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DISTRICT I

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

2014AP1313-CRNM State of Wisconsin v. Juan Roberto Solis
(L.C. #2012CF2430)

Before Kessler, Brennan and Brash, JJ.

Juan Roberto Solis appeals from a judgment of conviction entered after a jury found him guilty of: first-degree reckless homicide as a party to a crime; armed robbery with threat of force as a party to a crime; and possession of a firearm by a felon. *See* WIS. STAT. §§ 940.02(1), 939.05, 943.32(2), and 941.29(2) (2011-12).[1] Solis's postconviction/appellate counsel, Urszula Tempska, has filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WIS. STAT. RULE 809.32 that addresses nine substantive issues. Solis filed a lengthy response.[2] Tempska filed a supplemental no-merit report addressing the issues in Solis's response. We have independently reviewed the record, the no-merit report, Solis's response, and the supplemental no-merit report as mandated by ***Anders***. Because we conclude that Solis could pursue an arguably meritorious challenge to the admission of one witness's in-court identification of him and to his trial counsel's performance on several issues, we reject the no-merit report, dismiss the instant appeal without prejudice, and extend the deadline for filing a postconviction motion.

The criminal complaint alleged that three men—Solis, Deandre Davis, and Steven Taylor—robbed two men who were selling marijuana from a house (Ricky Ashford, who lived in the house, and his guest, Kelly Ortiz), fled the house, and shot one of several men who were chasing them. The complaint alleged that Taylor told the police that he, Solis, and Davis were the three robbers and that Solis was the man who pointed the gun in the direction of the people chasing them right before a gunshot was fired.[3]

Davis and Solis denied the allegations and proceeded to a joint jury trial. After the jury was selected, Davis decided to plead guilty. He later testified against Solis. Solis testified in his own defense, denying he was one of the three men who committed the robbery. He admitted being a drug supplier and said that he had previously been to Ashford's home twice to sell him marijuana, which explained why his fingerprints were on a plastic bag at Ashford's home. In

[2] Solis's typed response is ninety-two pages long and also includes a twenty-three page appendix.

[3] Taylor did not testify at trial.

addition, although he did not file a notice of alibi, Solis testified that on the day the crimes were committed, he spent time trying to get money to purchase a battery for his grandmother's car and, later that day (shortly after the time that the crimes were committed), he purchased a car battery from an auto parts store and installed it in his grandmother's car.

We begin our analysis with the applicable case law concerning no-merit appeals:

> "[I]f counsel finds [a defendant's] case to be wholly frivolous, after a conscientious examination of it, [counsel] should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal."

State v. Allen, 2010 WI 89, ¶18, 328 Wis. 2d 1, 786 N.W.2d 124 (quoting ***Anders***, 386 U.S. at 744) (first set of brackets in ***Allen***). Applying those standards here, this court has identified at least three issues of arguable merit that lead us to reject the no-merit report.[4]

First, in Section IV of the no-merit report, postconviction/appellate counsel considered whether the admission of "Ortiz's in-court identification … violate[d] due process." (Some capitalization omitted.) Postconviction/appellate counsel concludes that "[t]he police procedure which led to Ortiz's in-court identification of Mr. Solis was arguably so unduly suggestive as to

result in misidentification, but admission of such identification was 'harmless error.'" (Underlining and one hyphen omitted.) Postconviction/appellate counsel devotes eight pages to analyzing the arguments that could be made and why they are likely to fail. For instance, postconviction/appellate counsel concludes: "Ortiz's in-court identification would be found reliable under the ***Biggers*** factors, [*see* ***Neil v. Biggers***, 409 U.S. 188, 199 (1972),] under the totality of the circumstances." (Bolding added.) Postconviction/appellate counsel also asserts that "other independent evidence supported Mr. Solis' identification as a robber (e.g., Deandre Davis' testimony, the fingerprint evidence, Ashford's identification at line-up and in court)," and therefore, postconviction/appellate counsel concludes, Ortiz's in-court identification was harmless. We are not persuaded that there would be no arguable merit to challenge the admission of Ortiz's in-court identification. Given Ortiz's inability to identify Solis prior to trial, the conflicting testimony of numerous witnesses, Davis's incentive to testify against Solis, and other factors, it would not be wholly frivolous to make the arguments that postconviction/appellate counsel discusses in her no-merit report.

Similarly, we reject postconviction/appellate counsel's conclusion in Section V of the no-merit report that it would be wholly frivolous to argue that trial counsel was "constitutionally ineffective when she did not seek suppression of the in-court identification by Kelly Ortiz, although the identification resulted from an arguably unduly suggestive process." (Underlining omitted.) Postconviction/appellate counsel concludes that Solis "cannot even arguably meet the prejudice prong of the ***Strickland*** test." *See* ***Strickland v. Washington***, 466 U.S. 668, 694

[4] We have not attempted to make a final determination as to the arguable merit of all the issues discussed in the no-merit report, the supplemental no-merit report, and Solis's response. Postconviction/appellate counsel may ultimately conclude that additional issues have arguable merit.

