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

2014AP1002-CRNM State of Wisconsin v. Prentice S. Sanders (L.C. #2011CF3640)

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

Prentice S. Sanders entered guilty pleas to two counts of attempted first-degree intentional homicide. His appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967), concluding there is no arguable merit to a claim that Sanders's pleas were unknowingly, involuntarily or

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

unintelligently entered.[2] Sanders has filed three responses[3] disputing appellate counsel's conclusion concerning the validity of his pleas. Sanders asserts that trial counsel did not discuss the possibility of pleading not guilty by reason of mental disease or defect or inform him of available trial defenses. Sanders further states that at the time he entered his pleas, he did not understand the nature of the charges. On May 7, 2015, we received a letter from appellate counsel indicating he had received Sanders's final response and would not file a supplemental no-merit report. *See* RULE 809.32(1)(f). Because Sanders alleges facts outside the record supporting a plea withdrawal claim and given this court's inability to resolve factual disputes, we reject the no-merit-report, dismiss the appeal, and extend the time for Sanders to file a postconviction motion under WIS. STAT. RULE 809.30.

In 2011, the State charged Sanders with two counts of attempted first-degree intentional homicide. The complaint alleged that Sanders drove a U-Haul truck into his sister and her boyfriend while they were walking down the street. Prior to the preliminary hearing and pursuant to trial counsel's request, the court ordered a competency evaluation. The evaluator concluded that Sanders lacked the mental capacity to understand the pending proceedings or assist in his defense, and he was committed for treatment to regain competency. Sanders was briefly treated and a subsequent evaluation opined he was competent to proceed. Sanders chose

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[2] The no-merit report also concludes there is no arguably meritorious challenge to the trial court's finding that Sanders was competent to proceed or to its exercise of discretion at sentencing.

[3] Sanders's final response was submitted on April 30, 2015, pursuant to this court's April 14, 2015 order granting his request for an extension of time and permission to file an additional response. Though the April 14, 2015 order refers to Sanders's April 30, 2015 response as a second response, it is actually the third response filed by Sanders in this case.

not to contest his competency and, pursuant to a negotiated agreement, pled guilty to both counts.

In his responses to counsel's no-merit report, Sanders asserts several claims and supporting facts implicating the validity of his guilty pleas. First, he alleges that trial counsel never discussed potential trial defenses, including the possibility of pleading not guilty by reason of mental disease or defect (NGI). Sanders acknowledges that the record appears to contradict his claim where, at sentencing, trial counsel argued: "Now, could Mr. Sanders deposit a not guilty by mental defect claim? Did we consider it? Yes. Ultimately he decided to reject that." Sanders vigorously disputes trial counsel's statement that they considered but rejected pursuing an NGI plea, asserting that as to counsel's statement that "I [chose] to forego a defect claim, this is a Bald face outright lie. At the time of my plea and sentencing I did not know anything about a defect claim, or any defense in my favor."

Sanders has alleged a fact outside of the record, the veracity of which this court cannot determine. Because appointed counsel's no-merit report seeks counsel's discharge from the duty of representation, we must independently determine whether Sanders's ineffective assistance claim has sufficient merit to require appointed counsel to file a postconviction motion and request a ***Machner***[4] hearing. In other words, if we assume that Sanders's statement is true and that trial counsel failed to mention the possibility of an NGI plea, the question becomes whether counsel's failure gives rise to an arguably meritorious plea withdrawal claim. We conclude that it does. While in many cases, an allegation that trial counsel failed to raise the possibility of an

[4] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

NGI plea will not support an arguable plea withdrawal claim, we cannot make that determination on the facts of this case. The right to effective assistance of counsel applies to advice as to whether a defendant should forego a trial by pleading guilty or no contest. *See* ***State v. Fritz***, 212 Wis. 2d 284, 293, 569 N.W.2d 48 (Ct. App. 1997). "[A] 'defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial.'" ***Id.*** at 293-94 (citation omitted). *See also* ***State v. Dillard***, 2014 WI 123, ¶90, 358 Wis. 2d 543, 859 N.W.2d 44. Factors relevant to our determination that Sanders should be afforded a ***Machner*** hearing include his long history of mental health issues, the apparently undisputed fact that he was not taking previously prescribed medication at the time of the offense, the finding that he was incompetent shortly after his arrest, and that at sentencing, trial counsel highlighted these facts and acknowledged the potential propriety of an NGI plea in this case.

Sanders's response also asserts that he did not know or understand that acting with the specific intent to kill was an element of attempted homicide. He states he never possessed the requisite intent to cause the death of another and alleges that had he understood this element, he would not have pled guilty. Sanders points out that the offense elements were not listed in or attached to the plea questionnaire/waiver of rights form. Though the plea form indicates that trial counsel explained the elements, Sanders disputes this fact and alleges that trial counsel never discussed the elements or how his actions satisfied each element.

