



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

March 13, 2019

To:

Hon. Angela W. Sutkiewicz
Circuit Court Judge
615 N. 6th St.
Sheboygan, WI 53081

Connie Daun
Clerk of Circuit Court
Calumet County Courthouse
206 Court Street
Chilton, WI 53014

Nathan F. Haberman
District Attorney
206 Court St.
Chilton, WI 53014

Diane Lowe
Lowe Law, L.L.C.
1809 N. Cambridge Ave., Ste. 306
Milwaukee, WI 53202

Joseph Ehmann
Office of State Public Defender
P.O. Box 7862
Madison, WI 53707-7862

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Allison G. Wells 478334
Oakhill Correctional Inst.
P.O. Box 938
Oregon, WI 53575-0938

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

2018AP1662-CRNM State of Wisconsin v. Allison G. Wells (L.C. #2016CF84)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, 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).

Allison G. Wells appeals from a judgment of conviction for three counts of failure to support a child. On November 27, 2018, Wells's appellate counsel filed a no-merit report

pursuant to WIS. STAT. RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738 (1967). Wells received a copy of the report, was advised of his right to file a response, and has elected not to do so. Without completing our independent review of the record, the no-merit report is rejected.

Wells was found guilty by a jury. At the trial, jury instruction WIS JI—CRIMINAL 140 was given to the jury. On November 13, 2018, the Wisconsin Supreme Court granted a petition for review in *State v. Trammell*, No. 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018), to address whether the holding in *State v. Avila*, 192 Wis. 2d 870, 532 N.W.2d 423 (1995)—that it is “not reasonably likely” that WIS JI—CRIMINAL 140 reduces the State’s burden of proof—is good, sound law or should be overruled. Consequently, when counsel filed the no-merit report a potential issue of arguable merit existed from the use of WIS JI—CRIMINAL 140 at Wells’s trial. Until *Trammell* is decided, it cannot be determined whether further appellate proceedings on Wells’s behalf would lack arguable merit. The filing of the no-merit report with a potential issue existing was improper.

If *Trammell* presented the only problem with the no-merit report, we could put the appeal on hold pending the *Trammell* decision. In addition to the *Trammel* problem, the no-merit

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

report is incomplete. The report only discusses the sufficiency of the evidence² and the sentence. A jury trial has many components which must be examined for the existence of potential appellate issues, e.g., pretrial rulings, jury selection, evidentiary objections during trial, whether the defendant's waiver of the right to testify is voluntary and knowing, use of proper jury instructions, and propriety of opening statements and closing arguments. The no-merit report fails to give any indication that appointed counsel considered whether those parts of the process give rise to potential appellate issues.

The no-merit report points out that Wells told the presentence report investigator that because of medical problems he was unable to work during at least one of the periods of nonsupport. The report also acknowledges that Wells's inability to work may have supported an affirmative defense to at least one of the charges "had [Wells] advised his attorney [of this information] in advance of the trial." Without more, there is not a sufficient explanation in the no-merit report of why further postconviction proceedings based on information that Wells was unable to work for a related time period is without arguable merit. No-merit counsel faults Wells for not informing trial counsel, but the failure of trial counsel to learn that information by inquiry or in explanation of possible defenses is notable and perhaps deserving of explanation. See *State v. Pitsch*, 124 Wis. 2d 628, 638, 369 N.W.2d 711 (1985) ("It is the duty of the lawyer to conduct

² For its discussion of the sufficiency of the evidence, the no-merit report cites WIS. STAT. §§ 805.14(1), 805.17(2), and *Fricano v. Bank of America NA*, 2016 WI App 11, ¶1, 366 Wis. 2d 748, 875 N.W.2d 143 (2015), authorities tied more directly to the standard of review in civil cases. The no-merit procedure is better served by reference in the no-merit report to the standard of review specifically applicable to criminal cases—that is, whether there was sufficient evidence to have found guilt beyond a reasonable doubt. See *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990) (We may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.").

a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.” (citation omitted)).

The no-merit report also indicates that Wells questions the sentencing court’s authority to order as a condition of extended supervision that he have no contact with his son still at home with the mother. A child may be considered a victim of the crime of the failure to pay child support. See *State v. Oakley*, 2001 WI 103, ¶10, 245 Wis. 2d 447, 629 N.W.2d 200. Although a sentencing court has discretion to order no contact with victims, there is also a requirement that conditions set should be used “to further the objective of rehabilitation and protect society and potential victims from future wrongdoing.” *Id.*, ¶13 Conditions of extended supervision “may impinge upon constitutional rights as long as they are not overly broad and are reasonably related to the person’s rehabilitation.” *Id.*, ¶19. The law recognizes a fundamental liberty interest in parenting one’s child. See *Monroe Cty. DHS v. Kelli B.*, 2004 WI 48, ¶23, 271 Wis. 2d 51, 678 N.W.2d 831. The sentencing court did not give any explanation for the no contact order. The record suggests that the child’s mother requested the no contact order for reasons unrelated to the crime. The discussion in the no-merit report is inadequate to explain why a challenge to the condition that appears to impinge upon a fundamental right would lack arguable merit.³

A no-merit report is an approved method by which appointed counsel discharges the duty of representation. See *State ex rel. Flores v. State*, 183 Wis. 2d 587, 605-06, 516 N.W.2d 362

³ At sentencing held on November 3, 2017, it was reported that the child was seventeen years old and would turn eighteen years old in May 2018. The judgment of conviction states that Wells is to have no contact with the mother “or their youngest son.” The no contact provision is not tied to the age of the child. It cannot be said that any potential issue related to the no contact provision is moot.

(1994). A no-merit report must satisfy the discussion rule which serves to assure us that counsel has discharged his or her obligation competently and professionally and that the indigent defendant is receiving the same type and level of assistance as would a paying client under similar circumstances. See *State ex rel. McCoy v. Wisconsin Court of Appeals, Dist. 1*, 137 Wis. 2d 90, 100-01, 403 N.W.2d 449 (1987). The twin functions of an *Anders* brief are to “provide the appellate courts with a basis for determining whether appointed counsel have fully performed their duty to support their clients’ appeal to the best of their ability,” and to help courts make “the critical determination whether the appeal is indeed so frivolous that counsel should be permitted to withdraw.” *Penson v. Ohio*, 488 U.S. 75, 82 (1988) (citation omitted). The failure to submit a proper *Anders* brief not only fails to assist the courts, “more importantly, it amounts to a constructive denial of counsel to appellants.” *United States v. Zuluaga*, 981 F.2d 74, 75 (2d Cir. 1992).

Based on the incomplete no-merit report filed in this case, this court lacks confidence that appointed counsel performed the requisite review and conscientiously determined there are no arguably meritorious issues for appeal. See *State v. Tillman*, 2005 WI App 71, ¶16, 281 Wis. 2d 157, 696 N.W.2d 574. We reject the no-merit report as inadequate for its purpose, dismiss the appeal, and extend the time for Wells to file a postconviction motion or notice of appeal. The time for further postconviction proceedings is extended until after the Wisconsin Supreme Court decides *Trammell*.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected, Attorney Diane Lowe's motion to be relieved of further representation of Allison G. Wells is denied, and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the time for filing a postconviction motion or notice of appeal under WIS. STAT. RULES 809.30(2) or 809.32 is extended to sixty days after a decision by the Wisconsin Supreme Court in *State v. Trammell*, No. 2017AP1206-CR.

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

Sheila T. Reiff
Clerk of Court of Appeals