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March 24, 2016

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

2014AP708-CRNM	State of Wisconsin v. Branden L. Richter (L.C. # 2012CF96)
2014AP709-CRNM	State of Wisconsin v. Branden L. Richter (L.C. # 2012CF97)

Before Stark, P.J., Hruz and Seidl, JJ.

Counsel for Branden Richter filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),¹ concluding no grounds exist to challenge Richter's convictions for two counts of armed robbery with threat of force; one count of burglary while armed with a dangerous weapon;

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

and three counts of misdemeanor bail jumping—the first three counts as party to the crime and all counts as a repeater. Richter was informed of his right to file a response to the no-merit report and has not responded.

In Marathon County Circuit Court case No. 2012CF96, the State charged Richter with armed robbery with threat of force, armed burglary and misdemeanor bail jumping, the first two counts as party to a crime and all three counts as a repeater. The State alleged that on October 3, 2011, Richter and Mariano Valera entered Cliffhangers Bar in Schofield through the employee entrance, threatened the bartender at knifepoint and took the cash box and cash register, which contained over \$2200. In Marathon County Circuit Court case No. 2012CF97, the State charged Richter with party to the crime of armed robbery with threat of force and two counts of misdemeanor bail jumping, all three counts as a repeater. The State alleged that on November 2, 2011, Richter and Valera entered through the rear door of Piggy's Pub in Marathon Township, forced the owner and his girlfriend on the ground at gunpoint, and left with approximately \$1700 and a purse.

Richter entered no contest pleas to the misdemeanor bail jumping charges in both cases with the understanding that there would be no finding of guilt unless a jury found Richter guilty of the remaining charges. The cases were joined for trial and the jury found Richter guilty of the armed robberies and the armed burglary. Based upon his no contest pleas and the jury's verdicts, Richter was convicted of the six crimes charged in the complaints and the court imposed concurrent and consecutive sentences resulting in a thirty-year term, consisting of fifteen years' initial confinement and fifteen years' extended supervision.

The no-merit report acknowledges that at the plea hearing, the circuit court failed to personally advise Richter of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c). The no-merit report indicates that after discussing this with Richter, “it could not be argued in good faith that he did not understand the ramifications.” Our supreme court has held, however, that where the statutorily-required deportation warning is not given, a defendant is entitled to withdraw a guilty or no contest plea, *regardless* whether the defendant was aware of the deportation consequences at the time the plea was entered. *See State v. Douangmala*, 2002 WI 62, ¶31, 253 Wis. 2d 173, 646 N.W.2d 1. A potential issue arises in this case if Richter can show that his plea is likely to result in his “deportation, exclusion from admission to this country or denial of naturalization.” WIS. STAT. § 971.08(2); *see also Douangmala*, 253 Wis. 2d 173, ¶46.

The no-merit report also questions whether there is any arguable merit to challenge the joinder of these cases for trial. The no-merit report states: [I]t appears that there might be an argument that the charges should not have been tried at the same time; however any argument would need to pass the harmless error test.” In deciding a no-merit appeal, the question is whether a potential issue would be “wholly frivolous.” *State v. Parent*, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. The test is not whether the attorney or court expects the argument to prevail. Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for counsel to prosecute the appeal. *See McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988). Although a harmless error analysis may apply to certain issues, it is the State’s burden to prove the error was harmless. *State v. Sherman*, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 750 N.W.2d 500. A defendant may be entitled to advocacy of counsel with respect to the State’s burden to prove harmless error.

Finally, the no-merit report addresses whether there is any arguable merit to a claim that Richter is entitled to a new trial based on newly-discovered evidence. When moving for a new trial based on the allegation of newly-discovered evidence, a defendant must prove: “(1) the evidence was discovered after conviction; (2) the defendant was not negligent in seeking the evidence; (3) the evidence is material to an issue in the case; and (4) the evidence is not merely cumulative.” *State v. McCallum*, 208 Wis. 2d 463, 473, 561 N.W.2d 707 (1997). If the defendant is able to prove all four of these criteria, then it must be determined whether a reasonable probability exists that had the jury heard the newly-discovered evidence, it would have had a reasonable doubt as to the defendant's guilt. *Id.* The decision to grant or deny a motion for a new trial based on newly-discovered evidence is committed to the circuit court’s discretion. *State v. Plude*, 2008 WI 58, ¶31, 310 Wis. 2d 28, 750 N.W.2d 42.

The no-merit report recounts that at trial, Valera conceded he was testifying only because he had been granted immunity. Valera recounted his own participation in the crimes, and admitted he was one of two individuals involved. Valera, however, refused to identify the other individual at trial. The State consequently played the jury a video of Valera’s police interview, in which he identified Richter as his accomplice. On cross-examination, Valera indicated he felt pressure to give the police a name during the interrogation and, at the time, he “was under the influence.”

The no-merit report indicates that after Richter's conviction, Valera provided an affidavit² indicating that he did not want to identify the "actual person" who was with him because he feared for his life. Valera added that when the police brought up Richter's name to him, he "agreed with them to protect myself as well as stop them from pressuring me into name my coconspirator." Valera further stated: "I want it to be clear that Branden is not the one who was with me and had no knowledge of any criminal activity. ... I feel I need to tell the truth because an innocent person does not need to be sitting in prison for a crime he did not commit."

The no-merit report indicates there is no arguable merit to pursue a postconviction motion for a new trial because the newly-discovered evidence is merely cumulative to Valera's trial testimony. At trial, however, Valera said only that he felt pressured to give a name, without actually testifying that Richter was not his accomplice. In Valera's affidavit, however, he clearly claims that Richter was not his accomplice. The affidavit does not, therefore, appear to be cumulative.

To the extent the no-merit report alternatively suggests the affidavit would not have caused a reasonable doubt as to Richter's guilt, it appears the primary evidence against Richter at trial was Valera's statement to police, which his affidavit now contradicts. Based on the record, we cannot say it would be "wholly frivolous" to claim that had the jury heard the newly-discovered evidence, there is a reasonable probability it would have had a reasonable doubt as to Richter's guilt.

² Attached to the no-merit report is a copy of a document entitled "Affidavit of Mariano V. Valera" that indicates it is a sworn statement before a notary. Although the document appears to include a notary signature, we take no position on whether it was properly notarized.

Therefore, we will reject the no-merit report, dismiss the appeals without prejudice, and refer these matters to the Office of the State Public Defender for the possible appointment of new counsel.³ The Public Defender shall have thirty days within which to determine whether new counsel will be appointed. Once that determination is made, present counsel or new counsel, if appointed, shall have forty-five days from the SPD's determination to file a postconviction motion.

Upon the foregoing,

IT IS ORDERED that the no-merit report is rejected and the appeals are dismissed without prejudice.

IT IS FURTHER ORDERED that these matters are referred to the Office of the State Public Defender for the possible appointment of new counsel, any such appointment to be made within thirty days of the date of this order. The SPD shall notify this court when new counsel is appointed or when it concludes that no change in counsel will be made.

IT IS FURTHER ORDERED that within forty-five days of the date of the SPD's determination, counsel shall file a postconviction motion.

Diane M. Fremgen
Clerk of Court of Appeals

³ Counsel's conclusion that the appeal lacked arguable merit *may* conflict with the advocacy to which Richter is entitled. Appointment of new counsel, therefore, may be appropriate. Additionally, because we have identified issues of arguable merit, we do not discuss every potential issue raised in the no-merit report. Counsel is free to address, or not address, any issues of arguable merit as counsel sees fit.