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DISTRICT III

February 6, 2024

To:

Hon. Steven P. Anderson
Reserve Judge

Jennifer L. Vandermeuse
Electronic Notice

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Clerk of Circuit Court
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Roberta A. Heckes
Electronic Notice

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

2023AP1840-CRNM State of Wisconsin v. Joseph W. Falk (L. C. No. 2020CF80)

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).

Counsel for Joseph W. Falk has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),[1] concluding that no grounds exist to challenge Falk's convictions for two counts of first-degree intentional homicide, as a party to the crime. Falk was informed of his right to file a response to the no-merit report, but he has not responded. At this court's request, appellate counsel submitted a supplemental no-merit report addressing two issues. Having reviewed the no-merit report and the supplemental no-merit report, and upon our independent

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction, *see* WIS. STAT. RULE 809.21, as amended to reflect that Falk was sentenced on each count to life imprisonment without eligibility for release to extended supervision, rather than without eligibility for parole.

The State charged Falk with seven offenses, each as a party to the crime: two counts of first-degree intentional homicide, one count of armed carjacking, one count of armed burglary, two counts of theft of moveable property, and one count of felony criminal damage to property. The criminal complaint alleged that Falk, Adam Rosolowski, and a juvenile went to Rosolowski's grandparents' residence on June 6, 2020, with the intent to take a truck and shoot Rosolowski's grandparents. After waiving his ***Miranda***[2] rights during an interview with law enforcement on June 8, 2020, Falk admitted that he shot both of Rosolowski's grandparents, who were found dead at the scene. The complaint further alleged that Falk, Rosolowski, and the juvenile took property from the victims' residence, including two guns and a truck. The complaint also alleged that a company specializing in "trauma cleaning and biohazard removal" had provided "an estimate for services of $52,964.33 for damage to the residence, including walls, ceilings and floor."

Falk initially entered not-guilty pleas to all of the charges against him, but he later changed his pleas to not guilty by reason of mental disease or defect (NGI). A court-appointed psychologist submitted a written report opining that Falk did not meet the requirements for an

[2] *See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

NGI plea. Falk then retained his own expert, who reached the same conclusion. Falk subsequently withdrew his NGI pleas, following a colloquy with the circuit court regarding that decision.

Approximately seven months later, Falk entered guilty pleas to the two first-degree intentional homicide charges, pursuant to a plea agreement. In exchange for Falk's pleas, the remaining charges were dismissed and read in, and the State agreed not to argue against Falk's eligibility for release to extended supervision. Both sides were free to argue regarding the date that Falk would be eligible to petition for extended supervision and all other aspects of sentencing. The plea agreement provided that the amount of restitution was "TBD"—that is, to be determined.

Following a plea colloquy, supplemented by a plea questionnaire and waiver of rights form, the circuit court accepted Falk's guilty pleas, finding that Falk understood the plea agreement, the constitutional rights that he was waiving, the elements of the offenses, the potential penalties, and other consequences of his pleas. The defense stipulated that the complaint provided a factual basis for Falk's pleas, and the court found that an adequate factual basis existed. The court ordered a presentence investigation report (PSI), and the defense later submitted an alternative PSI.

The day before Falk's scheduled sentencing hearing, the circuit court held a hearing regarding a court reporter's statement to the victims' family that she had surreptitiously made a recording of the judge making disparaging remarks about the victims. The judge informed the parties that the court reporter's allegations had been the subject of an investigation by the Wisconsin Court System; that the court reporter had been placed on administrative leave but had

since returned to work; and that the court reporter would not be the reporter for the sentencing hearing the following day. The district attorney stated that the victims' family members "feel that this is a nonissue." The judge then offered to recuse himself if Falk had any objection to him presiding over the sentencing hearing.

During Falk's sentencing hearing the next day, one of Falk's attorneys confirmed that Falk did not object to the judge presiding over Falk's sentencing. After considering the seriousness of the offenses, Falk's character, including his deflection of responsibility onto others and his lack of remorse, and the need to protect the public, the circuit court imposed concurrent sentences of life in prison on both counts, with no eligibility for release to "parole." The court granted the State's request for $43,373.42 in restitution.

The no-merit report addresses: (1) whether Falk's pleas were knowing, intelligent, and voluntary; (2) whether there was an adequate factual basis for Falk's pleas; and (3) 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.