At the plea hearing, the following exchange occurred:

> The Court: Okay. And then did you read the Criminal Complaint?
>
> Sanders: Yeah.

> The Court: Did you understand it?
>
> Sanders: Yeah.
>
> The Court: And did you talk with [trial counsel] about the elements of the charges, what the state would have to prove if we had a trial on Count 1 and Count 2?
>
> Sanders: (No audible response)
>
> The Court: I am gonna go through them with you. But did you talk about what it means … attempted first degree intentional homicide, what the state would have to prove at trial?
>
> Sanders: Not really. I would like to go over that again.

The trial court then read the relevant jury instructions to Sanders and asked if he understood that by pleading guilty "you are admitting to both of those elements?" Sanders answered, "Yes."

Sanders maintains he did not know or understand the intent element of the crime charged. He states that though he told the court he understood that by pleading guilty he was admitting to the offense elements, in reality he was unable to comprehend the trial court's lengthy recitation. He argues that given his cognitive and educational limitations, the trial court should have tailored its colloquy to ensure he understood the nature of the crime and how his actions satisfied each element. *See* ***State v. Brown***, 2006 WI 100, ¶52, 293 Wis. 2d 594, 716 N.W.2d 906 (in taking a plea, a trial court's method of ascertaining the defendant's understanding should depend upon the circumstances of the case, including the defendant's education and the complexity of the charges; "[t]he less a defendant's intellectual capacity and education, the more a court should do to ensure the defendant knows and understands the essential elements of the charges").

We conclude that the record in this case does not sufficiently establish Sanders's understanding of the charges to which he pled. ***Id.***, ¶5 (defendant entitled to an evidentiary hearing where the plea-taking court "did not satisfactorily enumerate, explain, or discuss the

facts or elements of the [charges] in a manner that would establish for a reviewing court" the defendant's understanding of the nature of the charges). At the plea hearing, there was no discussion of Sanders's third-grade education or intellectual limitations.[5] ***Id.***, ¶35 (a plea-taking court must address the defendant and "[d]etermine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing"). Trial counsel's representation that he reviewed the elements with Sanders did not "constitute an 'affirmative showing that the nature of the crime'" was communicated. ***Id.***, ¶58 (citation omitted). At the plea hearing, Sanders indicated he did not understand the elements or nature of the crime. The trial court's subsequent recitation of the entire jury instruction followed by Sanders's one-word response did not effectively or meaningfully establish his understanding.[6] A plea is not voluntary unless the defendant has a full understanding of the charges. ***Id.***, ¶29, citing ***State v. Bangert***, 131 Wis. 2d 246, 257, 389 N.W.2d 12 (1986). On this record and in light of his personal characteristics, Sanders "has raised sufficient concerns about whether his pleas were knowing, intelligent, and voluntary to entitle him to an evidentiary hearing" to determine whether he should be permitted to withdraw his guilty pleas. ***Brown***, 293 Wis. 2d 594, ¶20.

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[5] In contrast, at sentencing, attention was immediately drawn to Sanders's limited education after trial counsel told the court he provided Sanders a copy of the presentence investigation (PSI) to read on his own, which prompted the State to request that the trial court perform a colloquy to ensure he was able to read the papers given his third-grade education. On further inquiry, it became apparent that Sanders had a limited ability to read and someone else read the PSI to him.

[6] For each count, the trial court read the jury instruction for first-degree intentional homicide followed by the jury instruction for attempt. Given Sanders's notable lack of education, cognitive limitations, and affirmative statement that he did "[n]ot really" understand the elements the State would need to prove at trial, it is plausible that the language in the jury instruction failed to elucidate the nature of the crime or how Sanders's actions satisfied each element.

Our discussion does not address all issues contained in counsel's no-merit report or Sanders's responses. Our limited analysis is not intended to suggest that we have determined that the issues addressed herein are the only potentially nonfrivolous issues arising from Sanders's plea and sentencing. Rather, we provide the discussion to explain our conclusion that the no-merit report has not demonstrated that there are no issues of arguable merit in this case. Because we determine there are at least two arguably meritorious issues, we reject the no-merit report. Counsel should remind Sanders of the potential consequences should he ultimately succeed in withdrawing his pleas. Assuming a postconviction motion is filed, the motion may include any claims counsel deems nonfrivolous.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion or notice of appeal is reinstated and extended to sixty days after remittitur.

Diane M. Fremgen
Clerk of Court of Appeals