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DISTRICT II

November 14, 2013

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

2012AP2816-CRNM State of Wisconsin v. Adam Garcia (L.C. # 2010CF1082)

Before Brown, C.J., Reilly and Gundrum, JJ.

Counsel for Adam Garcia has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding there is no basis for appealing a judgment of conviction entered upon Garcia's guilty plea to one count of operating a motor vehicle while intoxicated as a fourth offense within five years, a Class H felony, contrary to WIS. STAT. §§ 346.63(1)(a), 346.65 (2)(am)4m, and 939.50(3)(h) (2011-12).[1] Garcia has not responded. Although our initial review

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

of the record shows no other issues of arguable merit,[2] we cannot conclude there is no arguable issue with regard to the trial court's exercise of sentencing discretion because it never considered whether Garcia was eligible for the earned release program (ERP) as required by WIS. STAT. § 973.01(3g). We therefore reject the no-merit report.

According to the criminal complaint, a city of Kenosha police officer saw Garcia exit a parking lot and fail to yield to oncoming traffic, causing another car to brake quickly to avoid a collision. The officer pulled in behind Garcia at a red light and when the light turned green, Garcia accelerated quickly, squealing his tires. The officer also noted that Garcia's car was swerving and moving faster than the posted speed limit. The officer stopped Garcia and immediately noticed signs of intoxication. Garcia was arrested and charged with: (1) operating a motor vehicle while intoxicated as a fourth offense within five years; (2) operating a motor vehicle after revocation; and (3) misdemeanor bail jumping.[3]

As part of a negotiated settlement, Garcia pled guilty to count one, OWI fourth offense within five years, and to a charge of operating while intoxicated in a separate case, No. 2010CT727. In exchange, the State moved to dismiss counts two and three in the present

[2] Appointed counsel's no-merit report asserts that Garcia does not wish to withdraw his plea, and forgoes any meaningful discussion of the plea taking in the case, relying on language from a foreign case, ***United States v. Knox***, 287 F.3d 667, 670-72 672 (7th Cir. 2002). ***Knox*** addresses permissible no-merit procedures in the context of the Federal Rules and we are not persuaded that its rationale applies to state criminal cases. Generally, a no-merit report which neglects to analyze the validity of a criminal defendant's plea is considered a "partial no-merit" and fails to comply with WIS. STAT. RULE 809.32 (1)(a). *See* ***State ex rel. Ford v. Holm***, 2006 WI App 176, ¶¶11-12, 296 Wis. 2d 119, 722 N.W.2d 609. Our initial assessment that no other arguably meritorious issues exist is based on our independent review of the record in this case.

[3] Each charge added a penalty enhancer for habitual criminality under WIS. STAT. § 939.62(1)(a) or (b), which was later dismissed when it was determined that the predicate crimes were not committed by Garcia.

case, and all counts in another separate case, No. 2010CF448. The presentence investigation report prepared for sentencing stated that Garcia was statutorily eligible for the ERP. At sentencing on April 13, 2012, the trial court imposed a six-year bifurcated sentence consisting of three years each of initial confinement and extended supervision. The court stayed the sentence in favor of a two-year term of probation with numerous conditions, including six months of conditional jail time. However, the trial court neglected to make a finding as to whether Garcia was eligible for the ERP.

WISCONSIN STAT. § 973.01(3g) provides that when imposing a bifurcated sentence for all but certain enumerated crimes, "the court shall, as part of the exercise of its sentencing discretion, decide whether the person being sentenced is eligible or ineligible to participate in the earned release program under s. 302.05 (3) during the term of confinement in prison portion of the bifurcated sentence." In this case, Garcia was convicted of a crime for which the ERP is permitted, and the trial court imposed a bifurcated sentence. Though the court stayed imposition of the sentence, in the event of revocation, Garcia will not return to court for sentencing but will be transported directly to prison. Therefore, the trial court should have determined whether Garcia would be eligible to participate in the ERP in the event of his revocation, and we cannot conclude that Garcia's appeal is wholly without merit. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 437 (1988) (no-merit should not proceed unless appeal would be wholly frivolous). Accordingly, we reject the no-merit report, dismiss the appeal and direct counsel to consult with

Garcia to discuss whether he wishes to file a postconviction motion on the issue of ERP eligibility.[4]

Upon the foregoing,

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

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

Diane M. Fremgen
Clerk of Court of Appeals

[4] For example, pursuant to WIS. STAT. RULE 809.32(1)(b)1, Garcia may request that counsel close his file without an appeal. Regardless, counsel should remind Garcia of his remaining options under RULE 809.32(1)(b).