COURT OF APPEALS
DECISION
DATED AND FILED

FEBRUARY 24, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

Nos. 96-3677-CR-NM
96-3678-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BRAD A. PETERSON,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Taylor County: DOUGLAS T. FOX, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

PER CURIAM. Brad A. Peterson appeals from judgments convicting him of recklessly endangering safety, knowingly violating a temporary restraining order (TRO), threatening a judge, resisting an officer, and from postconviction orders denying his motions for sentence modification. The state

public defender appointed Attorney Kevin G. Klein as Peterson's appellate counsel. Attorney Klein served and filed a no merit report pursuant to ***Anders v. California,*** 386 U.S. 738 (1967), and RULE 809.32(1), STATS. Peterson filed a response. After an independent review of the records as mandated by ***Anders***, we conclude that any further proceedings would lack arguable merit.

The reckless endangering and TRO charges arose because Peterson pointed a loaded revolver at his wife and her friend. The threatening and resisting charges arose from a postjudgment motion hearing in the Petersons' divorce action, in which Peterson knocked a computer monitor off the courtroom table, screamed profanities and threatened the trial judge. This conduct prompted the judge to direct a deputy sheriff to arrest Peterson. Peterson resisted arrest and attempted to overpower the deputy sheriff who ultimately used oleoresin capsicum spray to control Peterson.

Pursuant to a comprehensive plea agreement, Peterson pleaded guilty to two counts of first-degree recklessly endangering safety, contrary to § 941.30(1), STATS., and to violating a domestic abuse TRO, contrary to § 813.12(8), STATS. Peterson also entered no contest pleas to threatening a judge, contrary to § 940.203(2), STATS., and to resisting an officer, contrary to § 946.41(1), STATS.[1] The state agreed to dismiss charges of felony bail jumping and disorderly conduct, contrary to §§ 946.49(1)(b) and 947.01, STATS. The parties jointly recommended a sixteen-month jail term.[2] Although the trial court

[1] A no contest plea means that the defendant does not claim innocence, but refuses to admit guilt. *See* § 971.06(1)(c), STATS.; *See* ***Cross v. State***, 45 Wis.2d 593, 599, 173 N.W.2d 589, 593 (1970).

[2] The parties also agreed that if the trial court adopted their recommendation, only 84 days would remain on Peterson's sentence.

did not impose the maximum sentences, it rejected the joint recommendation in favor of the harsher disposition recommended by the presentence investigator. The trial court imposed: (1) two concurrent five-year sentences on the reckless endangering convictions; (2) a three-year consecutive term of probation on the TRO conviction; (3) a three-year consecutive sentence on the threatening conviction; and (4) a three-year sentence withheld and a term of probation on the resisting conviction, consecutive to the prison terms.

Peterson moved for sentence modification and contended that the presentence investigator mistook his depression for anger and recommended harsher sentences than warranted.[3] The trial court disagreed and denied the postconviction motions.

Appellate counsel describes the trial court's reasons for denying postconviction relief and explains why challenging the postconviction orders would lack arguable merit.[4] We have reviewed the postconviction motion and transcript and we agree with appellate counsel's description and analysis, and we independently conclude that challenging the postconviction orders would lack arguable merit.

In his response, Peterson raises: (1) a challenge to the search and seizure which resulted in the reckless endangering convictions; (2) the court's violations of his constitutional rights which provoked his threats; and (3) the

[3] Peterson claimed that until he discontinued his medication he did not realize that the medication was the cause of his depression.

[4] Appellate counsel explains why postconviction motions for plea withdrawal and for ineffective assistance of trial counsel would have lacked arguable merit and were not pursued. Counsel advises the court that Peterson agreed to the limited scope of the postconviction motions which were ultimately filed.

ineffective assistance of trial and appellate counsel.[5] We independently conclude that Peterson's claims lack arguable merit.

