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DISTRICT III

January 31, 2023

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

2020AP897-CRNM State of Wisconsin v. Doug S. Nitek (L. C. No. 2017CF4)

Before Stark, P.J., Hruz and Gill, 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).

Doug Nitek appeals from a judgment convicting him, following a jury trial, of first-degree intentional homicide by use of a dangerous weapon, one count each of felony and misdemeanor criminal damage to property, one felony drug charge, and two misdemeanor drug charges.

Attorney Dennis Schertz has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20).[1] The no-merit report sets forth the procedural history of the case and addresses a contested judicial assignment; the admission of other-acts evidence relating to prior threats Nitek made against law enforcement; the denial of a self-defense instruction; the sufficiency of the evidence to support the verdicts; the denial of two motions for a mistrial based upon the possibility that the jury may have seen Nitek in shackles or learned that he had been in custody for two years; and the validity of the maximum sentences imposed on each count—including life without the possibility of release on supervision. Nitek has filed a response to the no-merit report raising claims of ineffective assistance of counsel and alleging that the circuit court was biased against him. Schertz has filed a supplement to his no-merit report addressing Nitek's response. Having independently reviewed the entire record as mandated by ***Anders v. California***, 386 U.S. 738, 744 (1967), we conclude that counsel will be allowed to withdraw and the judgment shall be summarily affirmed.

The State charged Nitek with multiple offenses[2] based upon events that occurred on his property on October 29 and 30, 2016. The most serious charge and the only one Nitek contests on appeal—first-degree intentional homicide—was based upon the shooting death of Rusk County Sheriff's Deputy Dan Glaze from a bullet fired by Nitek which went through Glaze's squad car windshield.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] In addition to the counts of conviction listed above, the circuit court dismissed one count of possession of a firearm by a felon and five bail jumping counts, and the jury acquitted Nitek of two counts of attempted first-degree homicide and seventeen counts of reckless endangerment. Those charges are not at issue in this appeal.

Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that the evidence was sufficient to support the verdicts. We therefore will not recount in detail the eight-day trial, which is adequately described in the no-merit report. Most significantly, a squad car video and dispatch recording partially captured the fatal shot coming from Nitek's pickup truck and law enforcement recovered the murder weapon from an area solely in Nitek's control, after a standoff with SWAT and tactical teams immediately following the shooting.

We further agree with counsel's description, analyses, and conclusions that there is no arguably meritorious basis to challenge the judicial assignment, the admission of other-acts evidence, the denial of the mistrial motions, or the validity of the sentences. We will discuss the circuit court's denial of a requested self-defense instruction in conjunction with Nitek's assertion that his trial counsel provided ineffective assistance by failing to investigate and present witnesses who could have supported a self-defense claim.

Nitek did not dispute that he shot and killed Deputy Glaze. Rather, the defense theory at trial was that Nitek lacked the requisite intent for first-degree intentional homicide. During closing argument, Nitek's trial counsel argued that Glaze had entered Nitek's property without permission; that it was too dark for Nitek to identify Glaze's vehicle as a squad car; that the speed with which Nitek fired a series of shots indicated "reckless" firing of a gun at "an intruding car" rather than taking deliberate aim; and that Nitek passed up a better opportunity to shoot Glaze if it had been his intention to kill him. The State contended that Nitek's decision to fire six shots at Glaze's squad car—two days after he threatened to kill the next officer who came onto his property—established the requisite intent to kill the occupant of the car, even if Nitek did not know specifically who that was.

Nitek asked the circuit court to instruct the jury pursuant to WIS JI—CRIMINAL 805 (2022), that "[t]he defendant may intentionally use force which is intended or likely to cause death or great bodily harm only if the defendant reasonably believed that the force used was necessary to prevent imminent death or great bodily harm to [himself]." Although the jury instruction conference was held off the record and only summarized later in court, we infer that the basis for the request was that Nitek could have believed it was necessary to defend himself against an unknown intruder on his property. We conclude that the evidence did not support the instruction, however, because there was no testimony that Nitek feared for his safety, it would not have been reasonable for Nitek to believe that he needed to use deadly force to defend himself when the squad car video established that Glaze had not exited his vehicle to approach Nitek, and Glaze's own weapon was still undrawn in his utility belt when his body was recovered.

