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October 2, 2018

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

2017AP1987-CRNM State of Wisconsin v. Ryan Carl Krupp (L.C. #2001CF165)

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

Ryan Carl Krupp appeals from a judgment imposing a sentence after the revocation of probation. His 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). Krupp has filed a response to the no-

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

merit report raising concerns that he was sentenced on the basis of inaccurate information and without consideration of the original sentencing rationale. *See* RULE 809.32(1)(e). Counsel has not filed a supplemental no-merit report. Upon consideration of these submissions and an independent review of the record, we cannot conclude that Krupp's claim that the sentencing court relied on inaccurate information is without arguable merit. We reject the no-merit report, dismiss this appeal, and extend the time for counsel to file a postconviction motion.

A jury found Krupp guilty of possession of LSD with intent to deliver within 1000 feet of a school and as a second or subsequent drug offense, maintaining a drug trafficking place as a habitual criminal, possession of marijuana with intent to deliver as a second or subsequent drug offense, and two counts of misdemeanor resisting or obstructing an officer. On January 25, 2002, sentence was withheld and Krupp was placed on probation for concurrent terms of three years on the maintaining a drug trafficking place and possession of marijuana convictions. Probation was ordered to be served consecutive to the nine-year prison sentence on the possession of LSD conviction. Krupp began to serve the terms of probation on November 9, 2013. In July 2016, Krupp was arrested for probation violations. After his revocation was affirmed on administrative appeal on January 3, 2017, Krupp returned to the court for sentencing. Krupp was sentenced to consecutive terms totaling five years of initial confinement and four years of extended supervision.[2]

In response to the no-merit report's conclusion that the sentence was a proper exercise of discretion, Krupp asserts the sentencing court relied on inaccurate information and trial counsel

[2] Judge Wayne J. Marik originally sentenced Krupp in 2002. Judge David W. Paulson imposed the sentence after the revocation of probation.

was ineffective for not objecting to the inaccurate information. He identifies the following points as being inaccurate:

- That Krupp had a prior conviction for possession of marijuana with intent to deliver. Krupp points out that at the original sentencing hearing, a correction was made that the prior juvenile delinquency adjudications were for simple possession of marijuana and that he has no other intent to deliver marijuana convictions other than this case.

- That Krupp was convicted of a third offense of operating while under the influence of an intoxicant (OWI) in May of 2013. Krupp asserts the conviction occurred in 2012.[3]

- That at the time of his arrest for probation violations, Krupp was enrolled in Behavioral Health Services as a condition of an alternative to revocation. Krupp points out that the way the revocation summary presented the information that Krupp was in the treatment program at the time of arrest, the sentencing court drew a negative inference that treatment was a requirement of an alternative to revocation rather than acknowledging that Krupp had voluntarily sought and enrolled in that treatment.

[3] Krupp also claims that the sentencing court inaccurately stated that he had supervision in the OWI third case revoked in April 2014. However, in referencing a revocation in April 2014, the court was recounting revocations that occurred while Krupp was on supervision on the LSD possession conviction in this case. The revocation summary listed the date of that revocation as April 2014 in one paragraph and as April 2012 in another paragraph. Since Krupp started serving his probation terms in October 2013, the revocation occurred in April 2012. The court simply misspoke when referencing that the revocation on the LSD possession conviction occurred in April 2014.

- That, in the sentencing court's words, the revocation was "also based on violation of the Racine County jail rules." Krupp points out that the revocation summary does not allege any violation of jail rules.

For each of the above points, Krupp indicates that the sentencing court specifically mentioned the inaccurate information.[4] *See* ***State v. Tiepelman***, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1 (to establish a due process violation, the defendant must show both that the information was inaccurate and that the court actually relied on the inaccurate information in the sentencing). Krupp also explains why he was prejudiced by reliance on the inaccuracies. Krupp argues that the inaccuracy about having a prior conviction for possession of marijuana with intent to deliver caused the sentencing court to misjudge his status as a drug dealer and the need to protect the public. He argues that by thinking the OWI third conviction was 2014 and not 2012, the court was unaware that he had been living outside of prison for four years, instead of two. He explains that the misimpression that Krupp was required to enroll in the Behavioral Health Services treatment did not give him due credit for seeking and obtaining treatment on his own. He believes the inaccurate information about violations of jail rules led the court to find further cause for a conclusion that he lacked the ability to conform his behavior to the rules.

