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September 21, 2016

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

2015AP2379-CRNM State v. Robert E. Burnette (L.C. # 2012CF214)

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

Robert E. Burnette appeals from a judgment of conviction for second-degree sexual assault of a child entered on an ***Alford*** plea.[1] Burnette's appellate counsel has filed a no-merit

[1] An ***Alford*** plea is a guilty plea where a defendant pleads guilty to a charge but either protests his or her innocence or does not admit to having committed the crime. *See* ***State v. Garcia***, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995). The plea derives its name from the United States Supreme Court's decision in ***North Carolina v. Alford***, 400 U.S. 25 (1970).

report pursuant to WIS. STAT. RULE 809.32 (2013-14),[2] and ***Anders v. California***, 386 U.S. 738 (1967). Burnette has filed a response to the no-merit report and counsel then filed a supplemental no-merit report. RULE 809.32(1)(e), (f). Upon consideration of these submissions and an independent review of the record, we disagree with counsel's conclusion that there is no basis to seek postconviction relief from the sentence. We reject the no-merit report, dismiss the appeal, deny counsel's motion to withdraw, and extend the time for Burnette to file a postconviction motion under WIS. STAT. RULE 809.30.

After his two young nephews reported that Burnette had engaged in sexual contact with them over a two-year period, Burnette was charged with exposing genitals to a child and repeated sexual assault of the same child. The plea agreement resulted in a reduction of the charge from repeated sexual assault of a child, which carries a twenty-five year mandatory minimum, to second-degree sexual assault of a child, which carries a forty year maximum and no mandatory minimum. The exposure charge was dismissed. At sentencing, the State complied with the plea agreement and argued only for the sentence recommended by the presentence investigation report (PSI)—six to eight years' initial confinement followed by five to six years' extended supervision. Finding the offense aggravated because Burnette violated a trust position with the children and repeatedly sexually assaulted one victim, the court sought to impose a sentence long enough to get the two children through adolescence and early adulthood before having to worry about running into Burnette. The court sentenced Burnette to eleven years' initial confinement and nine years' extended supervision. Although the court indicated that

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

Burnette was granted sentence credit to which he was entitled, no determination of the amount of sentence credit was made.[3]

The no-merit report first addresses the potential issue of whether Burnette has grounds to seek plea withdrawal, that is whether the trial court engaged in an appropriate colloquy and made the necessary advisements and findings required by WIS. STAT. § 971.08(1), ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14, and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986), and whether Burnette's plea was freely, voluntarily and knowingly entered.[4] We agree with the report's conclusion that no issue of merit exists from the plea taking.

The no-merit report next discusses the sentence and whether Burnette should seek a sentence modification. The report's discussion falls short of establishing that a postconviction motion challenging the sentence would be wholly frivolous.

Burnette complains in his response that his mental health was ignored by his trial attorney and the sentencing court. The no-merit report acknowledges: "What trial counsel failed to address was [the] health history of Mr. Burnette and how it might have contributed to his conduct." Appointed counsel explains that he reviewed information provided by Burnette and his family as to the health problems Burnette experienced as a baby and how they impacted

[3] The financial obligation section of the judgment of conviction lists the $250 DNA surcharge despite the sentencing court's finding that Burnette lacked the ability to pay and the court's waiver of surcharge. The comment section of the judgment repeats that the surcharge was waived but yet the amount is listed as an obligation. The oral pronouncement controls. ***State v. Perry***, 136 Wis. 2d 92, 114, 401 N.W.2d 748 (1987).

[4] The no-merit report explains that Burnette is not interested in challenging his plea even if there is grounds to do so.

Burnette's life and information that Burnette has suffered for many years from depression.[5] Counsel ultimately concludes that "the information provided, given the record made at sentencing, would not have made a difference in his sentence." In reviewing the no-merit report, the question is whether the potential arguments would be "wholly frivolous." ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915 (citation omitted). 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* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436-38 (1988). The test is not whether the attorney expects the argument to prevail. That in counsel's opinion the potentially missing information would not have made a difference does not mean that pursuit of a motion bringing that information to the sentencing court's attention would be wholly frivolous.

