



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

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To:

Hon. Timothy M. Van Akkeren
Circuit Court Judge
Sheboygan County Courthouse
615 N. 6th Street
Sheboygan, WI 53081

Melody Lorge
Clerk of Circuit Court
Sheboygan County Courthouse
615 N. 6th Street
Sheboygan, WI 53081

Joseph R. DeCecco
District Attorney
615 N. 6th Street
Sheboygan, WI 53081

Luca L. Fagundes
221 Packerland Drive
Green Bay, WI 54303

Gregory M. Weber
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Nicolas J. Avina Jr. 409711
Fox Lake Corr. Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

Joseph N. Ehmann
First Asst. State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

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

2015AP514-CRNM State of Wisconsin v. Nicolas J. Avina, Jr. (L.C. # 2013CF279)

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

Nicolas J. Avina, Jr., appeals from a judgment of conviction entered after a jury found him guilty of (1) conspiring to deliver not more than 200 grams of tetrahydrocannabinols (THC), contrary to WIS. STAT. §§ 961.41(1)(h)1 and 961.41(1x) (2013-14),¹ and (2) conspiring to deliver not more than one gram of cocaine, contrary to §§ 961.41(1)(cm)1g and 961.41(1x). Avina's

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

appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967), in which counsel addressed only the effectiveness of trial counsel. Avina filed a response raising claims based on facts outside the record. Counsel has not filed a supplemental no-merit report. We now reject the no-merit report and extend the time for the circuit court to hear and decide Avina's postconviction motion.

This appeal follows a two-day jury trial and a postconviction motion which was partially litigated but subsequently withdrawn. Counsel's no-merit report addresses the potential issues of whether trial counsel was ineffective for failing to (1) call two identified witnesses to testify at Avina's trial, (2) deliver an adequate closing argument at trial, and (3) request additional preparation time before trial. The no-merit report does not reflect any independent review of the record by appellate counsel in that it fails to discuss any pretrial rulings, voir dire, the sufficiency of the evidence to support each verdict, evidentiary or other rulings at trial, or the circuit court's exercise of sentencing discretion.

A no-merit report is an approved method by which appointed counsel discharges the duty of representation. See *State ex rel. Flores v. State*, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362 (1994). A no-merit report must satisfy the discussion rule which serves to assure us that counsel has discharged his or her obligation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. See *State ex rel. McCoy v. Wisconsin Court of Appeals, Dist. 1*, 137 Wis. 2d 90, 100-01, 403 N.W.2d 449 (1987). The twin functions of an *Anders* brief are to "provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients' appeal to the best of their ability," and to help courts make "the critical determination whether the appeal is indeed so frivolous that counsel

should be permitted to withdraw.” *Penson v. Ohio*, 488 U.S. 75, 82 (1988) (citation omitted). The failure to submit a proper *Anders* brief not only fails to assist the courts, “more importantly, it amounts to a constructive denial of counsel to appellants.” *United States v. Zuluaga*, 981 F.2d 74, 75 (2d Cir. 1992). Based on the incomplete no-merit report filed in this case, this court lacks confidence that appointed counsel performed the requisite review and conscientiously determined there are no arguably meritorious issues for appeal. See *State v. Tillman*, 2005 WI App 71, ¶16, 281 Wis. 2d 157, 696 N.W.2d 574. We reject the no-merit as inadequate for its purpose and dismiss the appeal.

Additionally, appellate counsel’s analysis in the no-merit report concerning trial counsel’s failure to call Sonja Anderson as a trial witness gives us pause. Counsel filed a postconviction motion alleging that trial counsel was ineffective for failing to call witnesses Anderson and B.S. to testify at Avina’s trial. The no-merit report states that in November 2014, Anderson informed appellate counsel she was willing to testify on Avina’s behalf at his trial but was never contacted by trial counsel. Anderson provided appellate counsel an affidavit averring that Avina’s trial counsel “did not subpoena me for his trial, although I was willing to testify” and that her own attorney told her “that anything having to do with me would not be used in Mr. Avina’s case. However, I later found that items pertaining to me were used against Mr. Avina in his trial.”²

A postconviction hearing was started on January 13, 2015, and continued to March 23, 2015. According to the no-merit report, minutes after the January 2015 hearing, appellate

² According to the no-merit report, Anderson pled no contest to a single charge of harboring/aiding a felon in a related case.

counsel heard Anderson's trial counsel state to Anderson "'you didn't want anything to do with testifying,' to which Ms. Anderson nodded her head affirmatively.'" The no-merit report states:

At that moment undersigned counsel, as an officer of the Court, could not rely upon Ms. Anderson's representation that she was willing to testify on behalf of Mr. Avina at trial, as she had previously indicated. Undersigned counsel could no longer present to the Circuit Court in post-conviction proceedings that Mr. Avina's trial counsel was ineffective for not calling Ms. Anderson. The second prong of *Strickland* would not have been met, as the likelihood of a different outcome at trial would be moot given Ms. Anderson's unwillingness to testify at the time of trial.

The record demonstrates that on March 4, 2015, appellate counsel sent a letter to the circuit court withdrawing Avina's postconviction motion for a new trial because "upon further investigation, these grounds have shown to lack merit." The circuit court then cancelled the March 23, 2015 hearing and this no-merit appeal followed.

Avina's response to the no-merit maintains that Anderson would have testified at Avina's jury trial and attaches an April 19, 2015 statement purportedly signed by Anderson stating: "Against counsel's advice if I would have been subpoenaed I would have testified on behalf of Nicolas Avina." We observe that there is no transcript of the January 2015 postconviction hearing in the record, nor is there any indication Avina knew about or agreed to the postconviction motion's withdrawal. Because the postconviction hearing was cut short, there remain unresolved factual issues regarding whether trial counsel was ineffective for failing to call Anderson as a witness at Avina's trial. This court cannot make findings of fact. If Avina wishes to pursue this issue, the evidentiary hearing should be completed to allow the circuit court to make relevant factual findings and legal determinations. This court's acceptance of a no-merit report and discharge of appointed counsel presumes that appointed counsel provided the level of representation constitutionally required. In reviewing the no-merit report, the question is

whether the potential arguments would be “wholly frivolous.” *McCoy v. Court of Appeals*, 486 U.S. 429, 438-39 (1988). This standard means that the issue is so lacking a basis in fact or law that it would be unethical for counsel to make the argument. *See id.* at 436-38.³ The test is not whether the attorney expects the argument to prevail. Under these circumstances, we will extend the time for the circuit court to hear and decide Avina’s postconviction motion.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected, Attorney Luca L. Fagundes’ motion to be relieved of further representation of Nicolas J. Avina, Jr., is denied, and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30(2)(i) time for the circuit court to decide Avina’s postconviction motion is extended to 120 days from the date of this order.

Diane M. Fremgen
Clerk of Court of Appeals

³ To the extent appellate counsel intimates it would be unethical to continue pursuing the postconviction motion based on the arguably ambiguous exchange he overheard between Anderson and her attorney, we remind counsel that he is not the fact finder. The circuit court determines the weight and credibility of the evidence and is charged with drawing any inferences therefrom. The conversation between Anderson and her attorney may be further explored in the circuit court.