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 III/II

September 25, 2013

To:

Hon. Michael A. Schumacher
Circuit Court Judge
721 Oxford Avenue
Eau Claire, WI 54703-5496

Kristina Aschenbrenner
Clerk of Circuit Court
Eau Claire County Courthouse
721 Oxford Avenue
Eau Claire, WI 54703-5496

Dan Chapman
P.O. Box 186
Hudson, WI 54016-0186

Gary M. King
District Attorney
721 Oxford Ave
Eau Claire, WI 54703

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

Ronald G. Sorenson 55615
Racine Corr. Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2013AP6-CRNM State of Wisconsin v. Ronald G. Sorenson (L.C. #2011CF424)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Ronald G. Sorenson appeals from a judgment imposing sentence after the revocation of probation on his convictions for bail jumping and battery to a law enforcement officer. His appointed appellate counsel, attorney Dan Chapman, filed a no-merit report under WIS. STAT. RULE 809.32 (2011-12).[1] An August 13, 2013 order required Chapman to file a supplemental no-merit report addressing whether there was arguable merit to Sorenson's contention in his response to the no-merit report that he was sentenced upon inaccurate information. Although the

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

supplemental no-merit report concludes that there is no arguable merit to Sorenson's claim, we do not agree. We reject the no-merit report and dismiss the appeal because we cannot conclude there are no claims of arguable merit for postconviction relief. We deny Chapman's motion to withdraw and extend the time for Sorenson to file a postconviction motion under WIS. STAT. RULE 809.30 by sixty days.

Sorenson's probation status was revoked June 26, 2012. He returned to the court for sentencing after revocation on August 10, 2012. During his allocution at sentencing, Sorenson denied all but three of the sentencing revocation allegations. In response, the prosecutor recounted that Sorenson had eight probation revocation violations, including that Sorenson had possessed pornography.[2] The sentencing court noted: "The violations occurring between October of 2011 and May of 2012 include use of alcohol, contact with his grandchildren, *viewing pornography*, taking medications prescribed to others, contact with Ms. Hanson." (Emphasis added.)

In his response to the no-merit report, Sorenson points out the administrative law judge (ALJ) in his revocation matter determined that Sorenson did not violate the rule against possessing and watching pornography. The ALJ's decision states: "The Department alleges that the offender possessed and viewed pornography. However, the offender admitted watching R-

[2] Due to prior sex offenses and because the bail jumping charge occurred when Sorenson was having prohibited contact with a minor, one of the court-ordered conditions of probation was that Sorenson was to follow sex offender registration requirements and rules. An amended notice of violations alleged seven violations. In paragraph three it was alleged that: "Between on or about 10/21/11, and 05/10/12, Ronald Sorenson did possess and view pornography. This behavior is in violation of rule[] #1 of the Rules of Community Supervision and rule #8 of the Standard Sex Offender Rules both signed by the aforesaid on 10/21/11."

rated movies such as Sex in the City. The Department did not establish that they were pornographic. He did not violate his rules as alleged in allegation three."[3]

A defendant may seek resentencing if the court imposed a sentence on the basis of inaccurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. To secure resentencing, however, the defendant must prove both that the court was presented with inaccurate information and that the court actually relied on that misinformation in reaching the sentence imposed. ***Id.***, ¶26.

The supplemental no-merit report concludes that information that Sorenson viewed pornography was not inaccurate because the sentencing court was informed of Sorenson's admission to his probation agent that he watched movies where people had sex.[4] Contrary to the assertion in the supplemental no-merit report that the sentencing court was not told which probation violations were proven at the revocation hearing, the prosecutor told the sentencing court that Sorenson had eight probation violations and, therefore, implied that all the probation violations were proven. Moreover, the prosecutor specifically drew attention to the seriousness of the violations "particularly number four [sic], that he possessed pornography." The

[3] Although the circuit court was provided a probation revocation packet which included the allegations against Sorenson, the ALJ's decision is not part of the packet. Consequently, the ALJ's decision is not in the appellate record. The decision is attached to the supplemental no-merit report. Sorenson also provides an incomplete copy of the ALJ's decision in his response to the supplemental no-merit report. Sorenson also provides a copy of the July 17, 2012 appeal decision by the administrator of the Division of Hearing and Appeals which sustained the ALJ's decision.