(1984) (To demonstrate prejudice, a 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."). Postconviction/appellate counsel notes that Ashford and Davis also identified Solis, and Solis's fingerprint was found on a plastic bag at the scene of the robbery.[5] Postconviction/appellate counsel acknowledges that "Solis testified that he may have left this fingerprint at the scene during a prior visit to the scene," but she points out that "Ashford testified that Mr. Solis had never been at the scene (Ashford's home) before." We are not persuaded that a postconviction motion alleging Solis was prejudiced by his trial counsel's alleged deficiency would be wholly frivolous. There were competing explanations for the evidence at trial, and Davis had an incentive to implicate Solis in order to secure a favorable recommendation from the State at sentencing.

Third, we have considered whether there would be arguable merit to assert that trial counsel performed deficiently by not securing the original receipt for the car battery to use at trial and by not adequately investigating a potential alibi for Solis that included the use of that receipt. It is undisputed that trial counsel provided only a copy of the original receipt as an exhibit at the trial. As the State was questioning Solis about the copy of the receipt, it asked where the original receipt was, leading Solis to answer that the original receipt was in the courtroom. A member of the gallery then produced the actual receipt, in view of the jury. The no-merit report explains that afterward, outside the jury's presence, trial "[c]ounsel admitted that she may have been deficient in not discovering the existence of the original receipt, but noted

[5] Although the no-merit report refers to a single fingerprint, the fingerprint examiner testified he was able to match two fingerprints on the bag: one that he believed matched Solis's left index finger and one that he believed matched Solis's left ring finger.

that the copy receipt in her opinion was sufficient for the purpose for which she offered it: as a basis for Mr. Solis to recall on what date his car had broken and required repair in the car parts store."

In his response to the no-merit report, Solis faults his trial counsel for not locating the original receipt before trial and argues that it hurt his credibility with the jury when the State implied he was lying about the authenticity of the receipt. In postconviction/appellate counsel's supplemental no-merit report, she asserts that Solis suffered "no prejudice from counsel's failure to discover/present [the] original receipt, even if the failure w[as] deficient." She explains:

> Even if [the State's] insinuations that the copy of the receipt may have been tampered with were arguably improper, they caused no harm. The jury had the opportunity to see the copy (admitted into evidence) and also had the memory of seeing an alleged original waived in court (not admitted as evidence, but admitted into the record) and seeing the [State's] annoyed reaction to its emergence. The jury saw that the original receipt emerged at the [State's] prompting: because a gallery member brought out the receipt and waived it in the air only after the [State] challenged Mr. Solis to explain: "where is the original?" The jury also heard Mr. Solis' testimony about being in the car parts store, paying, getting the receipt, recognizing the receipt copy as a correct copy of the original receipt, the [d]ate on the copy receipt, etc. The jury thus could make up its own mind as to whether the copy receipt was credible evidence that Mr. Solis had car trouble on the same day as the crime and whether he was at the store around the time of the crime, as he testified. So no prejudice resulted from this issue which improperly impacted the verdicts, in undersigned counsel's opinion.

We are not convinced that it would be wholly frivolous to assert that trial counsel acted deficiently with respect to securing and presenting the receipt and that Solis was prejudiced by that deficiency. What occurred in the courtroom was admittedly highly irregular and there

would be arguable merit to asserting that the jury's reaction to that event negatively affected its assessment of Solis's credibility.[6]

In summary, we conclude that the aforementioned issues have arguable merit that justifies the filing of a postconviction motion.[7]

Upon the foregoing, therefore,

IT IS ORDERED that the no-merit report filed by Attorney Urszula Tempska is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline to file a postconviction motion is extended to sixty days from the date of this order.[8]

Diane M. Fremgen
Clerk of Court of Appeals

[6] In addition, there may be arguable merit to asserting that trial counsel should have raised an alibi defense prior to trial, which may have opened the door to additional evidence about Solis's whereabouts on the day the crimes were committed. This court does not have all of the background information about trial counsel's investigation of the auto parts store transaction to fully evaluate that possibility.

[7] Solis's response also asserted that police reports from three witnesses support his allegation that trial counsel performed deficiently by not calling those witnesses to testify about incriminating statements made by a man named Larry Porter—Davis's brother—suggesting that Porter, rather than Solis, committed the crimes. Postconviction/appellate counsel contends that those witnesses subsequently recanted, that a jury would have believed the recantations, and that trial counsel made a strategic decision not to call those witnesses. However, Postconviction/appellate counsel has not provided an affidavit from trial counsel or the supplemental police reports concerning the recantations, so we cannot fully assess this issue.

[8] Counsel may, if necessary, move to extend this deadline. *See* WIS. STAT. RULE 809.82(2)(a).