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**DISTRICT II**

January 9, 2019

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

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2017AP2515-CRNM      State of Wisconsin v. Lupe Medina, III (L.C. #2015CF7)

Before Neubauer, C.J., Gundrum and Hagedorn, 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).**

Lupe Medina, III, appeals from a judgment convicting him of two counts of repeated sexual assault of a child and one count of second-degree sexual assault. His appellate counsel

filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)<sup>1</sup> and *Anders v. California*, 386 U.S. 738 (1967). Medina filed a response. Counsel then filed a supplemental no-merit report. After reviewing the record, counsel's reports, and Medina's response, we conclude that issues of arguable merit exist. Therefore, we reject the no-merit reports and extend the time for Medina to file a postconviction motion under WIS. STAT. RULE 809.30.

Medina was convicted following a jury trial of two counts of repeated sexual assault of a child and one count of second-degree sexual assault. The charges stemmed from allegations that he sexually abused his girlfriend's daughter over the course of many years. At trial, the defense accused the victim of making up the allegations, in part, to seek attention.

In his response to the no-merit report, Medina complains that his trial counsel failed to call a witness named Friberg to testify on his behalf. The record confirms that Medina's counsel had planned to call a witness by the name of Katie Friberg at trial. Medina's counsel referenced her in both his opening statement and cross-examination of the victim. According to Medina's counsel, Friberg was a classmate of the victim and had participated in a group counseling session with her. Friberg had recalled the victim talking about her abuse and then telling Friberg, "all of that's a lie I made it up to get attention." Although Friberg initially agreed to testify, she did not show up to trial due to a babysitting job she had taken that day. Thus, the case proceeded without her.

Criminal defendants are guaranteed the right to effective assistance of counsel by the federal and state constitutions. *State v. Jenkins*, 2014 WI 59, ¶34, 355 Wis. 2d 180, 848 N.W.2d

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2015-16 version.

786. The failure to call a potential witness at trial may constitute deficient performance of counsel. *Id.*, ¶41. Here, Friberg appeared to have information that would bolster Medina’s case. Yet, Medina’s trial counsel never subpoenaed her as a witness. Moreover, he did not seek an adjournment of the trial when she failed to show up as planned.

In the supplemental no-merit report, Medina’s appellate counsel questions the credibility of Friberg. This is due, in part, to her failure to show up at trial. Counsel also notes that her investigator has had some difficulty contacting Friberg, even though she is the cousin of one of the defense’s other witnesses. Accordingly, counsel does not wish to pursue a postconviction motion on the matter.

In deciding a no-merit appeal, the question is whether a potential issue would be “wholly frivolous.” *State v. Parent*, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. This standard means that the issue lacks a basis in fact or law. *McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 438 n.10 (1988). The test is not whether the attorney or court expects the argument to prevail. Also, because appellate counsel’s no-merit reports seek counsel’s discharge from the duty of representation, we must independently determine whether a potential claim has sufficient merit to require counsel to file a postconviction motion.

On this record, we cannot conclude that further postconviction proceedings on Medina’s behalf lack arguable merit. As an appellate court, we are not in the position to assess the credibility of Friberg, the adequacy of counsel’s search for her, or whether she would need to be located in light of these considerations and the entire proceeding in order to pursue a claim of ineffective assistance of counsel. Again, the record shows that trial counsel failed to produce a witness that he referenced in his opening statement. This could have negatively impacted

Medina's case. See *State v. Coleman*, 2015 WI App 38, ¶30, 362 Wis. 2d 447, 865 N.W.2d 190 (“If counsel says something will happen that does not, without explanation, counsel necessarily damages both his own, and potentially his client's, credibility.”). Also, trial counsel later admitted that he “felt horrible” that he “did not secure by subpoena the attendance of a potentially helpful witness.” This statement is arguably a concession of deficient performance.

In addition to the foregoing issue, we note that jury instruction WIS JI—CRIMINAL 140 was given at Medina's trial. On November 13, 2018, the Wisconsin Supreme Court granted a petition for review in *State v. Trammell*, 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018), to address whether the holding in *State v. Avila*, 192 Wis. 2d 870, 889, 532 N.W.2d 423 (1995)—that it is “not reasonably likely” that WIS JI—CRIMINAL 140 reduces the State's burden of proof—is good law; or should *Avila* be overruled on the ground that it stands rebutted by empirical evidence. Consequently, an additional issue of arguable merit may exist depending upon the outcome of *Trammell*.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit reports are rejected, appellate counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion is extended to sixty days after a decision by the Wisconsin Supreme Court in *State v. Trammell*, No. 2017AP1206-CR.

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

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*