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DISTRICT I

August 31, 2016

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

2016AP634-CRNM State v. Lafayette L. Fairconatue (L.C. # 2013CF1304)

Before Kessler, Brennan and Brash, JJ.

Lafayette L. Fairconatue appeals a judgment of conviction entered upon his guilty plea to one count of attempted first-degree intentional homicide while armed. The circuit court imposed a thirty-five year term of imprisonment, bifurcated as twenty years of initial confinement and fifteen years of extended supervision. Attorney Thomas J. Erickson filed a no-merit report on Fairconatue's behalf, concluding that further proceedings would be frivolous within the meaning

of ***Anders v. California***, 386 U.S. 738 (1967). *See* WIS. STAT. RULE 809.32 (2013-14). At our request, appellate counsel filed supplemental no-merit reports to address additional issues, including, as relevant here, whether Fairconatue could pursue an arguably meritorious challenge to the effectiveness of his sentencing counsel. The record and the no-merit reports do not establish that further postconviction proceedings would be wholly frivolous. Accordingly, we dismiss the appeal without prejudice and extend the deadline for Fairconatue to file a postconviction motion or notice of appeal.

The record shows that Fairconatue pled guilty to attempted homicide while armed pursuant to a plea bargain in which the State agreed to move to dismiss a variety of other counts and to make a sentencing recommendation of "27 to 33 years of confinement followed by 16 to 18 years of extended supervision." At sentencing, the State expressed some uncertainty about the terms of the recommendation and the circuit court stated them on the record. When discussing the recommendation, the State said:

> I know it's a total sentence of fifty years, and that's a lot, I'm not going to say it doesn't seem[] like a lot, it's a horribly long period of time. And I know this defendant, by the time he completes this sentence if the court imposes it, will be seventy-something years old at the end of it. But Judge, there is such a need to protect the public here, such a need to protect the public that this is the right sentence. Given the gravity of the offense, I believe it would be significantly undermined by a lesser sentence than that.

Defense counsel did not object.

"An accused has a constitutional right to the enforcement of a negotiated plea agreement." ***State v. Matson***, 2003 WI App 253, ¶16, 268 Wis. 2d 725, 674 N.W.2d 51. A breach is actionable when the deviation "violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained." ***State v. Bowers***,

2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255. Whether or not the sentencing court was influenced by the breach is irrelevant. ***State v. Howard***, 2001 WI App 137, ¶14, 246 Wis. 2d 475, 630 N.W.2d 244.

In the no-merit report, appellate counsel acknowledges that the State's remarks were "off base." Counsel further observes that, because the defense lawyer did not object, Fairconatue must pursue any challenge to the remarks as a claim of ineffective assistance of counsel. This challenge generally requires the defendant to show that counsel's performance was deficient and that the deficiency prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel suggests that Fairconatue was not prejudiced here because "at the end of the day, the defendant got from the court less than he bargained for from the State." In the plea bargain context, however, "[w]here the attorney is guilty of deficient performance in failing to object to a substantial and material breach of the plea agreement, the defense is automatically prejudiced." ***Howard***, 246 Wis. 2d 475, ¶26, (citing ***State v. Smith***, 207 Wis. 2d 258, 281, 558 N.W.2d 379 (1997)).

When resolving an appeal under WIS. STAT. RULE 809.32, 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 lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988).

In light of the foregoing, we cannot conclude that a challenge to trial counsel's effectiveness in failing to object to the State's "off base" sentencing remarks would be wholly frivolous. We do not suggest that we have reached any conclusion as to whether the State substantially and materially breached the plea bargain or whether trial counsel was deficient in not objecting to the State's remarks. We merely conclude that the record reflects an arguably meritorious basis in fact and law to pursue such claims. Therefore, we must reject the no-merit report filed in this case.

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

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Fairconatue, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Fairconatue or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED the deadline for Fairconatue to file a postconviction motion is extended until forty-five days after the date on which this court receives notice from the State Public Defender's office that it has appointed new counsel for Fairconatue or that new counsel will not be appointed.

Diane M. Fremgen
Clerk of Court of Appeals