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DISTRICT I

November 15, 2018

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

2017AP1101-CRNM State of Wisconsin v. Marte L. Coffee (L.C. # 2016CF713)

Before Kessler, P.J., Brash and Dugan, JJ.

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).

Marte L. Coffee appeals from a judgment of conviction. Attorney Brian C. Hagner filed a no-merit report and a supplemental no-merit report concluding that further postconviction or

appellate proceedings would lack arguable merit. *See* WIS. STAT. RULE 809.32 (2015-16).¹ Upon review, we conclude that Coffee could pursue an arguably meritorious challenge to the circuit court's ruling denying his request to instruct the jury on a lesser included offense. Accordingly, we reject the no-merit reports, dismiss this appeal without prejudice, and extend the deadline for filing a postconviction motion.

The State charged Coffee with a Class C felony, namely, armed carjacking as a party to a crime in violation of WIS. STAT. §§ 943.23(1g) and 939.05. Pursuant to WIS. STAT. § 939.66(2r), a lesser included offense may be “[a] crime which is a less serious type of violation under s. 943.23 than the one charged.” At the close of the evidence, Coffee requested an instruction on the Class I felony of operating a motor vehicle without owner's consent, a violation of WIS. STAT. § 943.23(3). The circuit court denied the motion, concluding that the two crimes each required proof of an element that the other did not, *see Blockburger v. United States*, 284 U.S. 299, 304 (1932), and therefore the latter crime was not a lesser included offense of the former. In the no-merit reports, Attorney Hagner does not offer support for the circuit court's conclusions. To the contrary, Attorney Hagner advises:

it is arguable that the Court erred in denying the defense request for an instruction on a lesser-included offense based on the *Blockburger* test, when WIS. STAT. [§] 939.66(2r) clearly states that, when charged with an offense under [§] 943.23, a less serious charge under that same section is an included offense.

¹ All references to the Wisconsin statutes are to the 2015-16 version unless otherwise noted.

Attorney Hagner's advisements reflect that, in appellate counsel's view, a violation of § 943.23(3) is arguably a lesser included offense of WIS. STAT. § 943.23(1g), i.e., that such a claim is not frivolous.

Attorney Hagner goes on to say that, in his view, the circuit court should have considered the request for a lesser included offense instruction by examining whether “there [were] reasonable grounds for acquittal on the offense charged; and (2) ... reasonable grounds for conviction on the lesser included offense.” In support, he cites *Jordan v. State*, 93 Wis. 2d 449, 468, 287 N.W.2d 509 (1980) (governing lesser included instructions in homicide cases). Further, Attorney Hagner states that “this evaluation requires viewing the evidence in the light most favorable to the defendant.” See, e.g., *State v. Barreau*, 2002 WI App 198, ¶17, 257 Wis. 2d 203, 651 N.W.2d 12. Attorney Hagner then concludes that, in his view, “there were no reasonable grounds for acquittal on the charged offense” of carjacking.

We have reviewed the record, including trial counsel's theory of defense, in light of the no-merit reports. We are not persuaded by appellate counsel's conclusion. It appears that counsel could state an arguably meritorious claim that Coffee proposed an instruction on a lesser included offense and that, when viewing the evidence in the light most favorable to the defense, the evidence provided a reasonable ground for acquittal on the charged offense and conviction on the proposed lesser charge. We emphasize that we do not reach any conclusion that such an argument would or should prevail, only that such an argument would not be frivolous within the meaning of WIS. STAT. RULE 809.32 and *Anders v. California*, 386 U.S. 738 (1967).

When resolving an appeal under WIS. STAT. RULE 809.32, 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. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988).

We cannot conclude that further proceedings in regard to the request for a lesser included jury instruction would be wholly frivolous. Therefore, we must reject the no-merit report filed in this case. We add that our decision does not mean we have reached a conclusion about the arguable merit of any other potential issue in the case. Coffee is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Coffee, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Coffee or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Coffee to file a postconviction motion is extended until forty-five days after the date on which this court receives notice from the State

public defender's office advising either that it has appointed new counsel for Coffee or that new counsel will not be appointed.

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

Sheila T. Reiff
Clerk of Court of Appeals