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

October 30, 2019

To:

Hon. Mark F. Nielsen
Circuit Court Judge
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Samuel A. Christensen
Clerk of Circuit Court
Racine County Courthouse
730 Wisconsin Ave.
Racine, WI 53403

Patricia J. Hanson
District Attorney
730 Wisconsin Ave.
Racine, WI 53403

Nicholas C. Zales
Zales Law Office
9012 W. Holt Ave.
Milwaukee, WI 53227-4426

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

Joseph N. Ehmann
Regional Attorney Manager
Wisconsin State Public Defenders
P.O. Box 7862
Madison, WI 53707-7862

Dominique D. Bryant, #551852
New Lisbon Correctional Inst.
P.O. Box 4000
New Lisbon, WI 53950-4000

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

2019AP28-CRNM State of Wisconsin v. Dominique D. Bryant (L.C. #2015CF1484)

Before Reilly, 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).

[1] This matter is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Dominique D. Bryant appeals a judgment entered after a jury convicted him of misdemeanor theft. The circuit court found that he committed the crime as a habitual offender and imposed an evenly bifurcated two-year term of imprisonment. Bryant's appellate counsel, Attorney Nicholas C. Zales, filed a no-merit report pursuant to ***Anders v. California***, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32, addressing the sufficiency of the evidence, the circuit court's exercise of sentencing discretion, and the postconviction order denying Bryant eligibility to participate in the Wisconsin substance abuse program. Bryant did not file a response. Upon consideration of the no-merit report and an independent review of the record, we conclude that the record supports an arguably meritorious claim that Bryant was denied his constitutional right to a speedy trial. Accordingly, we reject the no-merit report, dismiss the instant appeal, and extend appellate deadlines.

The constitutional right to a speedy trial attaches when "a defendant in some way formally becomes the accused." ***State v. Borhegyi***, 222 Wis. 2d 506, 510-11, 588 N.W.2d 89 (Ct. App. 1998) (citation omitted). A court reviews a claimed violation of the right by applying a four-part balancing test that requires consideration of: "(1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." ***Id.*** at 509. A twelve-month period of delay is the minimum normally required in Wisconsin to trigger consideration of the remaining factors. *See* ***id.*** at 510, 518.

Here, the State filed a criminal complaint on October 9, 2015, charging Bryant with armed robbery by use of force as a repeat offender, a Class C felony carrying forty-six years of

imprisonment and a $100,000 fine.[2] *See* WIS. STAT. §§ 943.32(1)(a), (2) (2015-16), 939.50(3)(c) (2015-16), 939.62(1)(c) (2015-16). The record indicates that no action was taken in the matter until August 1, 2016, when Bryant filed a letter from prison requesting a speedy trial. On August 26, 2016, he made an initial appearance, and on October 12, 2016, he was arraigned. At that time, his appointed counsel filed a demand for a speedy trial on his behalf. The circuit court scheduled the matter for trial on January 10, 2017.

On the day set for trial, the State advised that it was not prepared to proceed because it was unable to secure the presence of the complaining witness. Bryant moved to dismiss the charge, citing his statutory and constitutional rights to a speedy trial. He asserted that he was prejudiced by delay because he was serving a prison sentence, and the unresolved felony charge affected his activities and his security classification. The circuit court denied the motion to dismiss. Instead, the circuit court modified the $10,000 cash bail to a signature bond. The circuit court directed that the trial be rescheduled, adding that there was "no time pressure." The matter was rescheduled for trial on May 16, 2017.

In February 2017, the circuit court heard a bail motion in which Bryant sought low cash bail in order to preserve the possibility of earning sentence credit while imprisoned. Bryant also renewed his contention that he was entitled to a speedy trial, reiterating that the pending felony charge affected his ability to progress in the prison system. The circuit court denied relief.

[2] It appears that on October 9, 2015, Bryant was in jail in Kenosha County and that he remained confined there through late March 2016, when he was sentenced in Kenosha County circuit court and transferred to prison.

The matter did not proceed to trial on May 16, 2017. On May 23, 2017, the circuit court conducted a status conference to explain that the matter was transferred to the September 26, 2017 jury calendar because the May 2017 trial date "conflicted with [the c]ourt's sentencing institute obligations."

Trial began on September 26, 2017, and concluded two days later. The jury did not convict Bryant of armed robbery and instead convicted him of misdemeanor theft. At sentencing, Bryant reminded the circuit court that he had requested a speedy trial, and he alleged again that throughout the pendency of the instant matter he "wasn't allowed to do any programming or anything of that sort because of the pending case that he had here in Racine."

In sum, the record reflects that the delay in this case exceeded the twelve-month period that triggers consideration of a constitutional speedy trial claim. The record also indicates that Bryant asserted his right to a speedy trial, that delay was occasioned by the State and the circuit court, and that Bryant alleged prejudice as a result of the delay. Under these circumstances, it appears that Bryant could pursue an arguably meritorious claim that he was denied his constitutional right to a speedy trial. 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 ***Anders*** and WIS. STAT. RULE 809.32.

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 (citation omitted). The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. [2] (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 speedy trial issue 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. Bryant 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 Bryant, 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 Bryant or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Bryant to file a postconviction motion or notice of appeal is extended until forty-five days after the date on which this court receives notice from the public defender's office advising either that it has appointed new counsel for Bryant 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