The search and seizure which Peterson claims was illegal relates to the reckless endangering convictions. However, Peterson waived his right to challenge the search and seizure because he failed to file a suppression motion and then pleaded guilty to the reckless endangering charges. *See* ***County of Racine v. Smith***, 122 Wis.2d 431, 434, 362 N.W.2d 439, 441 (Ct. App. 1984).

Peterson entered a no contest plea to the crime of threatening Taylor County Circuit Court Judge Gary Carlson during a postjudgment hearing on a contempt motion filed by Peterson's ex-wife for his alleged failure to comply with the court-ordered sale of the house. Peterson claims that he threatened Judge Carlson because his Fifth Amendment right against self incrimination was violated. U.S. CONST. amend. V. We conclude that Peterson's claim lacks arguable merit.

Judge Carlson testified at the preliminary hearing that Peterson refused to answer questions in the postjudgment divorce proceeding about where he was living and the whereabouts of windows missing from the house.[6] The trial court "found [him] in contempt of court for not answering his questions."

---

[5] Peterson responds that counsel told him that he could only challenge the sentences.

[6] Judge Carlson testified that initially, Peterson refused to answer his inquiry on "where he was living—a rather innocuous question—and [Peterson] didn't want to answer that question, and [the court] said something to the effect, no, you are going to have to answer that question, and he kind of got like this agitated state, then he answered the question." Judge Carlson also asked Peterson whether he had "give[n] someone else permission to take these windows [which belonged with the house which the court had ordered sold], and then [Peterson] again became agitated at that."

The Fifth Amendment protects a defendant from being compelled to answer questions which may incriminate him or her in future criminal proceedings. ***See State v. Carrizales***, 191 Wis.2d 85, 94, 528 N.W.2d 29, 31 (Ct. App. 1995) (citations omitted). Whether a witness is entitled to claim the constitutional privilege against self incrimination is a question of law for the court's determination. *See* ***Martin v. State***, 216 Wis. 364, 366, 257 N.W.2d 34, 35 (1934). We conclude that it would lack arguable merit to challenge the trial court's rejection of Peterson's Fifth Amendment claim because Peterson did not specify how the court's questions implicated any criminal conduct.[7] Moreover, Peterson's no contest plea waived appellate review of this claim. *See, e.g.,* ***County of Racine***, 122 Wis.2d at 434, 362 N.W.2d at 441.

Peterson also claims ineffective assistance of trial and appellate counsel. Appellate counsel advises us that the trial court's remarks on the thorough and impeccable representation that Peterson received, and his review of the records persuade him that a motion alleging ineffective assistance of trial counsel would lack arguable merit. Because there is no evidentiary record on this issue, we cannot review Peterson's ineffective assistance of trial counsel claim. *See* ***State v. Machner,*** 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). However, we have reviewed the records and the no merit report and we are not persuaded that there would be any arguable merit to allow Peterson to belatedly pursue an ineffective assistance of trial counsel claim because we have rejected his substantive claims as frivolous. Peterson's claim that appellate counsel was ineffective must be pursued by a petition for a writ of habeas corpus

[7] If Peterson believed that Judge Carlson was violating his constitutional rights, the appropriate remedy was to invoke the Fifth Amendment and litigate that issue, not to threaten the judge.

in this court. *See* ***State v. Knight***, 168 Wis.2d 509, 522, 484 N.W.2d 540, 545 (1992). We will not review it on direct appeal. *See* ***id***. at 512-13, 484 N.W.2d at 541.

Upon our independent review of the records as mandated by ***Anders v. California,*** 386 U.S. 738 (1967), and RULE 809.32(3), STATS., we conclude that there are no other meritorious issues and that any further proceedings would lack arguable merit. Accordingly, we affirm the judgments of conviction and postconviction orders, and relieve Attorney Kevin G. Klein of any further representation of Brad A. Peterson in these appeals.

By the Court.—Judgments and orders affirmed.