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DISTRICT IV

March 5, 2018

To:

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

2016AP2107-CRNM State of Wisconsin v. Dylan J. Raikowski (L.C. # 2014CF151)
2016AP2108-CRNM State of Wisconsin v. Dylan J. Raikowski (L.C. # 2015CF261)

Before Blanchard, J.[1]

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).

Dylan Raikowski appeals two judgments, one convicting him of disorderly conduct as a domestic abuse incident and one convicting him of misdemeanor bail jumping. Attorney Patricia

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Sommer has filed a no-merit report seeking to withdraw as appellate counsel. WIS. STAT. RULE 809.32; *see also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S. 429 (1988). The no-merit report addresses Raikowski's plea to the bail-jumping charge and both sentences. Raikowski was sent a copy of the report, but has not filed a response. At this court's request, counsel has also filed a supplement to her no-merit report addressing a plea withdrawal motion Raikowski filed on the disorderly conduct charge.

Having independently reviewed the entire record, as well as the no-merit report and supplement, I conclude that counsel's discussion of the potential merit of an appeal is inadequate. *See* ***McCoy***, 486 U.S. at 438, 440 (noting that "a defense attorney has a duty to advance all colorable claims and defenses").

First, despite this court's order, counsel has still not addressed whether the circuit court's colloquy at the plea hearing on the disorderly conduct charge satisfied the requirements of WIS. STAT. § 971.08 and ***State v. Hoppe***, 2009 WI 41, ¶18, 317 Wis. 2d 161, 765 N.W.2d 794. It appears that counsel may be operating under the mistaken belief that Raikowski's plea agreement on the bail-jumping charge—which included a proposed *disposition* for the disorderly conduct charge—somehow encompassed a second or new *plea* on the disorderly conduct charge. It did not.

Second, Raikowski moved to withdraw his plea on the disorderly conduct charge on the grounds that trial counsel erroneously told him that he would not be subject to the federal prohibition on firearm ownership by those who have been convicted of domestic violence misdemeanors. *See* 18 U.S.C. § 922(g)(9) (2012). Raikowski further alleged that he was an avid

hunter, and would not have entered a plea if he had known that it could result in a lifetime firearm prohibition. Counsel informs us that Raikowski's allegations were supported by trial counsel's notes and a letter from Raikowski's probation agent informing him of the prohibition for the first time after he had entered his plea.

Counsel asserts that the plea withdrawal motion was withdrawn because Raikowski subsequently entered a plea to another disorderly conduct charge in Portage County Case No. 2016CM136, which could have deprived him of his right to own a firearm, and thus "rendered incredible his assertion on the prejudice prong that he would not have pleaded no contest had he known about the prohibition."

I note, however, that the docket entries for Portage County Case No. 2016CM136 show a conviction for disorderly conduct with no domestic violence designation. Counsel does not explain how that conviction would trigger 18 U.S.C. § 922.

Moreover, "[e]xcept in the rarest of cases, attorneys who adopt 'the role of the judge or jury to determine the facts,' pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment." ***Nix v. Whiteside***, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring) (quoted source omitted). Absent a client's expressed admission of an intent to testify untruthfully, an attorney cannot conclude that the client's proffered testimony would be perjury. ***State v. McDowell***, 2004 WI 70, ¶43, 272 Wis. 2d 488, 681 N.W.2d 500. Therefore, counsel's assessment that a trial court would be unlikely to find a defendant's testimony to be credible does not provide grounds to withdraw the motion.

In sum, counsel has failed to adequately explain why it would be frivolous to pursue a plea withdrawal motion on the disorderly conduct charge. Nor has counsel asserted that

Raikowski wishes to waive the issue at this time. Since the plea on the bail-jumping charge incorporated the disposition of the disorderly conduct charge, both pleas are implicated. If Raikowski no longer wishes to withdraw his plea or pleas, he retains the right to agree to close the file.

Therefore,

IT IS ORDERED that the no-merit report is rejected and the appeal is dismissed without prejudice. Attorney Patricia Sommer or a successor appointed by the State Public Defender shall continue to represent Raikowski on these matters.

IT IS FURTHER ORDERED that the time for Raikowski to file a postconviction motion shall be extended until March 30, 2018.

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

Sheila T. Reiff
Clerk of Court of Appeals