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DISTRICT I

November 2, 2023

To:

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Electronic Notice

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

2021AP1888-CRNM State of Wisconsin v. Tyrun Tyshon Montriel (L.C. # 2016CF5470)

Before White, C.J., Donald, P.J., and Dugan, 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).

Tyrun Tyshon Montriel is appealing a judgment, entered on a jury's verdict, convicting him of one count of armed robbery and two counts of home invasion burglary. Appellant counsel, Hans P. Koesser, has filed a no-merit report, concluding that further postconviction and appellate proceedings would lack arguable merit. *See* WIS. STAT. RULE 809.32 (2021-22);[1] *see also* ***Anders v. California***, 386 U.S. 738 (1967). Upon a review of the record, we conclude that

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

Montriel could raise an arguably meritorious claim related to the trial court's rejection of a potential no contest plea. We emphasize that we have not reached any conclusion about whether such an argument should or would prevail, only that such an argument would not be frivolous within the meaning of RULE 809.32 and ***Anders***.

In the early morning hours of December 5, 2016, J.H. exited her home to check her car, which she had started to warm up before leaving for work. Two masked men, armed with guns, approached her and told her it was a robbery. J.H. ran back inside and tried to lock the door, but she was overpowered. She ran upstairs and was able to call 911. The two men, plus a third, terrorized J.H., her partner D.H., her two children, and her two uncles while demanding money. When the police arrived, the three men fled the home, taking two of D.H.'s guns. The men ran across the back alley and entered a neighboring home by climbing through a kitchen window.

Police had seen the men entering the second home and established a perimeter. A resident of the home let police in, and three men were apprehended—Montriel and Jerrione Certion in a child's bedroom, and Xzavier Glover in an adult's bedroom. Police recovered five guns from the child's room and two rifles concealed in a bush across the driveway from the kitchen window; two of the guns were those taken from D.H. Police also recovered various articles of clothing, including three face masks, from in and around the second home. DNA from Certion and Glover was later confirmed on two of the masks, but there was no DNA evidence directly linking Montriel to the recovered items.[2]

[2] At trial, Montriel's defense was that he had been walking in the alley after an argument with his girlfriend and was approached by three or four masked men running his way. He climbed into the kitchen window to escape, but two of the men followed him in.

The State initially charged Montriel with one count of armed robbery for the theft of D.H.'s guns and one count of home invasion burglary for entering the neighbor's home, both as a party to a crime. The State offered Montriel a deal: in exchange for guilty pleas to the two offenses, the State would recommend ten years' imprisonment for the robbery and two years' imprisonment for the burglary, and it would refrain from issuing a second burglary charge for the entry into J.H. and D.H.'s home. Montriel declined the offer and made a speedy trial demand. The State filed an amended information, adding the second burglary charge.

On the day of trial, a jury was selected shortly before lunch. After the lunch break, as the trial court was preparing to bring the jury in, Montriel's attorney asked, "Can we pause? I think I may have misunderstood something my client may have been trying to tell me. Can I have a moment, please?" Defense counsel then asked the court for "a moment in chambers." When the parties returned to the courtroom, the trial court made a record.

> Okay. We're back on the record. We waited for the jury to come down. We discussed our preliminary instructions, and I was taken -- asked to go into chambers with the parties. It appeared that there needed to be some additional discussion during that conference.
>
> There was a question about whether I'd be willing to accept a no-contest plea from Mr. Montriel. I didn't get any basis that would support it under the law for why that would be. A no-contest plea is reserved for someone who admits to the -- admits that evidence exists as to the conduct but has no memory of it; for example, if they were extremely intoxicated, they could plead no contest because you all say I did this, and I know something happened, I just don't remember what it is. That's a no-contest plea. It's my understanding that's not a factual fit for this case.

The trial court then asked defense counsel, "[H]ow are we proceeding?" Counsel answered, "With the trial, Your Honor." As noted, the jury convicted Montriel on all three charges.

A defendant charged with a crime may plead guilty, not guilty, or, "subject to the approval of the court," no contest. *See* WIS. STAT. § 971.06(1)(a)-(c). Thus, the decision whether to accept a no contest plea is a matter of trial court discretion. *See* ***State v. Martin***, 162 Wis. 2d 883, 904, 470 N.W.2d 900 (1991). A proper exercise of discretion requires the trial court to, among other things, apply a proper standard of law. *See* ***State v. Scott***, 2018 WI 74, ¶39, 382 Wis. 2d 476, 914 N.W.2d 141. "[A]n exercise of discretion based on an erroneous application of the law is an erroneous exercise of discretion." ***State v. Carlson***, 2003 WI 40, ¶20, 261 Wis. 2d 97, 661 N.W.2d 51.

Although there are certainly instances in which a no contest plea was utilized by a defendant claiming no memory of having committed the charged offense, the no contest plea is not "reserved" for only that circumstance.

> A criminal defendant, by pleading no contest, declines to exercise his or her right to put the State to their burden of proving him guilty beyond a reasonable doubt, but does not admit unqualified guilt. Perhaps the defendant is concerned about possible collateral effects; perhaps the defendant does not want to make an admission of guilt. Regardless, when a defendant enters a no contest plea, he or she is not required to admit his or her guilt to every charge, which is precisely the advantage of entering a no contest plea instead of a guilty plea.

State v. Black, 2001 WI 31, ¶15, 242 Wis. 2d 126, 624 N.W.2d 363. Ultimately, a no contest plea "places the defendant in the same position as though he had been found guilty by the verdict of a jury." *See* ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 631, 579 N.W.2d 698 (1998).

The trial court's rejection of the no contest plea also appears to have subsequently impacted the sentence it imposed. After setting the term length on each count, the trial court explained that it was "running each of those [sentences] consecutive to one another. And I understand that is above what the State recommended, but I have heard not … one ounce of

accepting of responsibility[.]" The trial court also cited Montriel's "lack of any sort of responsibility here" when it made him ineligible for both the challenge incarceration and substance abuse programs.

When resolving an appeal under WIS. STAT. RULE 809.32, the question presented to this court is whether, upon review of the entire proceedings, any potential arguments would be "wholly frivolous." *See* ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915; *see also* ***Anders***, 386 U.S. at 744. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, ABA cmt. [2]. The question is only whether any potential arguments or issues so lack a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988).

Based upon the foregoing, we conclude that further proceedings, at least in regard to the trial court's rejection of a no contest plea, would not lack arguable merit or be wholly frivolous.[3]

Therefore,

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

[3] Again, we have reached no conclusion that such a claim should or would prevail, only that pursuing it would not be frivolous. We further note that this decision does not mean we have reached a conclusion about the arguable merit of any other potential issue in the case; Montriel is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Montriel,[4] any such appointment to be made within forty-five days of the date of 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 Montriel or the public defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Montriel to file a postconviction motion is extended until forty-five days after the date on which this court receives notice from the public defender regarding its decision on Montriel's counsel.

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

Samuel A. Christensen
Clerk of Court of Appeals

[4] We observe that current counsel requested twenty-one extensions of time for filing a postconviction motion or notice of appeal before ultimately filing a no-merit notice of appeal. Current counsel also specifically reproduced the trial court's comments rejecting the no contest plea, but made no further comment thereon.