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DISTRICT II

June 23, 2017

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

2017AP18-CRNM State of Wisconsin v. Thomas R. McAuliffe (L.C. # 2013CF1368)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Thomas R. McAuliffe appeals from a judgment convicting him of first-degree sexual assault of a child. McAuliffe's appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2015-16)¹ and *Anders v. California*, 386 U.S. 738 (1967). McAuliffe did not file

¹ All references to the Wisconsin Statutes are to the 2015-16 version.

a response. Upon consideration of the report and an independent review of the record, we reject the no-merit report because issues of arguable merit are presented by the record and not discussed in the no-merit report. The time for McAuliffe to file a postconviction motion under 809.30 is extended.

In October 2014, McAuliffe pled guilty to first-degree sexual assault of a child. The charge stemmed from allegations that he had sexual contact with a nine-year-old girl. The circuit court sentenced McAuliffe to five years of initial confinement followed by fifteen years of extended supervision.

McAuliffe filed a timely notice of intent to pursue postconviction relief, and the State Public Defender appointed Attorney Matt Last to represent him in postconviction proceedings. After meeting with McAuliffe, Attorney Last moved for a competency evaluation. The circuit court granted the motion and appointed Dr. Brooke Lundbohm to evaluate McAuliffe.

Over the course of approximately ten months, Dr. Lundbohm completed four mental health evaluations of McAuliffe. Each one opined that he lacked competency to proceed. The last one also expressed doubt that McAuliffe was likely to attain competency within the remaining timeframe. Based upon the evaluations, the circuit court found that McAuliffe was not competent. This no-merit appeal follows.

Upon review of Dr. Lundbohm's evaluations, we conclude that an issue of arguable merit exists as to McAuliffe's competency to enter his plea. *See State v. Farrell*, 226 Wis. 2d 447, 454-55, 595 N.W.2d 64 (1999) (recognizing that an incompetency determination made subsequent to a guilty plea proceeding may create a reason to doubt competency during the plea).

The no-merit report does not discuss this issue or the related issue of whether trial counsel was ineffective for failing to raise it.

We cannot conclude that further proceedings on McAuliffe's behalf lack arguable merit. Therefore, the no-merit report is rejected and the time to file a postconviction motion under 809.30 is extended.²

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion is reinstated and extended to sixty days after remittitur.

IT IS FURTHER ORDERED that this summary disposition order will not be published and may not be cited except as provided under WIS. STAT. RULE 809.23(3).

Diane M. Fremgen
Clerk of Court of Appeals

² Given McAuliffe's mental state, counsel may seek appointment of a guardian in order to proceed with further postconviction matters. See *State v. Debra A.E.*, 188 Wis. 2d 111, 135, 523 N.W.2d 727 (1994).