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DISTRICT IV

May 2, 2024

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
Dodge County Justice Facility
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Tony C. Franklin 267634
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You are hereby notified that the Court has entered the following opinion and order:

2023AP81-CRNM State of Wisconsin v. Tony C. Franklin (L.C. # 2020CF195)

Before Blanchard, Nashold, and Taylor, 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).

Appointed counsel for appellant Tony Franklin filed a no-merit report under WIS. STAT. RULE 809.32 (2021-22).¹ Franklin has filed a response. After an independent review of the record, we have concluded that there is one issue with arguable merit, specifically, whether there is an adequate factual basis to support Franklin's plea of no contest. Therefore, we reject the no-merit report, dismiss the appeal without prejudice, and extend the time to file a postconviction motion.

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

Franklin pled no contest to one count of identity theft for financial gain, contrary to WIS. STAT. § 943.201(2)(a). The factual allegations in the complaint, as used to form the factual basis for the plea, that are relevant to our analysis are the following. Franklin, a prison inmate, came into possession of personal identifying information about a person outside the prison. Franklin sent this information to another prisoner through the mail, with a letter in which Franklin suggested that the other prisoner should have “your people” apply for credit cards using the information, and then use those cards to make money that should be shared with Franklin. The letter was intercepted by prison staff before it could reach the other prisoner.

The elements of the offense, as related to these allegations and as used in the plea questionnaire and plea colloquy, are: (1) the defendant intentionally used, attempted to use, or possessed with intent to use, personal identifying information of the named alleged victim; (2) the defendant intentionally used, attempted to use, or possessed with intent to use, personal identifying information of the alleged victim to obtain credit, money, goods, services, employment, or anything else of value or benefit; (3) the defendant acted without the authorization or consent of the alleged victim and knew that the alleged victim did not give authorization or consent; and (4) the defendant intentionally represented that he was the alleged victim, that he was acting with the authorization or consent of the alleged victim, or that the information belonged to the defendant. WIS JI—CRIMINAL 1458.

It would not be frivolous to make the following argument as to the fourth element. Franklin was charged as a person who directly committed the offense. *See* WIS. STAT. § 939.05(2)(a). The language of the fourth element in the instruction, and of the statute itself, is written in the past tense. It requires proof of one of the following: that the defendant “represented” that he “was” the alleged victim, that he “was” acting with the alleged victim’s

permission, or that the information “belonged” to the defendant. Therefore, to obtain a conviction, it must be shown that the defendant actually made one of these three representations. Here, because the complaint failed to allege that Franklin made such a representation, the crime alleged was inchoate, that is, not completed. The prosecution itself appeared to recognize this to some degree at the plea hearing when it clarified that, as to the first two elements, its theory of the case was that Franklin *possessed* the information with intent to use it in violation of WIS. STAT. § 943.201(2)(a), not that he used it or attempted to use it. This clarification was consistent with the language charged in the criminal information.

The no-merit report’s analysis of this element is limited to one sentence: “Mr. Franklin’s proposed scheme of obtaining credit in the victim’s name would have required him to represent that he was the victim or was acting with the victim’s authorization.” This analysis appears to be flawed in at least two ways.

First, the phrases “proposed scheme” and “would have required” are future-oriented phrases that are not consistent with the retrospective focus of the fourth element. In other words, this analysis appears to recognize implicitly that the fourth element was not satisfied by the complaint’s allegations.

Second, this analysis asserts that the scheme would have required Franklin to represent that Franklin was the alleged victim or was acting with that person’s authorization. However, that does not align with the pertinent allegations in the complaint, as summarized above. The allegations are limited to Franklin’s suggestion to the other prisoner that the other prisoner arrange for *other* people to make such representations to obtain financial gain. The allegation of Franklin’s suggestion arguably does not satisfy what appears to be the fourth element’s

requirement that the defendant be the one making the representations, when as here the defendant is charged with directly committing the crime.

Therefore, we conclude that there is an issue with arguable merit. Although we have framed this order in terms of the lack of a factual basis for the plea, we can envision other legal theories for plea withdrawal that might also be based on the same analysis.

We emphasize that nothing in this order should be read as indicating that we have reached any conclusion about any point discussed in it. The purpose of this order is to discuss only the possibility of lines of argument. If any of these issues are litigated later, in circuit court or this court, it will still be necessary for counsel to provide a complete presentation to demonstrate the correctness of any argument made.

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

IT IS FURTHER ORDERED that the time to file a postconviction motion is extended to thirty days from the date of this order.

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

Samuel A. Christensen
Clerk of Court of Appeals