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DISTRICT I

June 23, 2020

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

2017AP1118-CRNM State of Wisconsin v. Anthony William Freeman
(L.C. # 2015CF859)

Before Brash, P.J., Donald and White, 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).

Anthony William Freeman appeals from a judgment convicting him of attempted first-degree intentional homicide and first-degree reckless injury, both crimes charged with use of a dangerous weapon and as acts of domestic abuse. Freeman's appellate counsel, Sara Heinemann Roemaat, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18) and ***Anders***

v. California, 386 U.S. 738 (1967).[1] Freeman received a copy of the report, was advised of his right to file a response, and has elected not to do so.[2] Upon consideration of the report and an independent review of the record as mandated by ***Anders***, 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.

The criminal complaint charged Freeman with attempted first-degree intentional homicide with use of a dangerous weapon as an act of domestic abuse stemming from an incident that occurred on February 18, 2015. According to the complaint, the victim was Freeman's former live-in girlfriend. On the date of the crimes, the victim was playing cards with Freeman's family members when Freeman approached her from behind, told her she "didn't give a fuck about him," and stabbed her in the neck with a knife. The complaint further alleged that the victim was treated for the stab wound, which perforated her trachea and esophagus, and that she would have died without immediate medical intervention. According to the complaint, Freeman admitted that he jabbed his hand toward the victim's neck while holding a knife.

In the information that followed, the State added one count of aggravated battery with use of a dangerous weapon as an act of domestic abuse. The State subsequently amended the aggravated battery count to first-degree reckless injury with use of a dangerous weapon as an act of domestic abuse.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] This court granted Freeman multiple extensions to file a response.

Freeman ultimately went to trial, and a jury found him guilty of attempted first-degree intentional homicide and first-degree reckless injury. The trial court ordered Freeman to serve concurrent sentences of twelve years of initial confinement and eight years of extended supervision. This appeal follows.

The no-merit report addresses, among other things, the sufficiency of the evidence, whether Freeman properly waived his right to testify, and the trial court's exercise of its sentencing discretion. This court is satisfied that the no-merit report properly analyzes the issues it raises as being without merit and that no procedural trial errors occurred. We will not discuss any of those potential issues further.

Although the no-merit report does not address it, we considered whether Freeman's attorney could have pursued a voluntary intoxication defense on his behalf. Trial testimony revealed that Freeman drank heavily on the night of the crimes and that his demeanor was out of character. In 2014, however, the legislature eliminated the voluntary intoxication defense. *See* 2013 Wis. Act 307, §§ 1-4. The crimes at issue here occurred in February 2015. Consequently, voluntary intoxication was not available as a defense for Freeman.

We also considered whether Freeman's attorney could have challenged the amended charges against Freeman. The original information charged Freeman with attempted first-degree intentional homicide with use of a dangerous weapon as an act of domestic abuse and aggravated

battery with use of a dangerous weapon as an act of domestic abuse.[3] Before trial, the State filed a second amended information that amended the aggravated battery charge, which was a Class E felony, to first-degree reckless injury with use of a dangerous weapon as an act of domestic abuse, which was a Class D felony. The second amended information was filed on the same date the parties informed the trial court that the plea negotiations were unsuccessful.

On the day his jury trial was set to begin, Freeman's trial counsel informed the trial court that Freeman wanted her to file a motion to dismiss, which she did not believe was appropriate. Trial counsel explained that Freeman had prepared his own motion for the trial court and that he objected to the second amended information on the grounds of prosecutorial misconduct and vindictiveness because the prosecutor filed it after the plea negotiations failed. The trial court denied the motion finding that there was no prosecutorial misconduct or vindictiveness and the case proceeded to trial.

It is indeed "a violation of due process when the State retaliates against a person 'for exercising a protected statutory or constitutional right.'" ***State v. Cameron***, 2012 WI App 93, ¶10, 344 Wis. 2d 101, 820 N.W.2d 433 (citation omitted). Thus, a presumption of vindictiveness applies when a court imposes a greater sentence after a successful appeal, or when a prosecutor increases the charges after a defendant secures a new trial. *See* ***State v. Johnson***, 2000 WI 12, ¶¶21-22, 232 Wis. 2d 679, 605 N.W.2d 846. However, a similar presumption does not apply to a pretrial filing of increased charges. *See* ***id.***, ¶¶24-32.

[3] In the first amended information, the State fixed errors relating to Freeman's date of birth and the statutory subsection for the use of a dangerous weapon modifier referenced in count two. Beyond these changes, the charges remained the same. It was not until the second amended information that the State amended the aggravated battery charge to first-degree reckless injury.

"[J]ust as a prosecutor may forgo legitimate charges already brought in an effort to save the time and expense of trial, a prosecutor may file additional charges if an initial expectation that a defendant would plead guilty to lesser charges proves unfounded." ***Cameron***, 344 Wis. 2d 101, ¶13 (citation omitted; brackets in ***Cameron***). Thus, Freeman "must show actual vindictiveness motivated by some constitutionally impermissible consideration by the prosecutor." *See* ***id.***, ¶14. To show actual vindictiveness, "there must be objective evidence that a prosecutor acted in order to punish the defendant for standing on his legal rights." ***Id.*** (citation omitted). There is no support for such a showing in the record before us.

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms Freeman's convictions, and discharges appellate counsel of the obligation to represent Freeman further in this appeal.

Upon the foregoing, therefore,

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

IT IS FURTHER ORDERED that Attorney Sarah Heinemann Roemaat is relieved of further representation of Anthony William Freeman in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals