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DISTRICT III

November 10, 2016

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

2015AP1822-CRNM State of Wisconsin v. Clarence J. Wilson (L.C. # 2014CF925)

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

Counsel for Clarence Wilson has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14),[1] concluding no grounds exist to challenge Wilson's convictions for delivering less than or equal to three grams of heroin, possession with intent to deliver less than or equal to three grams of heroin and maintaining a drug trafficking place. Wilson was informed of his right to file a response to the no-merit report and has not responded.

[1] All references to the Wisconsin Statutes are to the 2013-2014 version unless otherwise noted.

The State charged Wilson with two counts of delivering less than or equal to three grams of heroin, possession with intent to deliver less than or equal to three grams of heroin, maintaining a drug trafficking place and party to the crime of possessing drug paraphernalia, the first four counts as a second and subsequent offense. In exchange for his ***Alford***[2] pleas to delivering less than or equal to three grams of heroin, possession with intent to deliver less than or equal to three grams of heroin and maintaining a drug trafficking place, the State agreed to dismiss the second and subsequent offense sentence enhancers and also agreed to dismiss and read in the remaining counts. The State additionally agreed to cap its sentence recommendation depending on defense counsel's recommendation. Out of a maximum possible twenty-eight and one-half year sentence, the circuit court imposed concurrent sentences totaling five years' initial confinement and three years' extended supervision.[3]

Although the second and subsequent offense sentence enhancers had been dismissed under the plea agreement, the presentence investigation report (PSI) erroneously indicated

[2] An ***Alford*** plea is a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. ***State ex rel. Jacobus v. State***, 208 Wis. 2d 35, 54, 559 N.W.2d 900 (1997); *see also* ***North Carolina v. Alford***, 400 U.S. 25 (1970).

[3] We note that during the plea colloquy, the circuit court properly described the maximum sentence for the two heroin offenses as twenty-five years (twelve and one-half years for each count) and three and one-half years for maintaining a drug trafficking place. The court, however, mistakenly informed Wilson that his total maximum sentence was thirty-one and one-half years, when in fact it was only twenty-eight and one-half years.

If the circuit court fails to fulfill one of the duties mandated in WIS. STAT. § 971.08 (including the duty to ensure the defendant understands the potential punishment to which he is subjecting himself by entering a plea) or under the ***Bangert*** line of cases (a "***Bangert*** violation"), the defendant may move to withdraw his or her plea. ***State v. Bangert***, 131 Wis. 2d 246, 274, 389 N.W.2d 12 (1986). Our supreme court has concluded, however, that where, as here, the sentence communicated to the defendant is higher, but not substantially higher, than that authorized by law, the incorrectly communicated sentence does not constitute a ***Bangert*** violation and will not, as a matter of law, be sufficient to show that the defendant was deprived of his constitutional right to due process of law. ***State v. Cross***, 2010 WI 70, ¶40, 326 Wis. 2d 492, 786 N.W.2d 64.

Wilson was convicted with the sentence enhancers, thus increasing his sentence exposure by not more than twelve years (four years for each count).[4] The PSI's recommendations regarding the heroin offenses did not exceed the underlying maximum sentences for those crimes; however, the PSI recommended four years on Wilson's conviction for maintaining a drug trafficking place, when the maximum sentence for that offense is three and one-half years. The circuit court ultimately imposed a four year sentence on that count.

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. Here, it is unclear whether the sentence was based on a misapprehension of the maximum sentence allowed for the offense or whether it was based on the circuit court's mistaken belief that the sentence enhancers remained intact. "A defendant has a constitutionally protected due process right to be sentenced upon accurate information." ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. On this record, we cannot say there is no arguable merit to a claim that the sentence may have been based on inaccurate information.

Additionally, the judgment of conviction requires Wilson to pay $750 in DNA analysis surcharges, representing $250 for each of the offenses. WISCONSIN STAT. § 973.046(1r) requires the circuit court to impose a $250 surcharge for each felony conviction. In ***State v. Odom***, No. 2015AP2525-CR, certified to our supreme court, the defendant argues he has grounds for plea withdrawal because he was not advised at the time of his plea that he faced $900 in multiple mandatory DNA surcharges. Asserting the surcharge is punitive when assessed on a per-count

[4] The judgment of conviction also includes the "second and subsequent offense" designations.

basis against a defendant with multiple convictions, Odom contends this is part of the "potential punishment" a circuit court must ensure a defendant understands. *See* WIS. STAT. § 971.08(1)(a). It appears Wilson may be able to pursue the same argument.[5]

Upon our independent review of the record and the no-merit report, we cannot conclude at this time that there would be no arguable merit to further postconviction proceedings.

Therefore,

IT IS ORDERED that the no-merit report is rejected and the appeal is dismissed.

IT IS FURTHER ORDERED that the time for counsel to file a postconviction motion is extended to sixty days from the date of this order.

Diane M. Fremgen
Clerk of Court of Appeals

[5] If Wilson were to ultimately succeed in withdrawing his pleas, any agreements made under the plea agreement may be rescinded and the parties returned to the positions they occupied at the time they believed they had entered into a valid plea agreement. ***State v. Dielke***, 2004 WI 104, ¶26, 274 Wis. 2d 595, 682 N.W.2d 945.