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DISTRICT II

September 13, 2017

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

2015AP2602-CRNM State of Wisconsin v. Michael P. McMullen (L.C. # 2014CF201)

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

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Michael P. McMullen appeals from a judgment of conviction entered upon his guilty pleas to one count each of possessing child pornography and first-degree sexual assault of a child. McMullen's appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE

809.32 (2015-16),[1] and ***Anders v. California***, 386 U.S. 738 (1967). McMullen received a copy of the report, was advised of his right to file a response, and has elected not to do so. We reject the no-merit report and dismiss the appeal because the report fails to demonstrate that a challenge to the imposition of child pornography surcharges for counts that were dismissed but read in lacks arguable merit. We deny counsel's motion to withdraw and extend the time for McMullen to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30.[2]

The State charged McMullen with sixteen counts of possessing child pornography in violation of WIS. STAT. § 948.12(1m), and with one count of first-degree sexual assault of a child in violation of WIS. STAT. § 948.02(1)(b). The pornography charges represented images and videos of a child found on McMullen's phone, and the charging documents set forth which individual image or video formed the factual basis for each count. The sexual assault charge alleged that McMullen had sexual intercourse with a child under the age of twelve, a class B felony carrying a twenty-five-year mandatory minimum term of confinement. All seventeen counts involved the same child victim.

Pursuant to a plea agreement, the State filed an amended information changing the sexual assault charge to allege sexual contact with a child under the age of thirteen in violation of WIS. STAT. § 948.02(1)(e), a class B felony with no mandatory minimum. As stated at the plea hearing, the agreement called for McMullen to plead to one count of child pornography and to

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[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] Attorney Steven D. Grunder filed the no-merit report but is no longer employed with the Office of the State Public Defender. Attorney Joseph N. Ehmann is appointed as successor counsel. We consider successor counsel's potential lack of familiarity with the case in determining the length of the extension.

the amended sexual assault count, and to withdraw a previously-filed suppression motion. In exchange, the State moved to dismiss and read in the remaining child pornography counts as well as two unrelated cases, Waukesha County Nos. 2014CF163 and 2014CF164. As to sentence, the State requested a presentence investigation report and agreed to recommend an aggregate sentence of forty years, including twenty-five years of initial confinement. The State would also request a "substantial amount" of restitution in the read-in files, and the $500 child pornography surcharge on each image charged, including those dismissed but read in. As to the pornography charges, trial counsel informed the court that other images had been recovered, that she viewed the images, and that she believed a total of seventeen "sexually explicit images" were recovered. The State said it would only be recommending the surcharge in connection with the sixteen images charged, and trial counsel and McMullen confirmed their understanding of "what the state is recommending."

At sentencing and as permitted by the plea agreement, the prosecutor asked the court to impose the child pornography surcharge on all sixteen counts charged. When asked, trial counsel agreed that there were sixteen "images." The circuit court imposed the $500 child pornography surcharge on all sixteen counts originally charged, including those dismissed but read in, for a total of $8000 in child pornography surcharges.

WISCONSIN STAT. § 973.042, the child pornography surcharge statute, provides:

> **(1)** In this section, "image" includes a video recording, a visual representation, a positive or negative image on exposed film, and data representing a visual image.
>
> **(2)** If a court imposes a sentence or places a person on probation for a crime under [WIS. STAT. §] 948.05 or [WIS. STAT. §] 948.12 and the person was at least 18 years of age when the crime was committed, the court shall impose a child pornography surcharge

> of $500 for each image or each copy of an image associated with the crime. The court shall determine the number of images or copies of images associated with the crime by a preponderance of the evidence and without a jury.

Based on the facts of record and the language in WIS. STAT. § 973.042, we cannot conclude that a challenge to the circuit court's imposition of sixteen surcharges for one conviction would be wholly frivolous. The analysis in counsel's no-merit report does not persuade us otherwise. Though the plea agreement permitted the State to request the surcharge in connection with all sixteen charges, it appears from the record that McMullen was not required to agree to the imposition of multiple surcharges. Further, that the State was allowed to ask for the surcharges does not mean that a challenge to the circuit court's authority to impose them under § 973.042, would be without arguable merit.

Counsel's no-merit report points out that trial counsel did not object to the imposition of the surcharges, and asserts: "Because this was a negotiated disposition, and because the read-in images were, arguably, 'associated' with the crime, the undersigned attorney cannot allege that defense counsel's acquiescence to the charges rose to ineffectiveness." However, the question in a no-merit appeal is whether a challenge would be wholly frivolous, not whether such a claim is likely to prevail. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436-38 (1988). As the no-merit report acknowledges, it is arguable whether the read-in images were "associated" with the child pornography conviction within the meaning of WIS. STAT. § 973.042. To the extent McMullen might challenge trial counsel's failure to object to or argue against the fifteen additional surcharges, we cannot conclude that such a claim would be wholly frivolous.

We extend the time for McMullen to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30(2)(h). Appointed counsel should consult with McMullen and

determine how to proceed. We recognize there are a variety of reasons why McMullen might decide against challenging the child pornography surcharges. If McMullen does not want to pursue this issue, he could agree to having appointed counsel close the file without any appeal. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 617, 516 N.W.2d 362 (1994). Therefore,

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

IT IS FURTHER ORDERED that the time for filing a notice of appeal or postconviction motion under WIS. STAT. RULE 809.30(2)(h), is extended to ninety days from the date of this order. *See* WIS. STAT. RULE 809.82(2)(a).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals