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DISTRICT II

February 12, 2014

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

2013AP489-CRNM State of Wisconsin v. Jose A. Serra (L.C. # 2009CF487)

Before Neubauer, P.J., Reilly and Gundrum, JJ.

Jose Serra appeals from a judgment convicting him of possessing body armor as a convicted felon contrary to WIS. STAT. § 941.291(2)(a) (2009-10). Serra's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)¹ and *Anders v. California*, 386 U.S. 738 (1967). After we reviewed the no-merit report and independently reviewed the

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

record as mandated by *Anders* and RULE 809.32, we required appellate counsel to further investigate the question of sentence credit.

At sentencing, Serra asked for sentence credit. The circuit court responded that because it imposed a sentence consecutive to a sentence after revocation of extended supervision, any credit would be awarded against the post-revocation sentence. The court stated that if Serra was entitled to credit, he would receive it. The judgment of conviction does not grant sentence credit.

In his no-merit report, appointed appellate counsel briefly addressed sentence credit and concluded that no credit was available. Because the record did not clearly support counsel's conclusion, we required counsel to investigate and consult with Serra regarding this issue.

Counsel filed a supplemental no-merit report and provided us with documents from the Department of Corrections and the Racine County jail to substantiate counsel's conclusion that no sentence credit is due. In a response to counsel's no-merit report, Serra claims that he is entitled to sentence credit. The circuit court has never made any findings about sentence credit based on the records provided to us by appellate counsel.

In a WIS. STAT. RULE 809.32 no-merit appeal, we can only affirm a conviction if an appeal would lack arguable merit. RULE 809.32(3). Serra's supervision, revocation, jail and prison history is complex, and the answer to the question about sentence credit is not self-evident from the materials before this court. To determine whether there would be arguable merit to a sentence credit claim, we would have to make findings based upon the record and the supplemental materials. We are precluded from finding facts. *Kovalic v. DEC Int'l*, 186 Wis. 2d 162, 172, 519 N.W.2d 351(Ct. App. 1994).

Because the record on appeal and the supplemental materials do not permit us to conclude that a sentence credit request would lack arguable merit, we reject the no-merit report and reinstate the WIS. STAT. RULE 809.30 postconviction deadlines to permit postconviction proceedings, including proceedings relating to sentence credit. If the circuit court is asked to address sentence credit, the circuit court shall make detailed findings of fact regarding all aspects of the sentence credit claim to provide this court with an adequate record for a future review.²

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion is reinstated and extended to May 16, 2014.

Diane M. Fremgen
Clerk of Court of Appeals

² Because we reject the no-merit report and dismiss this appeal, we do not address any issues raised by Serra in his response to counsel's supplemental no-merit report.