

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-3180-CR-NM and 99-1379-CR-NM

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID DELLIS,

DEFENDANT-APPELLANT.

APPEALS from judgments of the circuit courts for Door and Brown Counties: PETER C. DILTZ, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Following his negotiated no contest pleas, David Dellis was convicted of mutilating a corpse, contrary to § 940.11(1), STATS., for which he was sentenced to ten years in prison; homicide by use of a dangerous weapon, contrary to § 940.08, STATS., for which he was sentenced to two years in

prison, to be served concurrently; hiding a corpse, contrary to § 940.11(2), STATS., for which he was sentenced to two years in prison, to be served concurrently; armed robbery, contrary to § 943.32(1)(b) and (2), STATS., for which he was sentenced to thirty years in prison, to be served consecutively to the mutilation charge;¹ false imprisonment, contrary to § 940.30, STATS., for which he was sentenced to two years in prison, consecutive to all other charges; and possession of a controlled substance with intent to deliver, contrary to § 161.41(1m)(h), STATS., for which sentence was withheld and probation imposed for five years, to run consecutive to prison time served on other charges.² The court ordered 382 days presentence credit.

¶2 Appellate counsel has filed no merit and supplemental no merit reports pursuant to *Anders v. California*, 386 U.S. 738 (1967), and RULE 809.32, STATS. The reports discuss the following issues: (1) whether the pleas were knowingly, intelligently and voluntarily entered; (2) whether a factual basis supported the pleas; (3) whether trial counsel was ineffective for failing to obtain additional competency examinations, not pursuing the plea of not guilty by reason of mental disease or defect, or for not pursuing suppression of the confession; and (4) whether the trial court reasonably exercised its sentencing discretion.

¶3 Dellis has been provided a copy of the report and has filed responses discussing numerous issues, including: (1) the court's erroneous exercise of sentencing discretion; (2) ineffective assistance of trial counsel; (2) a variety of

¹ Although the judgment of conviction states that Dellis was sentenced to 30 years for burglary, the record is clear that Dellis was convicted of and sentenced to 30 years for armed robbery. The burglary was dismissed as part of the plea agreement.

² The charges arose in different counties and were consolidated for the purposes of the plea proceedings.

conflict of interest issues; (3) the prosecutor's withholding evidence and interfering with the defense; and (4) ineffective assistance of appellate counsel. Based upon our independent review of the record mandated by *Anders*, we conclude that the record reveals no issue of arguable merit and therefore affirm the judgments.

¶4 Following his arrest, Dellis gave a written confession. He stated that he had an altercation with his friend, Mike. After Mike hit him several times, Dellis grabbed Mike around his neck for what seemed like seconds and, when he released Mike, Mike just dropped. Dellis hoped that Mike had only passed out, but discovered that he was dead. Dellis put the body in his car and later hid it in tall weeds near a power plant. Later, he returned and picked up the body with plans to cut it up and burn it. He took the body to a farm and proceeded to cut it up with a chain saw and place the pieces in barrels.

¶5 Approximately twenty minutes after he finished cutting up the body and cleaning the chain saw, three individuals arrived and discovered body parts in a garbage can. Dellis fled and, after several days of hiding, sought shelter in a farmhouse. When the couple who owned it arrived, he armed himself with a pipe, stole their money and tied up their hands. He fled in their truck, but was soon apprehended.

¶6 Dellis's confession also stated that after a traffic stop, he was arrested, treated fairly and offered food and drink. He stated that he was read his *Miranda* rights, understood them and waived them. *See Miranda v. Arizona*, 384 U.S. 436 (1966). He also stated that although he was tired, he knew what he was doing and wanted to continue his statement until he was done.

¶7 The record discloses no arguable merit to a challenge to the plea procedure. Dellis first entered pleas of not guilty and not guilty by reason of

mental disease or defect, and the court appointed Drs. Charles Barnes and Kenneth Schmail to examine him. Both reported that they did not believe Dellis lacked substantial capacity to appreciate the wrongfulness of his conduct or conform his actions to the requirements of law. As a result, Dellis withdrew his plea of not guilty by reason of mental disease or defect.

