OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT I

August 27, 2013

To:

Hon. Kevin E. Martens
Circuit Court Judge
Safety Building Courtroom, # 502
821 W. State Street
Milwaukee, WI 53233-1427

John Barrett
Clerk of Circuit Court
Room 114
821 W. State Street
Milwaukee, WI 53233

Karen A. Loebel
Asst. District Attorney
821 W. State St.
Milwaukee, WI 53233

Dennis Schertz
Schertz Law Office
P.O. Box 133
Hudson, WI 54016

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Jose M. Garcia 263097
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

Joseph N. Ehmann
State Public Defenders Office
P.O. Box 7862
Madison, WI 53707-7862

Jeremy C. Perri
First Asst. State Public Defender
735 North Water Street, Suite 912
Milwaukee, WI 53202

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

2012AP586-CRNM State of Wisconsin v. Jose M. Garcia (L.C. #2010CF965)

Before Curley, P.J., Kessler and Brennan, JJ.

Jose M. Garcia is pursuing an appeal with the assistance of Attorney Dennis Schertz pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2011-12).[1]

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Attorney Schertz filed a no-merit report and a supplemental no-merit report on Garcia's behalf. Garcia did not file a response. Upon review of the no-merit report, the supplement, and the record, we conclude that this matter presents an issue of arguable merit. Therefore, we reject the no-merit report, dismiss this appeal without prejudice, and extend the deadline for Garcia to file a postconviction motion or notice of appeal pursuant to WIS. STAT. RULE 809.30 and WIS. STAT. § 974.02.

A jury found Garcia guilty of one count of repeated sexual assault of the same child. *See* WIS. STAT. § 948.025(1)(e) (2009-10). The statute provides that a person is guilty of a class C felony if he or she commits three or more sexual assaults as defined by WIS. STAT. § 948.02(1) or (2) (2009-10) that involve the same child within a specified period of time.

The criminal complaint and information specified the period of time at issue as February 2006 through February 2010. During the trial, the circuit court permitted the State, over Garcia's objection, to amend the applicable time period to include the period from February 2004 through February 2006.

In the no-merit report, Attorney Schertz asserts that the circuit court properly exercised its discretion to permit the amendment because Garcia knew that he was not living with the child and the child's family during the period from October 2007 through October 2009 and therefore was not prejudiced. Because this explanation only addresses a time period included in the original charging documents, we asked Attorney Schertz to file a supplemental no-merit report to address the period from February 2004 through February 2006. Counsel filed a supplemental no-merit explaining that Garcia was not prejudiced by the amendment including that time period because, at trial, the child alleged conduct occurring only during the period "from 2008 through

2010." Counsel further explained that, in his view, "it would be different if [Garcia] was accused of having committed a sexual assault against this girl in 2005."

Our review of the record discloses that the evidence presented to the jury includes a DVD of the child giving a statement to an investigating officer in 2010. The child told the officer that Garcia had lived with the family for six years and touched her inappropriately for six years.

When the State proposed a mid-trial amendment to the charging period, Garcia, through trial counsel, told the circuit court that he had investigated and prepared his case in light of the time period specified in the charging documents, namely, February 2006 through February 2010. The record suggests that the investigation was fruitful, because the State did not dispute at trial that, during two of those years, Garcia did not live with the child and the child's family. The State, however, successfully amended the charging period mid-trial to include a period that Garcia explained he had no reason to pursue in developing a defense to the charge against him.

In cases involving allegations of child sexual assault, as in other criminal matters, "a defendant's due process and sixth amendment rights to fair notice of the charges and fair opportunity to defend may not be ignored or trivialized." ***State v. Fawcett***, 145 Wis. 2d 244, 250, 426 N.W.2d 91 (Ct. App. 1988). In ***Fawcett***, we considered the analysis applicable when charging documents alleged first-degree sexual assaults of a child during a six-month period, and the defendant claimed that the time frame alleged afforded him inadequate notice. We observed:

> [a] criminal charge must be sufficiently stated to allow the defendant to plead and prepare a defense. However, where the date of the commission of the crime is not a material element of the offense charged, it need not be precisely alleged. Time is not of the essence in sexual assault cases, and the pertinent statute, WIS. STAT. § 940.225(1)(d), does not require proof of an exact date.

Fawcett, 145 Wis. 2d at 250 (citations omitted). We went on to consider and apply a multi-factor analysis, and we concluded that the charging period was reasonable and adequately informed the defendant of the charges against him. ***Id.*** at 253-54.

The instant case involves a charge under WIS. STAT. § 948.025(1)(e), which requires proof of conduct "within a specified period of time." The considerations at issue may vary from those we discussed in ***Fawcett***. We conclude that such an argument would not entirely lack arguable merit.

When a lawyer files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See* ***Anders***, 386 U.S. at 744. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, comment. Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for counsel to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S.429, 436 (1988). Because the record indicates that Garcia can pursue an arguably meritorious claim that the mid-trial amendment deprived him of adequate notice of the charge and a fair opportunity to defend against it, the no-merit report is rejected.

Therefore,

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

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender for the possible appointment of new-counsel, any such appointment to be made within thirty days after the date of this order.

IT IS FURTHER ORDERED that the Office of the State Public Defender shall promptly notify this court either when new counsel is appointed or when the State Public Defender concludes that no change in counsel will be made.

IT IS FURTHER ORDERED that counsel for Garcia may file a postconviction motion or notice of appeal within sixty days of either the date on which new counsel is appointed or the date on which the public defender's office advises this court that new counsel will not be appointed, whichever is applicable.

Diane M. Fremgen
Clerk of Court of Appeals