The no-merit report also states: "Counsel observes that the sentencing of Mr. Burnette was flawed in counsel's view. There was no verification as to the accuracy of the PSI and Mr. Burnette apparently either misunderstood or was misinformed as to the Alford plea and his ability to discuss what occurred with the PSI writer." Although acknowledging a potential problem with the sentencing process, counsel again concludes "these oversights would not have changed the outcome of the sentencing nor do they provide the basis for a post conviction motion." Again, counsel's opinion that the outcome would not have been different does not mean a postconviction motion is wholly frivolous.

[5] The PSI establishes that as a baby Burnette had surgery to remove a portion of his skull due to an early closing of his skull and that it left him with a learning disability and ADHD. Burnette's father also told the PSI writer that Burnette had a "hard time understanding things." In his response, Burnette asserts that he also suffers from severe and paralyzing anxiety and has been diagnosed with a major depressive disorder and social anxiety disorder.

The PSI confirms that Burnette was told by his trial attorney not to talk about the crime because of his plea. The PSI states: "Mr. Burnette stated, 'I can not say anything about my offense. My attorney told me not to talk about it because I took an Alfred [sic] plea.' He would not give a statement about this offense or the impact it had on his victims." What is significant about Burnette feeling constrained to talk about the offense is that the sentencing court made note of Burnette's failure to accept responsibility. The sentencing court indicated:

> I don't have a real good feel as to who Mr. Burnette is. He's appeared in court. He's certainly always been cooperative, always been polite. In terms of the PSI, there really is no explanation as to the offense. He's never indicated anything about it. He entered what is called an Alford plea where he's not really acknowledging his guilt but conceding that there is sufficient information to convict him.
>
> ….
>
> I think he's—he's apologized, but in terms of remorse, it's not the—there's never been an admission in this particular case that he did anything wrong, and that is troubling to the Court.

Although a sentencing court may consider lack of remorse as a factor in a sentencing decision, ***State v. Wickstrom***, 118 Wis. 2d 339, 355-56, 348 N.W.2d 183 (Ct. App. 1984), it could be argued that it was unnecessary for Burnette to be seen as lacking remorse or refusing to accept responsibility. It could be argued that despite his ***Alford*** plea, Burnette could have discussed the crime, taken responsibility for the crime, or expressed remorse.[6] "A defendant's protestations of innocence under an ***Alford*** plea extend only to the plea itself." ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 632, 579 N.W.2d 698 (1998). It could be argued that trial counsel's advice that the plea prevented Burnette from discussing the crime or expressing

[6] In his response to the no-merit report, it appears that Burnette is willing to accept responsibility. He writes that he was terrified "from seeing the years that I was facing and also being ashamed of what I did."

remorse was either inaccurate or unreasonable. And while we acknowledge that the sentence was driven by the need for punishment and the needs of the victims, we cannot conclude on this record that a postconviction challenge to the sentence is wholly frivolous.[7] In short, it appears from the record that some flaw in Burnette's sentencing could be argued and Burnette is entitled to the advocacy of counsel to pursue it. It is not this court's responsibility in a no-merit review to frame the issue as either a claim of ineffective assistance of trial counsel, sentencing upon inaccurate information, or the existence of a new factor.

Finally, we note that the judgment of conviction does not include any sentence credit. The no-merit report does not address the possibility that Burnette is entitled to sentence credit. At sentencing the defense indicated that Burnette had spent the past year in custody on the charges. Appointed counsel, as postconviction counsel, should make an appropriate motion for an award of sentence credit.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected, Attorney Michael J. Backes's motion to withdraw is denied, and the appeal is dismissed without prejudice.

[7] Appointed counsel's conclusion to the contrary is also suspect because it is based in part on an inaccurate reading of the record. The no-merit report states: "The Court also had an obvious job to do in punishing Mr. Burnette for what he had done and *in deterring others from such conduct in the future*." (Emphasis added.) The sentencing court specifically stated that deterrence was not a factor in this case.

IT IS FURTHER ORDERED that the time for filing a postconviction motion under WIS. STAT. RULE 809.30(2)(h), is extended to sixty days from remittitur. *See* WIS. STAT. RULE 809.82(2)(a).

Diane M. Fremgen
Clerk of Court of Appeals