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**DISTRICT IV**

September 28, 2016

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

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2015AP2007-CRNM      State of Wisconsin v. Adam M. Sturdevant (L.C. # 2012CF2320)

Before Lundsten, Higginbotham and Sherman, JJ.

Attorney Angela Henderson, appointed counsel for Adam Sturdevant, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2013-14);<sup>1</sup> *Anders v. California*, 386 U.S. 738 (1967). The no-merit report addresses whether there would be arguable merit to a challenge to Sturdevant's plea, the sentence imposed by the circuit court, or the order denying postconviction relief. Sturdevant was sent a copy of the report, and he has filed a response arguing that his counsel erred by failing to pursue other postconviction

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

arguments. Attorney Henderson filed a supplemental no-merit report disputing that she had an obligation to pursue any additional issues in postconviction proceedings. Sturdevant filed a second no-merit response, disagreeing with counsel's position. Upon independently reviewing the entire record, as well as the no-merit report, responses, and supplemental no-merit report, we agree with counsel's assessment that there are no arguably meritorious appellate issues. Accordingly, we affirm.

Sturdevant was charged with theft by false representation and six counts of fraud to obtain unemployment benefits. The complaint alleged that Sturdevant obtained unemployment benefits by certifying that he was available to work during weeks that Sturdevant was in jail without work release. Pursuant to a plea agreement, Sturdevant pled guilty to an amended charge of theft by retaining possession of movable property, and the fraud counts were dismissed. Sturdevant was sentenced to fifteen months of initial confinement and three years of extended supervision.

The State Public Defender's Office appointed Attorney Henderson to represent Sturdevant in postconviction proceedings. Attorney Henderson filed a postconviction motion for plea withdrawal on Sturdevant's behalf. The motion argued that: (1) Sturdevant's plea to theft lacked a factual basis because the State consented in fact to Sturdevant retaining its property; and (2) trial counsel was ineffective by incorrectly advising Sturdevant that he had no defense to the original charges because, according to the motion, Sturdevant was in fact entitled to the benefits and, even if he was not, his belief that he was so entitled constituted a lack-of-intent defense. The circuit court denied the motion without an evidentiary hearing, and Attorney Henderson pursued a merit appeal on Sturdevant's behalf. *See State v. Sturdevant*, No. 2014AP1517-CR, unpublished slip op. (WI App Feb. 26, 2015). In that appeal, Attorney Henderson argued only

that Sturdevant was entitled to an evidentiary hearing on his claim that trial counsel was ineffective by incorrectly advising Sturdevant that he had no lack-of-intent defense to the charges originally filed against him. We agreed that Sturdevant was entitled to an evidentiary hearing on his claim of ineffective assistance of counsel. We therefore reversed the order denying Sturdevant's postconviction motion and remanded for an evidentiary hearing on Sturdevant's claim of ineffective assistance of counsel. Following an evidentiary hearing, the circuit court denied Sturdevant's postconviction motion.

The no-merit report concludes, first, that there would be no arguable merit to a challenge to Sturdevant's plea or sentencing. In response, Sturdevant asserts that, on remand, Attorney Henderson was required to pursue plea withdrawal based on both ineffective assistance of counsel arguments raised in Sturdevant's postconviction motion. He contends that Attorney Henderson erred by failing to pursue the argument that trial counsel incorrectly advised Sturdevant that he was not, in fact, entitled to receive unemployment benefits while in jail. Sturdevant reads our opinion reversing and remanding for an evidentiary hearing as recognizing merit to both claims of ineffective assistance of counsel raised in Sturdevant's postconviction motion. He also contends that the two claims of ineffective assistance of counsel are so interrelated that counsel could not reasonably pursue one without the other.

Contrary to Sturdevant's assertion, we remanded on the limited issue raised on appeal, that is, for an evidentiary hearing on Sturdevant's claim of ineffective assistance of counsel based on Sturdevant's claim that counsel misinformed Sturdevant as to a lack-of-intent defense.<sup>2</sup>

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<sup>2</sup> To the extent that Sturdevant complains that his appellate counsel was ineffective in his merit appeal, that claim is outside the scope of this no-merit appeal.

We stated that, while “Sturdevant presented multiple issues and arguments” in his postconviction motion, “[a]ll but one of those have been abandoned.” We therefore addressed only “the argument that remain[ed],” that is, Sturdevant’s claim of ineffective assistance of counsel based on his assertion that “trial counsel incorrectly informed Sturdevant that his belief about eligibility was not a defense.” We recognized that, in the postconviction motion, Sturdevant asserted that “because he was not in jail serving a sentence, he did not require work release privileges in order to be released for work” and “that, if he had been hired, his probation agent would have released the hold and, therefore, Sturdevant was in fact available for work and eligible to receive benefits.” We stated, however, that, “[o]n appeal, Sturdevant no longer relie[d] on the part of this assertion that insist[ed] he was actually eligible to receive unemployment benefits.” Rather, Sturdevant pursued only the assertion that counsel was ineffective by telling Sturdevant that Sturdevant’s belief as to eligibility was not a defense. We remanded for an evidentiary hearing on that issue.

We agree with counsel that any challenge to the circuit court’s decision following remand would lack arguable merit. Sturdevant only argued that his trial counsel was ineffective by advising him that he had no defense to the original charge of theft by fraud despite Sturdevant’s stated belief that he was entitled to unemployment benefits while in jail. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (claim of ineffective assistance of counsel must show that counsel’s performance was deficient and the deficient performance prejudiced the defense). Sturdevant testified consistent with that argument. Sturdevant’s trial counsel testified that he discussed a possible lack-of-intent defense with Sturdevant. Trial counsel explained that he told Sturdevant he was concerned about pursuing that defense because he was aware of recorded phone calls from the jail between Sturdevant and Sturdevant’s girlfriend, during which “they

were attempting to place third-party calls to the unemployment insurance people to keep the unemployment coming, to try and show to the unemployment people that he was not in jail, but was actually with [the girlfriend] at her home and, therefore, available to work.”

The circuit court found trial counsel credible and that counsel considered the intent issue and explained to Sturdevant that a lack-of-intent defense would be difficult in light of the recorded jail phone calls. The court therefore determined that trial counsel was not ineffective. The court’s factual findings were supported by the record and those facts established that trial counsel’s performance was not deficient. *See id.* at 690 (to show deficient performance for purposes of an ineffective assistance of counsel claim, the defendant must show that counsel’s specific acts or omissions were “outside the wide range of professionally competent assistance”); *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985) (we review the circuit court’s factual findings under the clearly erroneous standard, but review de novo whether those facts meet the legal standards for ineffective assistance of counsel). Thus, any challenge to the court’s determination would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment and order are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Angela Henderson is relieved of any further representation of Adam Sturdevant in this matter. *See* WIS. STAT. RULE 809.32(3).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*