¶8 The plea negotiations were placed on the record at two separate plea hearings.³ At the first plea hearing, defense counsel stated:

With respect to 96-CF-160, which is the charge of mutilation of a corpse, [Dellis] would be withdrawing his plea of not guilty and not guilty by reason of mental defect and entering a plea of no contest to that charge.

With respect to the File No. 96-CF-161, he would be withdrawing his plea of ... not guilty, not guilty of mental defect (sic) to the charge of armed robbery, and one count of false imprisonment and entering pleas of no contest to those two charges.

The second charge of false imprisonment would be dismissed, but read in[,] the charge of operating a motor vehicle without owner's consent would be dismissed. The armed burglary would be dismissed.

¶9 The trial court discussed with Dellis the elements of each offense and their potential penalties. Dellis stated that he had sufficient time to discuss the withdrawal of his previous plea of not guilty by reason of mental defect with his attorney. Dellis signed a plea questionnaire and waiver of rights form. He advised that he was thirty-five years old, attended fourteen years of school, understood the proceedings, had not taken any drugs or medications that would interfere with his

³ Dellis was originally charged with nine counts: (1) burglary; (2) robbery with threat of force; (3) and (4) two counts of false imprisonment; (5) taking and driving a vehicle without owner's consent; (6) mutilating a corpse; (7) second-degree reckless homicide; (8) hiding a corpse; and (9) possession of THC with intent to deliver.

understanding of the proceedings, understood the rights he would be waiving, and was satisfied with his counsel's representation. The trial court accepted Dellis's no contest pleas in accordance with the plea agreement.

¶10 At the second plea hearing, the parties' negotiations regarding the remaining charges were described on the record. One of the counts with which Dellis initially had been charged was second-degree reckless homicide. Dellis agreed to plead to a reduced charge of negligent homicide by use of a dangerous weapon. He also agreed to enter no contest pleas to concealment of a corpse and possession with intent to deliver marijuana. The trial court conducted a comprehensive plea colloquy. Dellis responded that he understood the plea procedure, the elements of the offense, the potential penalties, the rights he would be waiving, and was satisfied with his attorney's representation. The trial court accepted his pleas according to the plea negotiations.

¶11 The record reveals that the trial court conducted adequate plea colloquies to ensure that Dellis's no contest pleas were knowing, intelligent and voluntary. *See State v. Bangert*, 131 Wis.2d 246, 266-72, 389 N.W.2d 12, 22-25 (1986). Accordingly, any challenge to the plea procedures would lack arguable merit.

¶12 The record also discloses that an argument based upon an insufficient factual basis for accepting the pleas would be without arguable merit. The court relied on the criminal complaint and preliminary hearing testimony for a factual basis. Additionally, defense counsel explained the basis for a plea to homicide by handling of a dangerous weapon:

It is quite accurate that the State has a difficult case in terms of the [original charge of] second degree reckless homicide. And what we are doing here in terms of

amending that charge to one of homicide by negligent handling of a dangerous weapon is a concession by the State and by the Defense such that I think there is acknowledgement on both sides that there is no dangerous weapon. Mr. Dellis gains a reduction of the charge from a Class C felony to a Class D felony. [T]he negligent homicide better describes Mr. Dellis' scienter in relation to the death of Mr. Kasee, and all things considered, is advantageous to both sides.

¶13 The record reveals that the reduced charge was reasonably related to the greater charge and that a factual basis existed to support the greater charge. *See State v. Harrell*, 182 Wis.2d 408, 419, 513 N.W.2d 676, 680 (1994). The record reveals no arguable merit to a challenge to the factual basis to support the pleas.

