing a postconviction motion, which we denied.³ Smith-Morales and the State have now filed briefs addressing the issue that we identified regarding the circuit court’s denial of the motion to dismiss.

In its response brief, the State cites *State v. Schroeder*, 224 Wis. 2d 706, 715-17, 593 N.W.2d 76 (Ct. App. 1999), and it contends that Smith-Morales cannot appeal the circuit court’s denial of his motion to dismiss based on the “guilty plea waiver rule.” See *State v. Multaler*, 2002 WI 35, ¶54, 252 Wis. 2d 54, 643 N.W.2d 437 (a defendant who pleads guilty or no contest waives the right to raise almost all non-jurisdictional defects, including constitutional claims, on appeal). In *Schroeder*, this court addressed the application of the guilty plea waiver rule in the context of the State’s alleged delay in filing charges against Schroeder until he had become an adult for conduct that occurred when he was a juvenile. *Schroeder*, 224 Wis. 2d at 708. We determined that the guilty plea waiver rule precluded Schroeder, who had entered a guilty plea and been convicted in criminal court, from challenging the State’s delay as a due process violation in a postconviction proceeding. *Id.* at 722. The *Schroeder* court acknowledged that “jurisdictional” issues are not precluded by the guilty plea waiver rule, but it determined that, despite some language in cases that could be read to suggest otherwise, the due process issue Schroeder wanted to raise was not jurisdictional in nature. *Id.* at 711-12, 716.

³ Counsel’s motion represented that there was no additional information in the court record or any other documentation available about the reasons for the law enforcement delay. Counsel proposed to file a postconviction motion seeking an evidentiary hearing to obtain additional testimony about the reasons for the delay, and asking the circuit court to make additional findings beyond the findings that the court had already made.

The State's reliance on *Schroeder* is warranted. We are not persuaded by Smith-Morales's suggestion, raised for the first time in his reply brief, that there is a good reason to overlook the guilty plea waiver rule and address Smith-Morales's appeal of the court's decision on the motion to dismiss. *See State v. Riekkoff*, 112 Wis. 2d 119, 123-25, 332 N.W.2d 744 (1983) (recognizing that the guilty plea waiver rule is one of judicial administration). We conclude that Smith-Morales's challenge is barred by the guilty plea waiver rule.

Before concluding our analysis, we pause to address whether there would have been arguable merit to a postconviction motion that raised a related issue through the framework of an ineffective assistance of counsel claim. We take this unusual step because of the unique procedural posture of this case. This appeal originally came to us in the no-merit context, in which we were required to independently review the record, identify potential issues for appellate review, and consider whether those issues have arguable merit. Following our rejection of the no-merit report based on an issue that we have now determined is barred by the guilty plea waiver rule, we denied postconviction counsel's request to extend Smith-Morales's deadline to file a postconviction motion. Although counsel did not ask us to extend this deadline so that Smith-Morales could pursue a claim based on ineffective assistance of counsel, some readers may wonder whether our order may have prevented Smith-Morales from developing a meritorious claim based on ineffective assistance of counsel.

Accordingly, we now consider whether there could be arguable merit to a potential ineffective assistance of counsel claim stemming from any advice that trial counsel gave Smith-Morales regarding the potential advantages and disadvantages of accepting the plea agreement offered by the State. Specifically, we consider whether counsel was arguably ineffective for advising or allowing Smith-Morales to agree to the proposed plea agreement and enter no contest

pleas, which resulted in Smith-Morales being barred from challenging the circuit court's denial of his motion to dismiss on appeal. For the reasons we now explain, we conclude there would be no arguable merit to such an argument.

To prevail on a claim of ineffective assistance of counsel, a defendant has the burden to prove that trial counsel's performance was deficient, and also that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Strategic choices by counsel that are reasonable under the circumstances and based on professional judgment do not constitute deficient performance. *Id.* at 681, 689. When evaluating whether trial counsel's performance was deficient, we "apply[] a heavy measure of deference to counsel's judgment," *id.* at 690-91, making "every effort" to "evaluate the [representation] from counsel's perspective at the time" and to "eliminate the distorting effects of hindsight," *id.* at 689. When evaluating whether trial counsel's performance prejudiced the defendant, we consider whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Here, trial counsel was able to negotiate a favorable proposed plea agreement with the State, which would call for the dismissal of several pending felony and misdemeanor charges as well as a joint recommendation for a withheld sentence and probation. At the time counsel evaluated the proposed agreement and advised Smith-Morales on the potential advantages and disadvantages of accepting it, one factor that counsel may have assessed is the likelihood of a favorable resolution on appeal, should Smith-Morales reject the plea agreement, be convicted at trial, and pursue an appeal challenging the denial of his motion to dismiss the charges on due process grounds. Therefore, we consider the strength of that potential appellate issue in light of existing case law regarding the State's burden to prove lack of manipulative intent.

As discussed above, there was no direct evidence of any specific reason for the law enforcement delay between May 10, 2016 (when the officers' investigation and reports were complete) and July 27, 2016 (when the officers submitted their reports to their supervisor for approval). And that delay almost certainly made a difference in the prosecutor's ability to pursue these allegations in a juvenile delinquency proceeding. *See* WIS. STAT. § 938.25(2)(a) (providing statutory time limits for juvenile referrals). Therefore, the circuit court was left to determine whether the State satisfied its burden of proof, despite the lack of direct evidence explaining the cause of the substantial delay. The court's decision that the State met its burden to prove lack of manipulative intent appeared to be based on its assessment of the officers' demeanor and credibility. Specifically, the court appeared to infer from the officers' testimony that, even though the officers could not identify any specific cause for the delay, the delay was not the result of a "conscious effort on the part of the State to avoid juvenile court jurisdiction." *See Montgomery*, 148 Wis. 2d at 596-97.

Turning to the pertinent law, a reasonably competent attorney would have been aware of the *Montgomery* decision, in which our supreme court implied that law enforcement does not have any enforceable duty to act "with due dispatch" in initiating a juvenile prosecution, *Montgomery*, 148 Wis. 2d at 601-603, and the *Velez* decision, which disavowed the idea of a "rebuttable presumption of the State's manipulative intent," *Velez*, 224 Wis. 2d at 16. A reasonably competent attorney would also have been aware that there is no precedential or persuasive opinion of a Wisconsin appellate court that addresses a situation like this, in which there is an unexplained delay by police that might have been intentional (meaning a due process violation) or that might have been merely negligent (meaning no due process violation). Based on this deficit in the case law, Smith-Morales's attorney could have reasonably determined that it

would be risky to advise his client to forego a favorable plea agreement on the chance that any convictions might be overturned on appeal. That is, trial counsel could have reasonably concluded that the chances of prevailing on appeal were not strong enough to weigh in favor of counseling Smith-Morales to reject the plea agreement in order to preserve his right to appeal an arguably erroneous decision denying a motion to dismiss. Accordingly, we conclude that there would be no arguable merit to the potential ineffective assistance of counsel claim discussed above.

Therefore,

IT IS ORDERED that the judgment of conviction is affirmed.

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

Samuel A. Christensen
Clerk of Court of Appeals