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DISTRICT II

February 26, 2014

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

2013AP488-CRNM State of Wisconsin v. Joseph E. Lengling (L.C. #2011CF369)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Joseph E. Lengling appeals a judgment convicting him of first-degree reckless homicide for supplying a friend with what proved to be a lethal dose of heroin. Lengling's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Lengling received a copy of the report and has filed a response. Upon consideration of the no-merit report, the response, and an independent review of

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the record as mandated by ***Anders*** and RULE 809.32, we conclude that the judgment may be summarily affirmed because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21. We therefore affirm the judgment and relieve Attorney Timothy T. O'Connell of further representing Lengling in this matter.

Tabitha Thede died of a heroin overdose. Lengling was alleged to have traded heroin to her for Xanax. He was charged with first-degree reckless homicide, which carried a forty-year prison sentence. A jury found Lengling guilty. The trial court imposed a twenty-year sentence, bifurcated as twelve years' initial confinement and eight years' extended supervision. The court also ordered restitution. This no-merit appeal followed.

The no-merit report addresses six potential issues. It describes them as whether sufficient evidence supported the guilty verdict and the trial court erroneously exercised its discretion in sentencing Lengling. It also considers whether Lengling merits a new trial because the trial court improperly held Lengling's preliminary hearing more than ten days after his initial appearance, found that police legally seized heroin in a third party's purse in a vehicle in which Lengling was riding, denied him the opportunity to introduce evidence that he was not a possible contributor to the DNA found on the foil packaging of the heroin leading to Thede's death, and admitted evidence that Lengling tried to trade heroin for Xanax with another person the day before he allegedly made a similar trade with Thede.

We first address the sufficiency of the evidence. Lengling contends the issue has arguable merit, and recites various witnesses' testimony that, if believed, might have exonerated him. In reviewing the sufficiency of evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to

the State and the conviction, is so lacking in probative value and force that no reasonably acting trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). It is for the jury to decide credibility issues, to weigh the evidence and to resolve conflicts in the testimony. ***State v. Gomez***, 179 Wis. 2d 400, 404, 507 N.W.2d 378 (Ct. App. 1993).

The evidence established that Thede died of a heroin overdose. Her boyfriend, Dustin Lecher, testified to the following. He rode along with Lengling to a Milwaukee methadone clinic Lengling attended; they stopped somewhere else in Milwaukee where Lengling joined someone in a parked car for a few minutes; upon returning to his own vehicle, Lengling and Lecher drove back to Lengling's house where the two injected heroin Lengling had in his pocket; Lengling gave Lecher another foil-wrapped package to give to Thede, saying he owed it to her for Xanax she had given him; the package contained heroin; after giving Thede the package, Lecher and Thede prepared and injected the contents; and the next thing he knew, EMTs were rousing him and he learned Thede was dead.

A forensic scientist testified that the foil packet tested positive for heroin. A police officer testified that Lecher told him it was normal for Thede to trade her drugs for other drugs. Lecher's brother testified that Lecher told him he was going with Lengling to a methadone clinic to get some heroin. Dustin Slaton testified that Lecher told him that the heroin Thede used came from Lengling. Nathan Ott testified that Lengling asked him the day before Thede died if Ott would like some heroin in exchange for Xanax and that in the past he, Ott, had helped Lengling package heroin. A pharmacist testified that Thede picked up and signed for a prescription for 100 pills of generic Xanax the day before she died. A police officer testified that Thede's father turned in two empty prescription bottles found in his daughter's car after she died. Both were

prescriptions for Thede; one bottle stated "generic for Xanax." The pharmacist from the dispensing pharmacy identified the bottles by name, date, and prescription as the ones Thede picked up the day before she died. Sufficient evidence supports the guilty verdict.

