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December 7, 2015

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

2014AP1059-CRNM State of Wisconsin v. Michael Wilkins (L.C. #2012CF3462)

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

Appointed counsel for Michael Wilkins has filed a no-merit report under WIS. STAT. RULE 809.32 (2013-14).¹ Based on our review of the record, we reject the no-merit report, dismiss the appeal, and extend the time to file a postconviction motion.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

The first issue we discuss is whether it would be frivolous for Wilkins to allege that his trial counsel was ineffective by not sufficiently explaining to him the terms of a plea offer from the State. Wilkins rejected the offer and went to trial.

The plea offer, as described on the record, was that the State would amend the charge from second-degree sexual assault of a child to third-degree sexual assault. Further, the State would recommend that a sentence be imposed and stayed, consisting of three years of initial confinement and three years of extended supervision, with Wilkins placed on three years of probation.

From the no-merit report and Wilkins' response to it, we understand the potential claim to be that Wilkins did not understand what an imposed and stayed sentence meant, and erroneously believed that under this proposed agreement he would serve the sentence term described in the agreement, rather than being given probation.

In the no-merit report, appellate counsel states that in his "discussions with Wilkins, it truly seemed that Wilkins did not understand what 'stayed' meant – in that he would have been given an opportunity to avoid prison time altogether had he accepted the plea." However, counsel concludes that the issue is frivolous because "the record does sufficiently demonstrate that Wilkins did understand essential elements of the plea offer."

If Wilkins were to file a motion alleging that he did not understand the plea offer, it may be considered a motion under *State v. Bentley*, 201 Wis. 2d 303, 548 N.W.2d 50 (1996). Under *Bentley*, a defendant is entitled to an evidentiary hearing if the motion alleges facts that, if true, would entitle the defendant to relief. *Id.* at 310. Current counsel for Wilkins appears to hold the legal opinion that if it is true that Wilkins did not understand the plea offer, because he did not

understand what “imposed and stayed” meant, that would be a fact entitling him to relief. We agree that such an argument is not frivolous.

However, even if Wilkins meets that standard, a court can still deny the motion without a hearing if the record conclusively demonstrates that the defendant is not entitled to relief. *Id.* at 309-11. Here, current counsel appears to have decided that the record conclusively demonstrates that Wilkins is not entitled to relief, and that it would be frivolous to argue otherwise. We disagree with that conclusion.

It is not frivolous to argue that the record fails to “conclusively” show that Wilkins understood the meaning of an “imposed and stayed” sentence. As far as we can see, the concept of “imposed and stayed” was never explained on the record.

In addition, Wilkins’ answers to two questions asked by the circuit court appear to potentially support his claim. When the court was confirming Wilkins’ rejection of the plea offer before starting the trial, the court twice asked Wilkins what penalty he was facing. Each time Wilkins replied, “3 years.” The court was not satisfied with that answer, because the court believed it was asking about the maximum statutory penalty.

Wilkins’ answers arguably show that he understood the circuit court’s questions to be asking what sentence he would *actually serve under the plea agreement* if he was found guilty, and was then sentenced in accord with the State’s recommendation. It can reasonably be argued that the court’s questions, in the context of the discussion at the time, could reasonably be interpreted by the defendant as asking what penalty Wilkins was facing *under the plea agreement* that the court was then attempting to establish his understanding of. It was not until later in the exchange that the court made clear that it was asking about Wilkins’ understanding of

the statutory maximum penalty for the charge he would be going to trial on, if he persisted in rejecting the plea offer. Arguably Wilkins' answers would support a claim that, at the time of the plea, he did not understand that the three-year term of initial confinement would be stayed in favor of probation, and that instead he expected to serve that time, if he accepted the plea.

The answers arguably create an ambiguity in the record that, together with the fact that "imposed and stayed" was never explained on the record, makes it non-frivolous for Wilkins to argue that the record fails to "conclusively demonstrate" that he is not entitled to relief. If the record is not conclusive, Wilkins may then be entitled to an evidentiary hearing at which he can testify and allow the circuit court to evaluate his credibility, because normally courts do not decide reasonably disputable questions of fact based solely on paper records.

We also address an additional issue, although we are not relying on this issue as a basis to reject the no-merit report. The issue relates to a line of questioning by the State when Wilkins testified. In the no-merit report, current counsel notes that trial counsel objected to this line of questioning, but the circuit court allowed it. The no-merit report concludes that no claim of ineffective assistance can be made, because "if there was unfair prejudice due to this line of questioning, it was an error permitted by the Court."

The no-merit report does not discuss whether the circuit court's evidentiary ruling itself can be *directly* attacked with a non-frivolous argument on appeal. Instead, counsel states:

Whether or not this line of questioning prejudiced the defendant's right to a fair trial, appellate counsel leaves to the discretion of this Court. Appellate counsel requests that this Court consider this issue regardless of the filing of this no-merit report, as the potentially problematic nature of this line of questioning only came to counsel's attention during the drafting of this report.

Current counsel appears to be confused about the nature of the decision he must make, and what our role is in a no-merit appeal. It was counsel’s job to decide, before filing a no-merit report, whether this issue is frivolous. Similarly, our only function in reviewing a no-merit appeal is to decide whether the issue is frivolous. If we conclude an issue is not frivolous, we order counsel to continue further proceedings based on that issue. We do not “consider [an] issue regardless of the filing of [a] no-merit report” when counsel considers the issue “potentially problematic.”

Therefore, as to this issue, because it appears that counsel has not reached a decision about whether it is frivolous, or has concluded that it is *not* frivolous, we decline to state any opinion about whether this issue is frivolous. Counsel should consider further whether to raise this issue in proceedings that may occur after the dismissal of this appeal.

We emphasize that nothing in this order should be read as indicating that we have reached any conclusion about any point discussed in it. If any of these issues are litigated later, in circuit court or this court, it will still be necessary for counsel to provide a complete presentation to demonstrate the correctness of any argument made.

IT IS ORDERED that the no-merit report is rejected and the 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