There has been no supplemental no-merit report which demonstrates that Krupp's contentions lack arguable merit. 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 (citation omitted). This standard means that the issue lacks a basis in fact or law. ***McCoy v. Court of Appeals***, 486 U.S. 429, 438 n.10 (1988). The test is not whether the attorney or court expects the argument to prevail. Moreover, even though the reliance on inaccurate information can be found to be harmless, it is the State's burden to show that reliance on inaccurate information was harmless. ***Tiepelman***, 291 Wis. 2d 179, ¶26. A defendant may be entitled to advocacy of counsel with respect to the State's burden to prove harmless error. On this record, we cannot find that Krupp's claim that he was sentenced on the basis of inaccurate information or the related claim that trial counsel was ineffective is wholly frivolous.

We are not persuaded that there is arguable merit to Krupp's other claim that he is entitled to resentencing because the sentencing court was not familiar with the facts of the case and the rationale of the original sentencing court. The sentencing court did not indicate that it had read the prior presentence investigation report or the transcript of the original sentencing. In ***State v. Reynolds***, 2002 WI App 15, ¶9, 249 Wis. 2d 798, 643 N.W.2d 165, we held that when a sentencing after revocation is held before a judge who did not preside over the original sentencing, the new sentencing judge should be "informed of the trial record" and of the previous judge's assessment of the severity of the crime, particularly in cases involving trials. However, ***Reynolds*** does not establish a bright-line rule that the original sentencing must be considered. ***State v. Walker***, 2008 WI 34, ¶26, 308 Wis. 2d 666, 747 N.W.2d 673. Rather, reviewing the original sentencing transcript may only be necessary in some cases. ***Id.*** We conclude that it was

[4] Krupp also claims that trial counsel was ineffective for not investigating inaccurate information in the revocation summary about uncharged offenses of hit and run, OWI, possessing drugs, and possessing drug paraphernalia. The sentencing court made no mention of that information. Because the court did not rely on the information, Krupp was not prejudiced by trial counsel's failure to investigate in an attempt to disprove it.

not necessary in this case. This is not a case like ***Reynolds*** where the assessment of the severity of the crime was based on the original sentencing judge's view of the evidence presented at trial. *See* ***Reynolds***, 249 Wis. 2d 798, ¶14. The original sentencing court expressed that the crimes were aggravated by the spread of drug usage in the community and the destruction of other people's lives by the distribution of illegal substances.

Krupp asserts that the sentencing court erroneously relied on the criminal complaint that failed to reflect the "significantly less aggravating" evidence presented during trial. His only example is that the sentencing court observed from the criminal complaint that "drugs were brought into the property and sold from the property." He contrasts that with trial testimony from other residents of the home that they did not see drugs being used, packaged, or sold from the property. Obviously the jury rejected that testimony because it found Krupp guilty of possession of LSD with intent to deliver and maintaining a drug trafficking place. It cannot be said that the criminal complaint did not fairly represent the nature of the crimes.

Krupp claims that the sentencing court's "consideration of the 'protection of the public' sentencing factor was inconsistent with the original [sentencing] judge's rationale." It may be true that the original sentencing judge held high hopes for Krupp's prospects of remaining drug free and thereby reducing his risk to the community. However, a significant amount of time had passed since that assessment. The sentence imposed after revocation could be based on Krupp's conduct during probation. *See* ***State v. Verstoppen***, 185 Wis. 2d 728, 738-39, 519 N.W.2d 653 (Ct. App. 1994). The sentencing court could assess anew Krupp's risk to the community and in doing so consider conduct that lead to the number of revocations and alternatives to revocation Krupp racked up while on supervision. There is no merit to a claim that the sentencing court had to use the same assessment of risk to the community that the original sentencing judge had.

We reject the no-merit report and reinstate the time for Krupp to file a postconviction motion. By rejecting the no-merit report for the reasons previously discussed, we do not foreclose appellate counsel from raising in postconviction proceedings any other issue he now believes has arguable merit.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected and Attorney David Del Busto's motion to be relieved of further representation of Ryan Carl Krupp is denied.

IT IS FURTHER ORDERED that the appeal is dismissed and the time to file a postconviction motion under WIS. STAT. RULE 809.30(2)(h) is extended to sixty days after remittitur.

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

Sheila T. Reiff
Clerk of Court of Appeals