The no-merit report considers the trial court's exercise of discretion in sentencing Lengling. Sentencing is left to the discretion of the trial court, and appellate review is limited to determining whether that discretion was erroneously exercised. ***State v. Gallion***, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. The court must address sentencing objectives that include the protection of the public, punishment and rehabilitation of the defendant, and deterrence, ***id.***, ¶40, and the primary sentencing factors, the gravity of the offense, the character of the offender, and the need to protect the public, ***State v. Spears***, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999). The weight to be given the various factors is within the court's discretion. ***Cunningham v. State***, 76 Wis. 2d 277, 282, 251 N.W.2d 65 (1977). The court must provide a "rational and explainable basis" for the sentence it imposes to allow this court to ensure that discretion in fact was exercised. ***Gallion***, 270 Wis. 2d 535, ¶¶39, 76 (citation omitted). Unless the defendant can demonstrate otherwise from the record, we presume a sentence is reasonable. ***State v. Mosley***, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996).

We agree with appellate counsel that no basis exists to disturb the sentence. In addition to the PSI, and letters from members of the victim's family and Lengling's trial attorney, the court heard statements from Lengling's father and from Lengling himself. The court stressed the seriousness of the offense. It recognized that Lengling did not give the heroin directly to Thede or with the intent that she die, but also noted his disregard for the potential outcome when he well knew the dangers of heroin. Further, although Lengling was seeking treatment for his own heroin addiction, he used his daily trips to the methadone clinic to purchase heroin and then

resell "this poison" to others, demonstrating that "you take care of yourself but don't care what happens to others." The court concluded the public needed protection from him. The twenty-year sentence imposed was half of his exposure, and thus presumptively not unduly harsh. *See* ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507. The sentence is not so excessive or unusual as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

The report also considers whether there is an issue of arguable merit because the preliminary hearing was not held within ten days of his initial appearance and he was in custody with a $100,000 bail. *See* WIS. STAT. § 970.03(2). Lengling's hearing was timely scheduled. His counsel later advised the court that Lengling waived his right to have it within ten days and the court granted his request for a later date. A conviction resulting from a fair and errorless trial in effect cures any error at the preliminary hearing. ***State v. Webb***, 160 Wis. 2d 622, 628, 636, 467 N.W.2d 108 (1991). A defendant who claims error occurred at the preliminary hearing may obtain relief only prior to trial. ***Id.*** Thus, Lengling's recourse now would be a challenge to the effective assistance of counsel. *See* ***State v. Rock***, 92 Wis. 2d 554, 561, 285 N.W.2d 739 (1979).

To prove a claim of ineffective assistance of counsel, a defendant must show both deficient representation and resultant prejudice. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***Id.*** "To prove constitutional prejudice, the 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." ***Id.*** (citation omitted). Absent untruthfulness on counsel's part, Lengling waived his right to the

hearing within ten days because it was he who wanted the delay. Even if he was pressured into waiver, it resulted in no conceivable prejudice.

Next the report addresses whether an issue exists because the trial court denied Lengling's motion to suppress heroin seized from his girlfriend's purse during a search of a vehicle in which he was the front seat passenger and she was in the back seat. When a motion to suppress is erroneously denied, the conviction will be reversed only where there is a reasonable possibility that the error contributed to the conviction. *See* ***State v. Buck***, 210 Wis. 2d 115, 125, 565 N.W.2d 168 (Ct. App. 1997). In applying this test, the effect of the inadmissible evidence is weighed against the totality of the credible evidence supporting the verdict. *See* ***id.*** Here, even if the ruling was error, there is no question but that it did not contribute to the conviction because the State did not use the evidence at trial.

The no-merit report also considers whether the court should have permitted Lengling to argue that he was excluded as a contributor of the DNA found on the foil packet containing the heroin that led to Thede's death. Lengling's response also contends the trial court's ruling was erroneous. "Expert testimony is admissible only if relevant." ***State v. Pittman***, 174 Wis. 2d 255, 267, 496 N.W.2d 74 (1993). A trial court's decision with regard to the relevance of proffered evidence is a discretionary decision. ***Id.***

The DNA analyst tested the two syringes, a spoon, and the foil packet found near Lecher and Thede. The analyst testified that Thede's DNA was on one syringe and Lecher's was on the other. The analyst's report indicated, but he did not testify, that Lengling was a possible contributor to the DNA on one of the syringes, nor did he testify about whose DNA, if any, was found on the foil. The report was admitted into evidence. The court did not allow Lengling to

argue that the report indicated that he was excluded as a contributor to the foil DNA, as inconclusive evidence would only "muddy the waters." It did allow him to argue, however, that no DNA evidence linked him to the case. During deliberations, the jury asked for the report. The court explained in a note that parts of the report were irrelevant and invited a more specific request. The jury responded that it no longer needed the report.

