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 IV

February 25, 2021

To:

Hon. William E. Hanrahan
Circuit Court Judge
Dane County Courthouse
215 S. Hamilton St., Rm. 4103
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

William L. Brown
Assistant District Attorney
215 S. Hamilton St., Ste. 3000
Madison, WI 53703

Vicki Zick
Zick Legal LLC
P.O. Box 325
Johnson Creek, WI 53038

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

Justin T. Knutson 321494
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2019AP1652-CRNM State of Wisconsin v. Justin T. Knutson (L.C. # 2017CF2334, 2017CF1068)
2020AP542-CRNM

Before Blanchard, Kloppenburg, 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).

Attorney Vicki Zick, appointed counsel for appellant Justin Knutson, has filed no-merit reports in these consolidated no-merit appeals, seeking to withdraw as appellant counsel. *See*

WIS. STAT. RULE 809.32 (2017-2018)[1] and ***Anders v. California***, 386 U.S. 738, 744 (1967). Knutson filed responses and Attorney Zick filed a supplemental no-merit report. Upon this court's independent review of the no-merit reports, responses, and supplemental no-merit report, this court was unable to determine whether further proceedings would be wholly frivolous. We directed counsel to file a response addressing whether there would be arguable merit to a postconviction motion based on Knutson's assertion that his trial counsel made inaccurate statements at sentencing and that the circuit court relied on that inaccurate information in imposing sentence. Attorney Zick has filed a response concluding that further proceedings would be wholly frivolous. We disagree.

Knutson was convicted of operating while intoxicated as a fifth offense, disorderly conduct while using a dangerous weapon, and intimidating a victim. The disorderly conduct charge was based on Knutson's actions, while armed with a gun and drinking alcohol, at his ex-girlfriend's house. At sentencing, defense counsel argued that Knutson wanted to take care of his family, including his children and another child he was expecting with his significant other. The circuit court then asked defense counsel to explain the facts behind the charge of disorderly conduct while using a dangerous weapon. Defense counsel said that the "whole incident arises in the context of a party that had been going on some hours with a lot of drinking of alcohol--hard alcohol is my recollection—and the taking of a number of different drugs." Counsel also made the following statements: "I know where the house is. It's … a place where a lot of people go to have parties and things like that"; "When you go to this house, there are guns in the house…. It is my understanding that there are guns in the house from people I've spoken with

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

who … have been in the house and have been to the parties and things, and there are a lot of drugs, and then there's other things for sale"; and Knutson "went off his medicine, got involved with a really bad group of folks … was with them doing drugs and drinking and things like that."

In its sentencing comments, the circuit court said: "On one hand, I'm hearing that you've decided you want to be a good family man, but there's absolutely no evidence of that whatsoever here. I've got you out at drug houses where people have guns and drugs and alcohol …."

Knutson argues that his trial counsel was ineffective at sentencing by making inaccurate statements as to Knutson's frequenting a house known for drugs and guns. He argues that his counsel's comments that he was spending time with "a really bad group of folks," at a house where there were partying, guns, drugs and alcohol, and "other things" for sale did not support the defense argument for leniency. Knutson also contends that the information was not true, and that the circuit court relied on the inaccurate information at sentencing when it stated that, despite Knutson's claim of wanting to be a family man, Knutson had been "out at drug houses where people have drugs and guns and alcohol."

By prior order, this court questioned whether there would be arguable merit to a postconviction motion arguing ineffective assistance of counsel, *see* ***Strickland v. Washington***, 466 U.S. 668, 687-694 (1984) (claim of ineffective assistance of counsel must show that counsel's performance was deficient and that the deficient performance prejudiced the defense), or that Knutson was sentenced based on inaccurate information, *see* ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1 ("A defendant has a constitutionally protected due process right to be sentenced upon accurate information."). We noted that it did not appear that

counsel's statements at sentencing were supported by any evidence in the record. We directed counsel to review these issues and to provide this court with an update.

Counsel has now filed a supplemental no-merit report concluding that a postconviction motion arguing ineffective assistance of counsel or for resentencing would lack arguable merit. Counsel acknowledges that there is a factual dispute between Knutson and his trial counsel as to whether trial counsel's statements quoted above were accurate. Counsel argues, however, that Knutson's claim that his trial counsel's statements were untrue would not satisfy the prejudice prong of a claim of ineffective assistance of counsel. Counsel asserts that, even if trial counsel's statements were untrue, it remains that the court had before it evidence that Knutson himself possessed a gun, drugs, and alcohol at the house. In support, counsel cites the criminal complaint in Knutson's disorderly conduct case as alleging that Knutson possessed a gun and alcohol at the house, and the criminal complaint in Knutson's OWI case as alleging Knutson's possession of drugs in a car outside the house. Counsel also argues that the circuit court did not sentence Knutson based on his frequenting a "drug house," but rather based on what the court viewed as Knutson's "horrible crime spree" resulting in multiple criminal cases. Thus, counsel concludes, it would be "difficult" to argue that there is a reasonable probability of a different sentencing outcome absent counsel's purportedly untrue statements that Knutson had been spending time with "a really bad group of folks," at a house where there were partying, guns, drugs and alcohol, and "other things" for sale. *See* ***State v. Sholar***, 2018 WI 53, ¶33, 381 Wis. 2d 560, 912 N.W.2d 89 (prejudice prong requires showing of a reasonable probability of a different result absent counsel's errors).