The no-merit report also asserts that there would be no arguable merit to a claim that Falk's trial attorneys were constitutionally ineffective. *See* ***State v. Dillard***, 2014 WI 123, ¶84, 358 Wis. 2d 543, 859 N.W.2d 44 (explaining that a defendant may establish manifest injustice, as required to withdraw a guilty plea after sentencing, by showing that he or she received ineffective assistance of counsel). After reviewing the record, we questioned whether there would be arguable merit to claims that Falk's trial attorneys were ineffective in two respects, and we ordered appellate counsel to address those potential issues. Appellate counsel subsequently

filed a supplemental no-merit report, along with supporting affidavits from Falk's trial attorneys, asserting that the identified issues lack arguable merit.

We first asked appellate counsel to address whether there would be arguable merit to a claim that Falk's trial attorneys were ineffective by failing to move to suppress Falk's incriminating statements to law enforcement. According to the criminal complaint, Falk admitted shooting both of the victims during a recorded interview with law enforcement on June 8, 2020, after waiving his ***Miranda*** rights. However, Falk told the PSI author that he was "tired and unmedicated" when he made those statements. Falk similarly told the author of the defense's alternative PSI that he "was tired, unmedicated, confused, and scared" at the time of his arrest; that he was "confused by the Miranda Warning" and "signed the warning because he thought he understood it at the time"; and that after he signed the waiver form, "the investigators told him he had waived his rights with the signature," and "[h]e then thought he was obligated to speak with them." Falk was seventeen years old at the time of the interview and, according to the PSI, has an IQ "in the Borderline to Low Average range."

In an affidavit submitted in support of the supplemental no-merit report, Attorney Ryan Moertel, one of Falk's trial attorneys, averred that he and co-counsel "spent a significant amount of time contemplating ways we could either exclude or neutralize" Falk's incriminating statements. Moertel further averred that he conducted legal research and reviewed recordings of Falk's June 8, 2020 interview with law enforcement and a second interview the following day.[3]

[3] As noted above, during his initial interview with law enforcement on June 8, 2020, Falk admitted shooting both victims. Moertel's affidavit states that law enforcement conducted a follow-up interview with Falk on June 9, 2020, during which Falk again waived his ***Miranda*** rights and admitted shooting both of the victims.

After doing so, Moertel concluded that any argument that Falk did not validly waive his ***Miranda*** rights or that his incriminating statements were involuntary would be unsuccessful.

Moertel's affidavit sets forth in detail his legal analysis supporting that determination. In particular, Moertel explained that based on his review of the recorded interviews, he concluded the State would be able to make a prima facie showing that Falk was informed of his ***Miranda*** rights and indicated that he understood those rights and was willing to waive them. *See* ***State v. Mitchell***, 167 Wis. 2d 672, 697, 482 N.W.2d 364 (1992).

Moertel further explained that he did not believe the defense would be able to present "countervailing evidence" showing that Falk's ***Miranda*** waiver was invalid. *See* ***id.*** at 696. Moertel explained that he considered Falk's claim that he was unmedicated at the time he waived his rights, but he concluded that the opinions of both NGI examiners contradicted any notion that Falk was unable to execute a valid ***Miranda*** waiver for that reason. In addition, Moertel noted that Falk "appeared to be coherent and responsive" during his interviews with law enforcement, and his "general demeanor" would not have supported a claim that his ***Miranda*** waiver was invalid. Furthermore, while Moertel "recognized that the first interview was done in the early morning hours when … Falk was likely very tired," Moertel also "considered the fact that the second interview took place the next day after [Falk] had been given plenty of opportunity to rest." Moertel also averred, based on his review of the interviews, that the officers "never told … Falk that he was obligated to continue speaking with them because he had signed the waiver form. Rather, they specifically told him that he could decide to exercise his rights at any time."

With respect to the voluntariness of Falk's incriminating statements, Moertel explained that he concluded the State would be able to make a prima facie showing that those statements were voluntary, and the defense would not be able to present countervailing evidence of involuntariness. *See* ***Mitchell***, 167 Wis. 2d at 696. Critically, Moertel recognized that in order to show that Falk's statements were involuntary, the defense would need to present evidence of "actual coercion or improper police practices." *See* ***State v. Clappes***, 136 Wis. 2d 222, 236, 401 N.W.2d 759 (1987). Moertel concluded that the defense could not do so, given that law enforcement did not meaningfully mislead Falk in any way, did not engage in an overly long interrogation, and did not make any meaningful promises in order to induce Falk's statements. Moertel also averred that he and co-counsel discussed the prospect of filing a suppression motion with Falk and explained why they did not believe such a motion would be successful "on multiple occasions" before Falk entered his pleas.