The record is silent as to whether Lengling handled the foil packet in a manner so as to deposit DNA. The jury heard no DNA evidence impugning Lengling. The court gave a reasoned explanation for its ruling and allowed a rational compromise argument. There is no arguable challenge to the court's decision.

In a related claim, Lengling asserts a due process violation because the jury was not allowed to consider "exculpatory 'LOCUS & VALUE NUMBERS OF DNA PROFILE'" that is "uniquely capable of proving an actual innocence claim." As noted, no evidence was introduced that his DNA was on any of the tested items and his counsel affirmatively argued that no scientific evidence implicated him. Given the substantial other evidence inculpating Lengling, giving the jury this additional data would not have changed his fate.

Lastly, the no-merit report addresses other-acts evidence regarding Lengling's attempt to trade heroin for Xanax with Nathan Ott the day before he made a like trade with Thede. Lengling contends the other-acts evidence constituted "piling on" and a "final kick at the cat," a curious argument considering his previous claim that the evidence was insufficient.

Evidence of other crimes, wrongs, or acts is not admissible to prove a person's character but may be used to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *See* WIS. STAT. RULE 904.04(2); see also ***State v.***

Wagner, 191 Wis. 2d 322, 330, 528 N.W.2d 85 (Ct. App. 1995). A trial court's decision to admit other-acts evidence is reviewed as for an erroneous exercise of discretion. *See* ***State v. Hunt***, 2003 WI 81, ¶34, 263 Wis. 2d 1, 666 N.W.2d 771. The ruling will be upheld if the court "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process, and reached a conclusion that a reasonable judge could reach." ***Id.***

Here, trial counsel twice objected to the other-acts evidence and once moved for a mistrial. After the trial court admitted the other acts as evidence of background and found that its probative value outweighed the potential prejudicial effect, it instructed the jury to ignore the portion of the testimony to which Lengling objected. This demonstrates consideration of a proper purpose, intent and motive, and the record contains facts supporting that decision. *See* ***id.*** (even if court did not set forth its reasoning, reviewing court may independently review record to determine whether appropriate basis exists); *see also* ***State v. Johnston***, 184 Wis. 2d 794, 822, 518 N.W.2d 759 (1994) (we presume jury follows court's instructions). There would be no merit to a challenge in this regard.

Next, Lengling alleges a ***Franks/Mann*** violation. *See* ***Franks v. Delaware***, 438 U.S. 154 (1978), and ***State v. Mann***, 123 Wis. 2d 375, 367 N.W.2d 209 (1985). The arresting officer stated in his warrant affidavit that he believed probable cause existed to obtain a DNA buccal swab from Lengling. Lengling points out that the swab kit bore an instruction to first check computerized records for a prior sample and not to collect a sample if one already has been provided. Lengling contends his DNA has been on file since 2004, such that the probable cause statement was false and its exclusion would have prevented the court commissioner from issuing the warrant. This claim has no arguable merit.

Even if necessary to a finding of probable cause, Lengling cites no evidence, and we find none, that the inaccurate statement was made or the fact of an earlier DNA sample was withheld knowingly and intentionally, or with reckless disregard for the truth. *See* ***Franks***, 438 U.S. at 155-56; *see* ***Mann***, 123 Wis. 2d at 385-86. Furthermore, Lengling did not object at the time, thus waiving the issue. Considering the failure to object as possible ineffective assistance of counsel also does not aid Lengling. Had his 2004 sample been used, the results would have been the same. Moreover, his counsel argued that no DNA evidence tied him to the deadly heroin. Absent proof of prejudice, an ineffectiveness claim fails.

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

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Timothy T. O'Connell is relieved from further representing Lengling in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals