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DISTRICT IV

February 18, 2014

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

2013AP1214-CRNM State of Wisconsin v. Keyon Nathaniel Barker (L.C. # 2011CF328)

Before Lundsten, Higginbotham and Kloppenburg, JJ.

Appointed counsel for Keyon Barker has filed a no-merit report under WIS. STAT. RULE 809.32 (2011-12).¹ We dismiss the appeal as improperly filed.

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

The no-merit report asserts that Barker's plea colloquy was defective and that he is entitled to a fact-finding hearing on that issue, if he chooses. The report further notes that, if Barker were to be successful at withdrawing his plea, that would also have the effect of reinstating other charges that were dismissed. The report states: "The decision as to whether to pursue this remedy is solely that of Mr. Barker." The conclusion of the report states: "Mr. Barker may pursue post-conviction relief due to defects in the plea colloquy, but doing so would be accompanied by a substantial risk of increased penalties."

We are unable to see at this point why counsel filed a no-merit appeal. A no-merit appeal, by definition, is to be filed in cases where counsel concludes there are *no* issues with arguable merit. WIS. STAT. RULE 809.32(1)(a). Here, it appears that counsel has concluded there is one issue with arguable merit.

What is not clear is whether Barker has made a decision about whether to pursue that issue. If that decision has not occurred, Barker must make that choice. However, whichever path Barker chooses, a no-merit report is not appropriate. If Barker chooses to seek plea withdrawal, counsel would then file a postconviction motion seeking that relief, not a no-merit appeal.

If Barker chooses *not* to seek plea withdrawal, a no-merit report would again be inappropriate, because counsel has not concluded that there are no issues with arguable merit. After counsel finds one non-frivolous issue but a defendant chooses not to pursue it, the defendant is not entitled to a no-merit review to find a second issue that might be more to the defendant's liking. See *State ex rel. Ford v. Holm*, 2006 WI App 176, ¶¶9-12, 296 Wis. 2d 119, 722 N.W.2d 609.

Therefore,

IT IS ORDERED that this appeal is dismissed without prejudice.

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

Diane M. Fremgen
Clerk of Court of Appeals