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DISTRICT II

April 18, 2014

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

2012AP1526-CRNM State of Wisconsin v. Jason J. Harvestine (L.C. # 2011CF723)

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

Jason Harvestine appeals from a judgment convicting him of second-degree sexual assault of a child contrary to WIS. STAT. § 948.02(2) (2011-12)¹ on his guilty plea. Harvestine's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967). Harvestine received a copy of the report and filed a response to it. In his response, Harvestine raised a claim of ineffective assistance of trial counsel. We

¹ All subsequent references to the Wisconsin Statutes are to the 2011-12 version.

required appellate counsel to investigate this claim, consult with Harvestine and advise the clerk of this court whether this claim has arguable merit for appeal. Appellate counsel filed a supplemental no-merit report and affidavits from himself and trial counsel. Harvestine then filed a response to the supplemental no-merit report.

Our review of the record reveals an issue with arguable merit relating to the plea colloquy. For that reason, we reject the no-merit report, dismiss this appeal and reinstate the time under WIS. STAT. RULE 809.30 for filing a postconviction motion.

In his response to counsel's supplemental no-merit report, Harvestine claims that he was taking an anti-depressant and that the medication made it hard for him to focus at the plea hearing.

On the plea questionnaire, dated the same date as the plea hearing, Harvestine checked the "yes" box for currently receiving treatment for a mental illness or disorder. He also checked the "have" (or "yes") box in response to a question about whether he had "had any alcohol, medications or drugs within the last 24 hours."

At the plea hearing, the circuit court did not inquire about the claimed mental illness or disorder or about any medications or their effect on Harvestine. At one point during the colloquy, the circuit court observed that Harvestine appeared confused, and later in the hearing, the court adjourned so that Harvestine could consult with counsel. Harvestine now claims that the medications affected his ability to focus at the plea hearing.

The record before us implicates the circuit court's duty to determine Harvestine's "general comprehension so as to assess the defendant's capacity to understand the issues at the

[plea] hearing.” *State v. Hoppe*, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. The issue Harvestine raises is not resolved in the record and potentially permeates the plea hearing. We cannot conclude on this record that a challenge to the guilty plea on this basis would lack arguable merit.²

Because an issue with arguable merit is present, we cannot determine that further proceedings would be without arguable merit. WIS. STAT. RULE 809.32(3). Therefore, we reject the no-merit report, dismiss this appeal and reinstate the time for filing a WIS. STAT. RULE 809.30 postconviction motion.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this appeal is dismissed in favor of further proceedings under WIS. STAT. RULE 809.30.

IT IS FURTHER ORDERED that the time for filing a WIS. STAT. RULE 809.30 postconviction motion is extended to June 20, 2014.

Diane M. Fremgen
Clerk of Court of Appeals

² Because we reject the no-merit report, we do not address any other potential appellate issues.