¶14 Next, the record reveals no arguable merit to a challenge to the court's sentencing discretion. At sentencing, the court gave the parties an opportunity to correct any erroneous information contained in the presentence report. An officer from the sheriff's department testified for the State, and a psychiatric social worker from the Winnebago Mental Health Institute testified on Dellis's behalf. Defense counsel pointed out: "While he is competent, and under a legal standard he doesn't suffer from insanity, he has many mental health problems." The trial court took into consideration the nature of the offenses, Dellis's mental health record, his character, substance abuse, rehabilitative needs and protection of the public. These are appropriate factors. *See State v. Sarabia*, 118 Wis.2d 655, 673, 348 N.W.2d 527, 537 (1984).

¶15 Next, the no merit report, the supplemental no merit report and Dellis's responses discuss the potential issue of ineffectiveness of trial counsel. Dellis makes a broad attack on counsels' effectiveness, challenging nearly every aspect of their performance. To demonstrate a claim of ineffective assistance of

counsel, a defendant must show that counsel's conduct or inaction constitutes deficient performance and that deficiency caused the defendant prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Dellis's contentions do not arguably demonstrate both prongs.⁴

¶16 First, the record fails to disclose a basis to challenge effectiveness of trial counsel for failing to pursue additional psychological testing for competency. Counsel raised the issue of competency. *See State v. Johnson*, 133 Wis.2d 207, 220, 395 N.W.2d 176, 182 (1986). The trial court ordered a competency exam at the Winnebago Mental Health Institute. *See* § 971.14, STATS. The examiner's report concluded that Dellis was competent to proceed. Because there was no basis to challenge the report, defense counsel stated that Dellis chose to waive an evidentiary hearing on the issue.

¶17 The trial court personally addressed Dellis, who stated that he understood that he could request his own examiner and have the opportunity to have an evidentiary hearing on the issue of competency, but that it was his intention to waive the hearing. Relying on the examiner's report and its own observations of Dellis's conduct and demeanor in court, the trial court concluded that Dellis did not lack substantial capacity to assist in his own defense. The record reveals no basis for counsel to believe that Dellis was incompetent or to obtain additional testing.

⁴ We note that no postconviction proceedings were brought to preserve counsel's testimony. *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App. 1979). "[I]t is a prerequisite to a claim of ineffective representation on appeal to preserve the testimony of trial counsel" at a postconviction proceeding. *Id.* at 804, 285 N.W.2d at 908. Because no *Machner* hearing was held, Dellis's ineffective assistance of counsel claims are unsupported by the record. Nonetheless, because many of his claims are based upon undisputed facts, we may review them as issues of law. *See State v. Smith*, 207 Wis.2d 258, 266, 558 N.W.2d 379, 383 (1997).

¶18 In addition, the record fails to support a claim that counsel imprudently abandoned the defense of not guilty by reason of mental disease or defect. Two psychologists examined Dellis and offered opinions that did not support this defense. The record affords no basis to pursue the NGI defense.

¶19 The record also fails to indicate any basis to pursue suppression of Dellis's confession. There is no indication of coercion, duress, threats, promises or police misconduct. Dellis was notified of his rights and waived them. *See State v. Santiago*, 206 Wis.2d 3, 18-19, 556 N.W.2d 687, 692 (1996). Defense counsel is not required to pursue a motion that clearly lacks merit.

¶20 Dellis further argues that his attorney failed to take steps to challenge the credibility of witnesses at the preliminary hearing. There is no allegation that the witnesses' testimony was so inherently or patently incredible as to render it implausible; thus, credibility is not an issue to be determined at a preliminary hearing. *See State v. Hooper*, 101 Wis.2d 517, 545 n.15, 305 N.W.2d 110, 124 n.15 (1981). Consequently, a claim of ineffective assistance of counsel based upon counsel's failure to attack witness credibility at the preliminary hearing would lack arguable merit.

¶21 Dellis further contends that defense counsel failed to obtain the aid of an investigator, failed to obtain statements from witnesses and failed to take time to understand the details of the crime. Dellis fails to allege "with specificity what the investigation would have revealed and how it would have altered the outcome of the trial." *See State v. Flynn*, 190 Wis.2d 31, 48, 527 N.W.2d 343, 349-50 (Ct. App. 1994). Consequently, his assertions lack arguable merit.

