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DISTRICT I

December 11, 2013

To:

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

2013AP593-CRNM State of Wisconsin v. Brian Gregory Markiewicz
(L.C. #2010CF6305)

Before Fine, Kessler and Brennan, JJ.

Brian Gregory Markiewicz appeals a judgment convicting him of burglary. Carl W. Chesshir, Esq., filed a no-merit report seeking to withdraw as counsel. *See* WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738, 744 (1967). Markiewicz filed a response. After considering the no-merit report and the response, and after conducting an independent review of the Record, we have identified an issue of arguable merit. Therefore, we reject the no-merit report. *See* WIS. STAT. RULE 809.21.

To ensure that a defendant is knowingly, intelligently, and voluntarily waiving the right to trial by entering a guilty plea, the circuit court must conduct a colloquy with a defendant to ascertain that the defendant understands the elements of the crimes to which he is pleading guilty, the constitutional rights he is waiving by entering the plea, and the maximum potential penalties that could be imposed. See WIS. STAT. § 971.08, and *State v. Bangert*, 131 Wis. 2d 246, 266–272, 389 N.W.2d 12, 16 (1986). The circuit court must also “advise the defendant personally on the record that the court is not bound by any plea [bargain] and ascertain whether the defendant understands the information.” *State v. Hampton*, 2004 WI 107, ¶20, 274 Wis. 2d 379, 390, 683 N.W.2d 14, 20. The circuit court may not rely on the plea questionnaire to infer that the defendant understands that it is not bound by the plea bargain:

The circuit court cannot satisfy its duty by inferring from the plea questionnaire or from something said at the plea hearing or elsewhere that the defendant understands that the court is not bound by the plea [bargain]. The court must make certain through dialogue that the defendant understands that the court is not bound by other people’s promises. The plea questionnaire may be used to aid the court (or the prosecutor or defense counsel) in explaining, on the record at the plea hearing, the court’s role in sentencing. But the court must ask the question that ascertains that the defendant understands what he has been told.

Id., ¶69, 274 Wis. 2d at 410, 683 N.W.2d at 29.

The plea questionnaire that Markiewicz acknowledged reviewing and signing informed him that the circuit court was not bound by the plea bargain, but the circuit court did not ask Markiewicz personally during the plea colloquy whether he understood that the circuit court was

not bound by the plea bargain. In his response, Markiewicz states that he thought that the plea bargain was binding. Under *Hampton*, this presents an issue of arguable merit.¹

Accordingly,

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

IT IS FURTHER ORDERED that the time to file a postconviction motion or notice of appeal is extended until sixty days from the date of this order.

Diane M. Fremgen
Clerk of Court of Appeals

¹ In discussing the plea bargain issue in this order, we do not mean to suggest that this is the only issue of arguable merit. That is a determination that we leave to Markiewicz's lawyer.