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DISTRICT IV

August 27, 2020

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

2018AP677-CRNM State of Wisconsin v. Jeremy L. Rigelsky (L.C. # 2016CF660)

Before Fitzpatrick, P.J., Graham, and Nashold, 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).

Diane Lowe, appointed counsel for Jeremy Rigelsky, has filed a no-merit report seeking to withdraw as appellate counsel pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Subsequent to filing the report, counsel filed a supplemental

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

report. Rigelsky then filed a response, counsel filed an additional supplemental report, and Rigelsky filed an additional response. Upon an independent review of the record, the no-merit report and supplemental reports, and Rigelsky's responses, we conclude that further postconviction proceedings would not be wholly frivolous within the meaning of RULE 809.32 and ***Anders***. More specifically, we conclude that it would not be frivolous to pursue a postconviction motion based on a plea colloquy defect. Accordingly, we reject the no-merit report, dismiss this appeal, and extend the time to file a postconviction motion.

To ensure that a defendant's plea is knowing, intelligent, and voluntary, the circuit court is required to carry out a number of duties at the plea hearing. *See* ***State v. Taylor***, 2013 WI 34, ¶31, 347 Wis. 2d 30, 829 N.W.2d 482. Among other duties, the court must "advise the defendant personally that the terms of a plea agreement, including a prosecutor's recommendations, are not binding on the court and, concomitantly, ascertain whether the defendant understands this information." ***State v. Hampton***, 2004 WI 107, ¶38, 274 Wis. 2d 379, 683 N.W.2d 14.

Here, Rigelsky and the State entered into a written plea agreement under which the State agreed to recommend that Rigelsky's sentence include not more than ten total years of initial confinement, concurrent with any other sentence Rigelsky was presently serving.[2] At the plea hearing, the circuit court conducted a colloquy with Rigelsky that was in many respects exemplary, but the court did not personally inform Rigelsky that the court was not bound by the parties' plea agreement, including the State's sentencing recommendation. At sentencing, the

[2] The written agreement is not in the record on appeal, but counsel provided a copy of the agreement in the appendix to her second supplemental no-merit report.

court departed from the State's recommendation and imposed a sentence that included seven and one-half total years of initial confinement, consecutive to any other sentence Rigelsky was presently serving.[3] The court found that Rigelsky had eight years remaining on an existing sentence and that, if the court imposed his sentence in this case concurrent with that existing sentence, Rigelsky would in effect serve no further time.

In his response, Rigelsky alleges that the circuit court failed to inform him that the court was not bound by the parties' plea agreement. He further alleges that he did not know this information. Additionally, Rigelsky makes other allegations that, if true, would support a finding that Rigelsky did not understand that the court could accept his plea but depart from the State's recommendation at sentencing. Rigelsky asserts that he should be allowed to withdraw his plea because it was not knowing, intelligent, and voluntary.

Under these circumstances, it would not be frivolous to bring a postconviction motion challenging the validity of Rigelsky's plea. In ***Hampton***, the supreme court stated:

> In every instance where the requisite showing is made that the defendant was not properly advised at the plea hearing, and the defendant asserts he was unaware that the court could exceed the negotiated sentencing recommendation, there is a genuine issue of material fact which must be resolved at an evidentiary hearing.

Id., ¶70; *see also* ***id.***, ¶¶46, 66, 72-73.

[3] The circuit court imposed seven and one-half years of initial confinement on each of two counts of first-degree recklessly endangering safety, and two years of initial confinement on a count of possession of a firearm by a felon, all concurrent to one another but consecutive to any other sentence Rigelsky was presently serving.

Counsel asserts that both the written plea agreement and the plea questionnaire/waiver of rights form that Rigelsky signed stated that the circuit court was not bound by the plea agreement, including the State's sentencing recommendation. Counsel further asserts that the court established at the plea hearing that Rigelsky had reviewed and understood these documents. In ***Hampton***, however, our supreme court rejected the argument that the circuit court satisfies its plea colloquy duties by establishing that the defendant was provided the information on a plea questionnaire/waiver of rights form and signed the form. *See* ***id.***, ¶¶8-10, 68-69. The court in ***Hampton*** stated: "The circuit court cannot satisfy its duty by inferring from the plea questionnaire or from something said at the plea hearing or elsewhere that the defendant understands that the court is not bound by the plea agreement." ***Id.***, ¶69. Although the facts here are not precisely the same as those in ***Hampton***, we conclude that there is a non-frivolous argument under ***Hampton*** that the facts here show a plea colloquy defect.

In sum, we reject the no-merit report based on the potential plea colloquy issue discussed above. While we have specifically identified only one non-frivolous issue, counsel is not precluded from raising any other issue in postconviction proceedings or on appeal that counsel now concludes has arguable merit.[4]

Therefore,

[4] The record before us does not contain a transcript of a sentence credit hearing even though there are references to such a hearing, after which the judgment of conviction was amended to reduce Rigelsky's sentence credit from 391 days to zero days. Absent the transcript, we do not address whether there may be arguable merit to a sentence credit issue. However, we note that sentence credit is an additional possible issue that may warrant further review or investigation by counsel.

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

IT IS FURTHER ORDERED the time to file a postconviction motion is extended to sixty days from the date of this opinion and order.

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

Sheila T. Reiff
Clerk of Court of Appeals