¶22 Dellis contends that his defense attorneys were ineffective for numerous other reasons, including: (1) his second attorney withdrew because he

was too busy to handle the case; (2) his third attorney informed Dellis that he was not being paid enough; and (3) three attorneys in succession caused too much confusion and a lack of coordination. These allegations, however, do not merit additional proceedings because Dellis fails to allege how he was prejudiced. He entered a negotiated plea of no contest, stating that he was satisfied with representation of counsel. A valid plea generally waives nonjurisdictional defects and defenses. *Bangert*, 131 Wis.2d at 293, 389 N.W.2d at 34.

¶23 Dellis also raises a variety of contentions relating to conflict of interest. He argues: (1) his first attorney withdrew because of a conflict of interest due to his representation of the victim on battery charges; (2) his second attorney had a conflict of interest because his wife prosecuted Dellis when she was a district attorney; and (3) counsel was ineffective for failing to raise the issue of conflict of interest and potential liability to the victim's family between the Winnebago Mental Health Institute, Brown County and the State, based upon their failure to ensure that Dellis was placed on supervision when conditionally released in 1995 and having that release voided before he committed the offenses.

¶24 Because the first and second counsel withdrew, no prejudice appears to have resulted from the alleged conflicts of interest. The third issue apparently is designed to impeach the credibility of the psychologist at Winnebago who determined that Dellis was competent to stand trial. There is no indication in the record that the writer of the report had any connection with Dellis's earlier release or had any conflict of interest. The record fails to disclose arguable merit to Dellis's conflict of interest claims.

¶25 Next, Dellis argues that defense counsel failed to challenge the presentence report writer's bias, failed to discuss sentencing strategy, and failed to

obtain a continuance to contest the erroneous report. The record, however, fails to reveal that the presentence writer was biased, or that there was a lack of sentencing strategy. Counsel presented a very articulate argument at sentencing. Also, Dellis does not identify material inaccuracies in the presentence report. Based upon the record before us, these alleged deficiencies lack arguable merit.

¶26 Dellis further contends that the prosecutor failed to turn over a tape recording of his confession, a photo showing that he had been injured during his altercation with the victim, witness statements, phone tap evidence, psychiatric reports, and that one of the investigating officers was charged with a crime. Because Dellis entered no contest pleas, he did not preserve these claims of error. *See id.* To the extent these allegations are intended to show ineffective assistance of counsel, Dellis's claims fail to identify the materiality of these items and as a result, he does not demonstrate prejudice.⁵ Consequently, his allegations fail to support a claim of arguable merit.

¶27 Finally, Dellis's complaints with respect to appellate counsel are not properly before us. A claim of ineffective assistance of appellate counsel is properly raised by a petition for a writ of habeas corpus in the appellate court that heard the defendant's direct appeal. *See State v. Knight*, 168 Wis.2d 509, 512-13, 484 N.W.2d 540, 541 (1992). Where the alleged deficiencies relate to ineffective postconviction proceedings in the circuit court, the claim should be raised in the circuit court either by a petition for a writ of habeas corpus or a motion under § 974.06, STATS. *State ex rel. Smally v. Morgan*, 211 Wis.2d 795, 797-98, 565

⁵ Appellate counsel asserts that there is no tape of the confession in existence so there is no prosecutor misconduct. Counsel also contends that because there was no dispute that Dellis had been injured, the absence of photos to support his claim was immaterial.

N.W.2d 805, 807 (Ct. App. 1997). In any event, this direct appeal is not the appropriate mechanism for raising issues of ineffective assistance of postconviction and appellate counsel.

¶28 We note that the written judgment states that Dellis was convicted of burglary but that the transcripts make clear that Dellis pled to, was convicted of and sentenced for armed robbery, contrary to § 943.32(1)(b), STATS. As a result, we direct the clerk, on remittitur, to amend the judgment of conviction to reflect the correct disposition. The record reveals no other potential appellate issues. We are satisfied that further appellate proceedings lack arguable merit within the meaning of *Anders*. Attorney Steven Bauer is relieved of further representation of Dellis in these appeals.

By the Court.—Judgments affirmed.