On this record, we agree with appellate counsel that Falk's trial attorneys' failure to file a suppression motion did not fall below an objective standard of reasonableness. *See* ***State v. Savage***, 2020 WI 93, ¶28, 395 Wis. 2d 1, 951 N.W.2d 838. As such, there would be no arguable merit to a claim that trial counsel performed deficiently by not moving to suppress Falk's incriminating statements. *See* ***id.***, ¶27 (explaining that a defendant must establish both deficient performance and prejudice to prevail on an ineffective assistance of counsel claim).

We also asked appellate counsel to address whether there would be arguable merit to a claim that Falk's trial attorneys were ineffective by failing to object to the circuit court's restitution award. As noted above, the plea agreement provided that the amount of restitution would be determined at a later date. At sentencing, the State informed the court that the total amount of restitution was $43,373.42, and the court ordered Falk to pay restitution in that

amount. No restitution hearing ever took place, no documentation was submitted to the court regarding the State's restitution request, and Falk did not stipulate to the amount of restitution. *See* WIS. STAT. § 973.20(13)(c).

The supplemental no-merit report asserts that there would be no arguable merit to a claim that Falk's attorneys were ineffective by failing to object to the restitution award. In support of that contention, appellate counsel submitted an affidavit of Attorney Matthew Krische, Falk's second trial attorney. Krische averred that he received the State's request for $43,373.42 in restitution, along with supporting documentation, on July 25, 2022—the day before the sentencing hearing. The State's request included $24,490.40 for cleaning the crime scene, and that amount was substantiated by an invoice from a cleaning company. The State's request also included $18,883.02 for lost wages by the victims' son.

Krische averred that after receiving the State's restitution request, he reviewed the restitution statute and concluded that the requested cleaning costs were "a proper request for remediation of the property damaged due to" Falk's crimes under WIS. STAT. § 973.20(2)(am)2. Krische also concluded that the request for lost wages was appropriate under § 973.20(5)(a) and (b). In addition, Krische averred that he discussed the restitution request with Falk prior to the sentencing hearing, that Falk "did not dispute the restitution amount," and that "it was discussed that we would agree to the restitution to better argue for the ability to request release on extended supervision after 20 years of initial confinement." Under these circumstances, we agree with appellate counsel that there would be no arguable merit to a claim that Falk's trial attorneys performed deficiently by failing to object to the restitution award.

The no-merit report asserts that there are no other arguably meritorious grounds to claim that Falk's trial attorneys were constitutionally ineffective. We agree. In particular, we note that there would be no arguable merit to a claim that Falk's trial attorneys were ineffective by permitting Falk to withdraw his NGI pleas, given that both of the examiners concluded that Falk did not meet the requirements for those pleas. We also conclude that there would be no arguable merit to a claim that Falk's trial attorneys were ineffective by failing to request recusal of the circuit court judge after learning that the judge had allegedly made disparaging remarks about the victims. If anything, the judge's alleged comments would be evidence of bias against the victims and, by association, against the State. The comments do not provide any grounds to assert that the judge was objectively or subjectively biased against Falk. *See* ***State v. Gudgeon***, 2006 WI App 143, ¶¶20-21, 295 Wis. 2d 189, 720 N.W.2d 114 (discussing the legal standards for objective and subjective judicial bias).

Finally, the no-merit report notes that when pronouncing sentence, the circuit court stated that it was sentencing Falk to life in prison "with no eligibility for parole" on each count. Falk's judgment of conviction similarly lists the sentence for each count as "[l]ife without eligibility of [p]arole." However, where, as here, a person is sentenced to life imprisonment for a crime committed on or after December 31, 1999, the circuit court shall make an "extended supervision eligibility date determination." *See* WIS. STAT. § 973.014(1g)(a). "Under Truth in Sentencing, extended supervision and reconfinement are, in effect, substitutes for the parole system that existed under prior law." ***State v. Brown***, 2006 WI 131, ¶6, 298 Wis. 2d 37, 725 N.W.2d 262.

In this case, the circuit court's reference to "parole" appears to have been a mere oversight or misstatement, as the court correctly referred to extended supervision at other points during its sentencing remarks. Under these circumstances, we agree with appellate counsel that

the court's "mistaken [characterization of] extended supervision as parole[] does not change either the court's reasoning or the final outcome to the level of an appealable issue." Upon remittitur, the court shall amend Falk's judgment of conviction to reflect that he was sentenced on each count to life imprisonment without eligibility for release to extended supervision, rather than without eligibility for parole.

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

Therefore,

IT IS ORDERED that the judgment is amended and, as amended, is summarily affirmed. WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Roberta A. Heckes is relieved of any further representation of Joseph W. Falk in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Samuel A. Christensen
Clerk of Court of Appeals