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DISTRICT III

July 16, 2018

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

2017AP1478-CRNM	State of Wisconsin v. Derek Steven Milligan (L.C. # 2016CT16)
2017AP1490-CRNM	State of Wisconsin v. Derek Steven Milligan (L.C. # 2016CF28)

Before Stark, P.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).

Counsel for Derek Milligan filed a no-merit report concluding no grounds exist to challenge Milligan's convictions for operating with a restricted controlled substance, as a second

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

offense; misdemeanor battery; and disorderly conduct, the latter two charges as acts of domestic abuse. Milligan was informed of his right to file a response to the no-merit report and has not responded. Upon an independent review of the records as mandated by *Anders v. California*, 386 U.S. 738 (1967), this court discovered that at the plea hearing, the circuit court failed to personally advise Milligan of the deportation consequences of his pleas, as mandated by WIS. STAT. § 971.08(1)(c) (2015-16).² A potential issue therefore arises if Milligan can show that his pleas are likely to result in his “deportation, exclusion from admission to this country or denial of naturalization,” see WIS. STAT. § 971.08(2), and that he was not otherwise aware of the potential immigration consequences. See *State v. Fuerte*, 2017 WI 104, ¶41, 378 Wis. 2d 504, 904 N.W.2d 773 (circuit court’s failure to give deportation warning during plea colloquy subject to harmless error analysis).

Additionally, the plea questionnaire and waiver of rights form that Milligan signed reflects that he had seven years of schooling and did not have a high school diploma, GED, or HSED. The form also reflects that Milligan had taken “medications” within the last 24 hours before the plea hearing, possibly as treatment for a mental disorder. Despite this information on the form, the record does not reflect that the circuit court asked Milligan whether his education level, mental disorder, or medications interfered with his ability to comprehend the proceedings. See *State v. Bangert*, 131 Wis. 2d 246, 261-262, 389 N.W.2d 12 (1986).

We also noted the circuit court did not inform Milligan that he faced multiple mandatory DNA surcharges. Currently pending is *State v. Freiboth*, 2015AP2535-CR, where the appellant

² All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

argues he has grounds for plea withdrawal because he was not advised at the time of his plea that he faced multiple mandatory DNA surcharges. If the appellant's argument in *Freiboth* prevails, it appears that Milligan may be able to pursue the same argument.

Having identified these possible issues, we directed appellate counsel to consult with Milligan and file (1) a supplemental no-merit report addressing why there is no arguable merit to challenge the pleas based on the absence of the deportation warning or Milligan's ability to comprehend the plea proceedings; (2) a written statement by Milligan indicating that he waives any challenge to the pleas on these grounds; **or** (3) a motion to voluntarily dismiss these matters and to extend the time for filing a postconviction motion. Counsel has informed this court that he has been unable to make contact with Milligan and, therefore, does not know how Milligan wants to proceed.

Based on our review of the records, the no-merit report and counsel's response to our order, we cannot say there is no arguable merit to challenge the pleas based on the absence of the deportation warning or Milligan's ability to comprehend the plea proceedings. The possible DNA issue in *State v. Freiboth* also remains pending. Therefore, we will reject the no-merit report, dismiss the appeals and direct counsel to file a postconviction motion. If Milligan's input is necessary to pursue the postconviction motion and he has not apprised counsel or the court of his whereabouts, counsel may consider moving the circuit court to dismiss the matters and relieve counsel of further representation. *See, e.g., State v. Bono*, 103 Wis. 2d 654, 655, 309, N.W.2d 400 (Ct. App. 1981) ("It is within the discretion of the court to refuse to decide a criminal appeal if the defendant cannot be made to respond to the court's judgment.").

Upon the foregoing,

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

IT IS FURTHER ORDERED that the time for filing a postconviction motion is extended to forty-five days from the date of this order.

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

Sheila T. Reiff
Clerk of Court of Appeals