Nitek now contends his trial counsel provided ineffective assistance by failing to investigate a series of witnesses who could have testified that law enforcement officers had been "harassing [Nitek] non-stop" and "trespassing on his property daily" to the extent that Nitek "felt his life was in danger." Aside from the lack of affidavits supporting this assertion, the allegations are insufficient to establish either the deficient performance or prejudice components of an ineffective assistance claim. *See generally* ***State v. Sholar***, 2018 WI 53, ¶32, 381 Wis. 2d 560, 912 N.W.2d 89 (discussing test for ineffective assistance of counsel).

First, a contention that Nitek was justified in firing upon Deputy Glaze because Nitek had reason to fear the police would have directly contradicted the defense theory that Nitek did not recognize that Glaze's vehicle was a squad car and thought he was facing some unknown intruder. Moreover, evidence of additional hostile incidents between Nitek and law enforcement

could have failed by instead bolstering the State's theory that Nitek had motive to intentionally kill Glaze because he hated the police. Therefore, counsel did not perform deficiently by choosing not to pursue that alternative theory of defense.

Furthermore, even if Nitek had pursued an alternate defense theory that he had reason to fear law enforcement, there was still no evidence that Glaze took any actions on the night of his death that would have led Nitek to reasonably believe that he was in *imminent* danger of death or great bodily harm. It follows that investigating and presenting the witnesses now identified by Nitek would not have changed the circuit court's refusal to give the self-defense instruction under WIS JI—CRIMINAL 805 (2022). At best, Nitek could have sought an instruction on unnecessary defensive force that would have mitigated the first-degree intentional homicide charge to second-degree intentional homicide under WIS. STAT. § 940.01(2)(b). However, Nitek expressly informed the court that he did not want any instructions on lesser-included offenses such as second-degree intentional homicide or first-degree reckless homicide because he wished to proceed on an "all or nothing" basis. Therefore, Nitek was not prejudiced by counsel's alleged failures to investigate and present witnesses who potentially could have provided testimony that would have supported a mitigation defense. Our conclusion that there is no arguable basis to challenge trial counsel's performance also defeats Nitek's claims that postconviction counsel[3] should have done so.

Nitek next alleges that Judge Scott Needham should have been disqualified from hearing the case because he had "a political interest" in handling the "high profile" case to aid his own

[3] Nitek also raises claims against appellate counsel, but those lie outside the scope of this appeal.

reelection bid and his own father was a law enforcement officer. Motions to disqualify a judge may be made upon either statutory or constitutional grounds. Here, Nitek has not identified any relationship that would require a statutory recusal under WIS. STAT. § 757.19(2). Rather, he appears to be raising a due process claim based upon the absence of an impartial tribunal. *See* ***State v. Goodson***, 2009 WI App 107, ¶8, 320 Wis. 2d 166, 771 N.W.2d 385.

In analyzing a claim of judicial bias, we begin with the presumption that a judge is fair, impartial, and capable of ignoring any biasing influences. ***State v. Gudgeon***, 2006 WI App 143, ¶20, 295 Wis. 2d 189, 720 N.W.2d 114. To overcome that presumption, a party must demonstrate the objective[4] existence of "actual bias" (i.e., that the judge in fact treated the party unfairly) or the "appearance of bias" (i.e., whether there is a serious risk of actual bias based upon objective and reasonable perceptions). ***Id.***, ¶¶20-24; ***Miller v. Carroll***, 2020 WI 56, ¶22, 392 Wis. 2d 49, 944 N.W.2d 542 (citation omitted). Nitek contends that Judge Needham demonstrated actual bias by sentencing him to life in prison without the possibility of release on supervision. However, the record shows that the judge properly exercised his discretion by discussing proper sentencing factors—placing significant weight on the unlikelihood of rehabilitation, given Nitek's lengthy criminal record and lack of empathy, and on the need for punishment given the severity of the crime. In short, there was nothing objectively unfair about imposing the maximum sentence on the homicide count. Nor does the judge's campaign status or his familial connection to a law enforcement officer create the appearance of bias. Both factors are common circumstances that the average judge could be reasonably expected to ignore.

[4] Although a judge may also be subjectively biased, that is a determination that can only be made by the judge. ***State v. McBride***, 187 Wis. 2d 409, 414-15, 523 N.W.2d 106 (Ct. App. 1994).

Our independent review of the record—including the withdrawal of an NGI plea, venue issues, and voir dire—discloses no other potential issues for appeal. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders***. Accordingly, counsel shall be allowed to withdraw and the judgment of conviction will be summarily affirmed. *See* WIS. STAT. RULE 809.21.

Upon the foregoing,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of any further representation of Doug Nitek in this matter pursuant to 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