[4] The sentencing court indicated it had reviewed the entire revocation packet. The probation summary, a form that lists the probation violation allegations, includes a description of probation violations, and makes a recommendation for sentencing, recounted Sorenson's admission that "he watches adult movies 'where people have sex.'" Notably the probation summary form does not indicate the finding that Sorenson did not violate rules as alleged in allegation number three. As noted earlier, the ALJ's decision was not part of the revocation packet.

sentencing court also referred to viewing pornography as a violation. There is arguable merit to a claim that information at sentencing regarding the number and nature of probation violations Sorenson committed was inaccurate.[5]

The supplemental no-merit report also concludes that even if the information that Sorenson viewed pornography was inaccurate, the sentencing court did not rely upon the information because it only mentioned it in passing and did not call any specific attention to it. Whether the court "actually relied" on the incorrect information at sentencing "turns on whether the [sentencing] court gave 'explicit attention' or 'specific consideration' to the inaccurate information, so that the inaccurate information 'formed part of the basis for the sentence.'" ***State v. Travis***, 2013 WI 38, ¶28, 347 Wis. 2d 142, 832 N.W.2d 491 (quoted source omitted). ***Travis*** recognizes that it can be a difficult task to determine whether the sentencing court actually relied on information, although the task is made easier when the sentencing court "expressly paid heed to the inaccurate information."[6] ***Id.***, ¶¶29, 30. Given the difficulty of the task, we are unable to conclude that there is no arguable merit to a claim that the sentencing court actually relied on the information regarding the number and nature of Sorenson's probation violations. The question is not, as the supplemental no-merit report suggests, whether the sentence was appropriate for other

[5] The supplemental no-merit report also suggests that the sentencing court could take a different view than the ALJ on whether movies in which people have sex is pornography or not: "The mere fact that the Department of Corrections was unable to prove at a revocation hearing that the DVD in question *was* pornography is not clear and convincing evidence that is *wasn't*." We need not consider the possibility that the sentencing court would conclude the movie was pornography because the court was relying on violations found by the ALJ.

[6] In ***State v. Tiepelman***, 2006 WI 66, ¶30, 291 Wis. 2d 179, 717 N.W.2d 1, the supreme court concluded, based on the one inaccurate statement by the sentencing court of the number of prior convictions reflected in the presentence investigation report, that Tiepelman had met his burden of showing that the sentencing court actually relied on inaccurate information in reaching its decision on sentencing.

reasons. ***Id.***, ¶47. That contention rests on a harmless error analysis and it is the State's burden to prove harmless error.[7] *See* ***id.***, ¶66.

Finally, we observe that Sorenson's sentencing counsel was not his attorney at the revocation hearing. It is unknown, and appointed counsel has made no effort to clarify, whether sentencing counsel knew of the results of the revocation proceeding and the finding that Sorenson was not found to have violated probation rules with respect to possessing and viewing pornography. Despite the presumption that trial counsel has rendered adequate assistance and exercised reasonable professional judgment, ***State v. Byrge***, 225 Wis. 2d 702, 719, 594 N.W.2d 388 (Ct. App. 1999), *aff'd*, 2000 WI 101, 237 Wis. 2d 197, 614 N.W.2d 477, we cannot conclude that there is no arguable merit to a potential claim that sentencing counsel was constitutionally deficient in not objecting when the prosecution indicated that Sorenson had eight probation violations.

As his response to the supplemental no-merit report Sorenson provides copies of letters filed with the clerk of the circuit court, the district attorney, and the circuit court judge at the end of August 2013. By those letters Sorenson provides a copy of the ALJ's revocation decision and asserts that he was sentenced upon inaccurate information and his prison classification is affected by the inaccuracy. It appears that Sorenson seeks to pursue the issue that has arguable merit. We reject the no-merit report, dismiss the appeal, and extend the time for Sorenson to file a

[7] Because it is the State's burden to establish harmless error and the State does not respond in a no-merit appeal, we will not consider harmless error. A defendant may be entitled to advocacy of counsel on the question of harmless error.

postconviction motion. Chapman's motion to withdraw is denied and appointed counsel's representation continues.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected, appointed counsel's motion to withdraw is denied, and the appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the time for filing a notice of appeal or postconviction motion under WIS. STAT. RULE 809.30(2)(h), is extended to sixty days from the date of this opinion and order. *See* WIS. STAT. RULE 809.82(2)(a).

Diane M. Fremgen
Clerk of Court of Appeals