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DISTRICT III

August 27, 2024

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

2022AP1345-CRNM State of Wisconsin v. Dezman V. Ellis (L. C. No. 2021CF130)

Before Stark, P.J., Hruz and Gill, 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).

Attorney Daniel Goggin II has filed a no-merit report seeking to withdraw as appellate counsel for appellant Dezman Ellis. *See* WIS. STAT. RULE 809.32 (2021-22),[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Ellis filed a no-merit response, and counsel then filed a supplemental no-merit report. By prior order, we directed counsel to further address an issue

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

raised in the no-merit response. Counsel has now filed a second supplemental no-merit report. Because the no-merit report and supplemental no-merit reports do not establish that further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and RULE 809.32, we reject the no-merit report.

Pursuant to a plea agreement, Ellis pled no contest to second-degree intentional homicide and first-degree recklessly endangering safety, based on a shooting that occurred when Ellis was seventeen years old. Under the plea agreement, both sides were free to argue at sentencing. The State argued for an aggregate sentence of thirty years' initial confinement followed by twenty years' extended supervision. Ellis argued for a sentence of thirteen years' initial confinement followed by seven years' extended supervision on the second-degree intentional homicide charge, plus a consecutive three-year term of probation on the first-degree recklessly endangering safety charge. The circuit court ultimately imposed a total sentence consisting of forty years' initial confinement followed by twenty-five years' extended supervision.

Ellis asserts in his no-merit response that one of the issues he wishes to raise is that his plea was not knowing, intelligent, and voluntary. Ellis asserts that, at the plea hearing, "he never felt any of the answers were [his] own" but were procured by "undue influence." While the no-merit response does not further explain the basis for this claim, the record also contains a letter, sent to the circuit court after sentencing, where Ellis asserted that his trial counsel was ineffective. In that letter, Ellis alleged that his trial counsel "promised" him that he would be sentenced to fifteen years. Ellis asserted that his counsel told him: "The judge has put a cap on your offer, which means he's bonded [sic] by the law and can't go over 15 years." Ellis also alleged that his counsel told him: "When we get into court[,] just agree with what the judge is saying because he's on our side."

In our order directing no-merit counsel to further address this issue, we noted that counsel concluded in a supplemental no-merit report that the record does not support Ellis's claim that he was forced to give the answers he gave during the plea colloquy. We explained, however, that counsel had not addressed whether there would be arguable merit to a motion for plea withdrawal based on Ellis's claim that his trial counsel promised him that his sentence would be no more than fifteen years and instructed him to "just agree with what the judge is saying." *See* ***State v. Bentley***, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996) (the ineffective assistance of counsel may constitute a manifest injustice warranting plea withdrawal).

No-merit counsel has now filed a second supplemental no-merit report, concluding that there would be no arguable merit to a ***Bentley*** claim for plea withdrawal. No-merit counsel offers the following in support of that conclusion. First, no-merit counsel consulted with Ellis's trial counsel, who denied promising Ellis that the circuit court had placed a cap on the sentence. Rather, trial counsel stated that he met with Ellis prior to the plea hearing and informed him that the court was not bound by any sentencing recommendation. Trial counsel also denied that he told Ellis to just agree with whatever the court said at the plea hearing. No-merit counsel has provided a supporting affidavit from trial counsel to support those assertions.

Second, no-merit counsel states that he has discussed this issue further with Ellis. No-merit counsel states that Ellis told him that his trial counsel informed him that, as part of the plea agreement, the State would recommend fifteen years' initial confinement followed by fifteen years' extended supervision. Ellis also told no-merit counsel that his trial counsel told him to just agree with any questions by the circuit court at the plea hearing at the time that Ellis completed the plea questionnaire. No-merit counsel has filed an affidavit averring to that conversation.

No-merit counsel concludes that the evidence in support of Ellis's assertions is not more persuasive than the evidence opposing those assertions. No-merit counsel notes three assertions by Ellis that could potentially support a ***Bentley*** motion: (1) that his trial counsel promised him that the circuit court had capped the sentence at fifteen years; (2) that his trial counsel misinformed him that, as part of the plea agreement, the State would recommend a sentence of fifteen years' initial confinement; and (3) that his trial counsel told him to just agree with whatever the judge said at the plea hearing. No-merit counsel asserts that Ellis has no evidence to corroborate his assertions and that Ellis has not been consistent as to whether the purported fifteen-year sentencing cap originated with the court or the State.

No-merit counsel argues that the following evidence disputing Ellis's assertions is more persuasive: (1) language in the plea questionnaire listing the maximum potential sentences and stating that the circuit court was not bound by any plea agreement and could sentence Ellis up to the maximum; (2) the portion of the plea colloquy concerning that same information; (3) a lack of any evidence in the record that, as part of the plea agreement, the State agreed to limit its recommendation to fifteen years' initial confinement; (4) trial counsel's assertions disputing Ellis's claims; and (5) Ellis's apparent engagement with the plea colloquy, as demonstrated by his asking for clarification and answering "no" to a question by the court. Thus, no-merit counsel concludes, Ellis's claims are not persuasive against the evidence opposing them.

When resolving an appeal under WIS. STAT. RULE 809.32, the question is whether a potential issue would be "wholly frivolous." ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her 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. *See* ***McCoy v. Court of Appeals of Wis.***, 486 U.S. 429, 436 (1988). In light of the foregoing, we must reject the no-merit report filed in this matter.

No-merit counsel concludes that Ellis's claims that he received misinformation from his trial counsel that induced him to enter his plea would not be persuasive when weighed against contrary evidence. However, counsel's position would require this court to resolve disputes of fact regarding the information trial counsel provided and Ellis's claimed reliance on that information. This court does not engage in fact finding. *See* ***Lange v. LIRC***, 215 Wis. 2d 561, 572, 573 N.W.2d 856 (Ct. App. 1997).

Ultimately, counsel's supplemental no-merit report has not persuaded us that further proceedings would be wholly frivolous. Therefore, we will reject the no-merit report, dismiss this appeal without prejudice, and authorize the filing of a postconviction motion. We add that our decision does not mean that we have reached a conclusion on the arguable merit of any potential issue in this case. Ellis is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

Upon the foregoing,

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

IT IS FURTHER ORDERED that, if successor counsel is to be appointed by the State Public Defender, the appointment shall be made within thirty days of the date of this order.

IT IS FURTHER ORDERED that the time for filing a postconviction motion under WIS. STAT. RULE 809.30 is extended to sixty 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