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DISTRICT IV

January 29, 2020

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

2017AP2002-CR State of Wisconsin v. Preston P. Rodenkirch (L.C. # 2016CF98)

Before Fitzpatrick, P.J., Kloppenburg and Nashold, JJ.

Appointed counsel for appellant Preston Rodenkirch filed a no-merit appeal under WIS. STAT. RULE 809.32.[1] We ordered counsel to consider additional issues, and counsel has now filed a supplemental no-merit report stating that the issues lack arguable merit. We conclude that

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

one of those issues has arguable merit, and therefore we reject the no-merit report and order briefing to proceed in this court under WIS. STAT. RULE 809.19.

The issue with arguable merit is whether there was sufficient evidence to support the conviction for possession of an illegally obtained prescription drug, specifically, buprenorphine. The third element of the jury instruction on that charge was that the "prescription drug was not dispensed to the defendant upon a prescription order issued by a practitioner." We ordered counsel to review what evidence at trial supported a finding against Rodenkirch on that element.

In the supplemental no-merit report, counsel points to the fact that Rodenkirch possessed the buprenorphine in an unlabeled container. Counsel asserts that this is sufficient circumstantial evidence to find in the State's favor on the lack of a prescription.

We first note that the supplemental no-merit report misquotes the applicable instruction. The third element in the written instruction contained in the record is as we quoted above, and in our earlier order. Counsel instead quotes, for reasons that are not apparent, a third element that refers to obtaining the drug by fraud, deceit, or willful misrepresentation, or by various other means, none of which include the language we quoted above.

In reviewing sufficiency of the evidence on appeal, we affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that no reasonable trier of fact could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990).

We conclude that it is not frivolous to argue that a person's use of an unlabeled container is not, by itself, sufficient to prove beyond a reasonable doubt that the person possessed the substance without a prescription. Some people carry prescription drugs in unlabeled containers

for convenience when they do not want to carry the entire supply that is contained in the properly labeled container.

Counsel asserts that the State is not required to "produce evidence that they checked with all the local pharmacies and it was established they could find not one apothecary who had issued him a prescription." If counsel is suggesting that the unlabeled container must be sufficient evidence because it would be too hard for the State to produce more evidence, that is a debatable proposition. If proving the lack of a prescription is difficult, that may be a problem of the State's own making in creating the offense or the instruction. However, it is not clear why a defendant would be obliged to solve that problem for the State by accepting a finding of guilt on evidence that does not reach the standard of beyond reasonable doubt.

Furthermore, state statutes and rules create a centralized database of prescriptions that is accessible to law enforcement, *see* WIS. STAT. § 961.385 and WIS. ADMIN. CODE § CSB 4.11(10) (through Dec. 2019), although we do not know whether it was available for use at the time of this case. Inquiry to individual apothecaries may not be necessary.

We emphasize that nothing in this order should be read as indicating that the court has reached any conclusion about any point discussed in it. The purpose of this order is to describe a nonfrivolous line of argument.[2] In subsequent briefing, it is still necessary for counsel to provide a complete presentation to demonstrate the correctness of any argument made.

[2] In reviewing a no-merit brief, the question is whether the potential arguments would be "wholly frivolous." This standard means that the issue is so lacking a basis in fact or law that it would be unethical for counsel to make the argument. *See* ***McCoy v. Court of Appeals of Wis.***, 486 U.S. 429, 436-38 (1988). The test is not whether the attorney expects the argument to prevail. *See* ABA Comment to SCR 20:3.1 (action is not frivolous even though lawyer believes client's position ultimately will not prevail).

IT IS ORDERED that the no-merit report is rejected. The appeal will proceed as a regular appeal with briefing under WIS. STAT. RULE 809.19.

IT IS FURTHER ORDERED that the appellant's brief shall be filed within forty days of the date of this order.

Sheila T. Reiff
Clerk of Court of Appeals