OFFICE OF THE CLERK
**WISCONSIN COURT OF APPEALS**
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

**DISTRICT I**

July 22, 2024

*To*:

Hon. Carolina Stark
Circuit Court Judge
Electronic Notice

Anna Hodges
Clerk of Circuit Court
Milwaukee County Safety Building
Electronic Notice

Leonard D. Kachinsky
Electronic Notice

Jennifer L. Vandermeuse
Electronic Notice

Andrea Taylor Cornwall
Wisconsin State Public Defenders Office
735 N. Water St., Ste. 912
Milwaukee WI 53202-4105

Kelsey Jarecki Morin Loshaw
Regional Attorney Manager
Wisconsin State Public Defenders Office
P.O. Box 7862
Madison, WI 53707-7862

Leland Bernard Hall 305316
Stanley Correctional Inst.
100 Corrections Dr.
Stanley, WI 54768

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

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2023AP1651-CRNM State of Wisconsin v. Leland Bernard Hall (L.C. # 2019CF2770)

Before White, C.J., Donald, P.J., and Colón, J.

**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).**

Leland Bernard Hall appeals judgments of conviction entered after a jury found him guilty of possessing not more than five grams of cocaine with intent to deliver cocaine, possessing narcotic drugs (fentanyl), and obstructing an officer. Hall's appellate counsel, Attorney Leonard D. Kachinsky, filed a no-merit report, *see* WIS. STAT. RULE 809.32(1) (2021-

22)[1] and, at our request, a supplemental no merit report.[2] Upon review of the record and the no-merit reports, we conclude that Hall could pursue further postconviction proceedings that would not be frivolous as to at least one issue. Accordingly, we reject the no-merit report, dismiss this appeal without prejudice, and extend the time for Hall to file a postconviction motion or notice of appeal on the merits.

According to the criminal complaint, police were dispatched to a Milwaukee location in response to citizen complaints of shots fired. Hall was one of the people present, and when officers approached, he fled into the Milwaukee River. After he was arrested, police found a bottle containing suspected controlled substances.

Hall filed a motion *in limine* objecting to any evidence that: (1) police initially approached Hall when responding to an anonymous call about gunshots; (2) Hall resembled one of the alleged shooters; and (3) a dive team searched the Milwaukee River for a firearm and no firearm was found. At two pretrial conferences, the prosecutor noted his expectation that the parties would "work out" a stipulation to explain to the jury, without mentioning a firearm, that police lawfully arrived on the scene. At a third pretrial conference, however, the circuit court addressed the motion *in limine* without seeking additional argument. The circuit court ruled that the State could offer evidence that police arrived on the scene in response to complaints about

[1] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

[2] This is the second no-merit appeal that Attorney Kachinsky filed in this matter. We dismissed the first no-merit appeal after determining that Attorney Kachinsky was pursuing it even though eight transcripts, representing a quarter of the proceedings held on the record, remained outstanding at the time that he filed a no-merit report. ***State v. Hall***, No. 2022AP2147-CRNM, unpublished op. and order (WI App Apr. 4, 2023).

gunfire and that Hall resembled one of the alleged shooters.[3] At the conclusion of the circuit court's ruling, defense counsel advised that nothing further required discussion.

At trial, the State told the jury in opening statement that the case began because police were responding to complaints about "shots fired." The arresting officer testified about the "shots fired" complaints, stated several times that police were responding to "shots fired" calls when they saw Hall, and told the jury that Hall "matched the description" that one of the callers provided. The State discussed the complaints in closing argument, reiterating in multiple ways that the police encountered Hall because they were investigating complaints of gunfire.

The no-merit report did not include any discussion of the stipulation that the parties apparently contemplated before trial. We asked Attorney Kachinsky to file a supplemental no-merit report addressing why Hall could not raise an arguably meritorious claim that his trial counsel was ineffective for failing to pursue the matter. Our order sought specific information about the steps that trial counsel took to obtain a stipulation and the results of trial counsel's efforts.

In the supplemental no-merit report, Attorney Kachinsky advised that he had "communicated with [trial counsel] as to whether further efforts were made off the record with the State to obtain a stipulation. [Trial counsel] could not recall any." Attorney Kachinsky further stated that, in his view, "[i]t was not error to admit the limited testimony into evidence."

[3] After the circuit court ruled on the first two components of Hall's motion *in limine*, the State said that it did not intend to offer any evidence that a dive team unsuccessfully searched the Milwaukee River for a gun. The circuit court then excluded that evidence without seeking a response from Hall.

A claim of ineffective assistance of counsel requires the defendant to show that counsel's performance was deficient and that the deficiency prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Upon our independent review, we conclude that it would not be frivolous for Hall to claim that trial counsel performed deficiently by failing to pursue a stipulation that the State appeared willing to enter and that would have resolved Hall's motion *in limine* in the way that the defense requested. We further conclude that it would not be frivolous for Hall to claim that he was prejudiced by trial counsel's failure to pursue a stipulation that would have avoided introduction of evidence connecting him to complaints about gunfire.

When resolving an appeal under WIS. STAT. RULE 809.32, the question is whether a potential issue would be "'wholly frivolous.'" *See* ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915 (quoting ***Anders v. California***, 386 U.S. 738, 744 (1967)). The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (stating that an action is not frivolous even though the lawyer believes that the client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. ***McCoy v. Court of Appeals***, 486 U.S.429, 436 (1988). Here, it appears that Hall could pursue a claim of ineffective assistance of counsel that would not be frivolous. We emphasize that we do not reach any conclusion that Hall would or should prevail, only that the record and the submissions reflect that pursuing the claim on the merits would not be frivolous within the meaning of RULE 809.32, and ***Anders***.

Because we cannot conclude that further proceedings would be wholly frivolous, we must reject the no-report report filed in this case. We add that our decision does not mean that we have reached a conclusion in regard to the arguable merit of any potential issue that we have

not discussed. Hall is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Hall, with any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Hall or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Hall to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30 is extended until sixty days after the date on which this court receives notice from the State Public Defender's office advising either that it has appointed new counsel for Hall or that new counsel will not be appointed.

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

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*Samuel A. Christensen*
*Clerk of Court of Appeals*