No-merit counsel also argues that it appears that trial counsel's arguments were strategic. Counsel argues that it was reasonable for trial counsel to argue that Knutson had committed the

disorderly conduct because he had been involved with a "really bad group of folks" but wanted to turn his life around and be a "family man." *See* ***Strickland***, 466 U.S. at 690 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable"). The concept appears to be something like the following. By highlighting the disreputable nature of the house and the "really bad" other people there at the time of Knutson's offenses, trial counsel was attempting to bolster the idea that Knutson could become a "family man" now that he is away from the house and the people.

We are not persuaded that a claim of ineffective assistance of counsel would be wholly frivolous. As no-merit counsel recognizes, there is a factual dispute between Knutson and his trial counsel as to whether trial counsel made inaccurate statements at sentencing that Knutson had been spending time with a "really bad group of folks" at a house known for parties, guns, drugs and alcohol, and "other things" for sale prior to the disorderly conduct offense. We do not agree with counsel's assessment that those statements could not have mattered to the sentencing court based on evidence that Knutson had possessed a gun and alcohol at the house at the time of the disorderly conduct and that he possessed drugs outside the house at the time of the OWI. *See* ***Sholar***, 381 Wis. 2d 560, ¶33 (prejudice shown if there is a reasonable probability of a different result absent counsel's errors). While the allegations in the criminal complaints showed a singular instance of Knutson possessing a gun and alcohol at the house, and a singular instance of his possessing drugs outside the house, counsel's statements at sentencing introduced allegations that the house was known for parties, guns, drugs and alcohol, where presumably illicit "other things" were for sale, and that Knutson had been "spending time" there with a "really bad group of folks."

Moreover, counsel has not persuaded us that that it would be wholly frivolous to argue that trial counsel was ineffective on the basis that the statements, even if untrue, might have been part of a sentencing strategy. Counsel has not established that trial counsel's decision to introduce allegations that Knutson had been spending time with "a really bad group of folks" at a house known for parties, gun, drugs and alcohol, and "other things" for sale, was necessarily part of a reasonable strategy to show that Knutson had made a mistake but wished to turn his life around. *See* ***Strickland***, 466 U.S. at 690-91 (strategic choices by counsel not ineffective if reasonable under the circumstances).

Counsel does not provide any other explanation as to why she has concluded that a claim of ineffective assistance of counsel would be wholly frivolous. Accordingly, we are not persuaded that this issue would lack arguable merit.

Next, counsel concludes that the circuit court did not rely on inaccurate information at sentencing. Counsel asserts that "it seems doubtful" that Knutson could show that the court actually relied on the inaccurate information in imposing sentence. *See* ***State v. Coffee***, 2020 WI 1, ¶38, 389 Wis. 2d 627, 937 N.W.2d 579 ("A circuit court actually relies on incorrect information when it gives explicit attention or specific consideration to it, so that the misinformation formed part of the basis for the sentence." (internal quotation marks and quoted source omitted)). Counsel asserts that the court stated that Knutson had been at "drug houses" only to refute Knutson's claim that he wanted to be a good family man. Counsel argues that the court did not make any further reference to Knutson frequenting drug houses in its sentencing remarks. Counsel also asserts that the court focused on the seriousness of Knutson's crimes, which the court considered "outrageous," and that it viewed Knutson as "bumbling from one potential disaster into the next" and that Knutson had been on "a horrible crime spree." Counsel

asserts that the court's sentencing objectives were to address Knutson's treatment needs, change his criminal thinking, and protect the public. Counsel asserts that no part of the sentence was imposed based on Knutson frequenting drug houses, and thus it would be "difficult" to show that the inaccurate information formed part of the basis for the sentence.

Counsel also asserts that it would be "difficult" to show that trial counsel's statements indicating that the house was a "drug house" were untrue. She contends that Knutson would be unable to establish that the house was not a "drug house," contending that the term "drug house" is not readily defined. She argues that the term "drug house" is "too nebulous to prove or disprove."

Again, counsel has not persuaded us that a postconviction motion for resentencing would be wholly frivolous. As counsel notes, the circuit court specifically referenced the inaccurate information to refute Knutson's argument that he wanted to be a good family man. Counsel has not explained why it would be wholly frivolous to contend that the circuit court's specific reference to the allegedly inaccurate information to refute an argument for a lesser sentence was "explicit attention or specific consideration to [inaccurate information], so that the misinformation formed part of the basis for the sentence." ***Id.*** Counsel's assertion that the circuit court referenced the inaccurate information only once, and also based its sentence on the seriousness of the offenses, Knutson's rehabilitative needs, and the need to protect the public, does not persuade us that it would be wholly frivolous to argue that the circuit court actually relied on inaccurate information in imposing the sentence.

Finally, we are not persuaded by counsel's assertion that Knutson would be unable to show that his trial counsel's statements were inaccurate based on a difficulty in defining "drug

house." As an initial matter, counsel acknowledges that there is a factual dispute between Knutson and his trial counsel as to whether trial counsel's statements at sentencing were inaccurate, regardless of the definition of "drug house." Moreover, counsel has not established that it would be wholly frivolous to argue that the circuit court's sentencing comment that Knutson had been at "drug houses" was a reference to trial counsel's inaccurate description of Knutson spending time at a house known for parties, guns, alcohol and drugs.

Counsel's position is generally that the arguments we identified would be "difficult" to pursue. However, that does not meet the standard required for this court to accept the no-merit report, which is that the issues lack even arguable merit. The question in a no-merit appeal 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. 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 no-merit counsel or this court expects the argument to prevail.

Therefore,

IT IS ORDERED that the no-merit report is rejected and this no-merit appeal is dismissed.

IT IS FURTHER ORDERED that the time to file a postconviction motion or notice of appeal is extended to sixty days from the date of this order.

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

Sheila T. Reiff
Clerk of Court of Appeals