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May 27, 2021

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

2020AP824-CRNM State of Wisconsin v. Jerry D. Canady (L.C. # 2018CF1375)

Before Brash, P.J., Dugan and White, 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).

Jerry D. Canady is pursuing a no-merit appeal after pleading guilty to three counts of delivery of one gram or less of cocaine and pleading no contest to one count of maintaining a drug trafficking place by use of a dangerous weapon. His appellate counsel, Attorney Thomas J. Erickson, 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 (2019-20).¹ Canady did not file a response. Upon review, we conclude that Canady could pursue an arguably meritorious claim to clarify the structure of his sentences, amend the judgments of conviction, and seek any related postconviction relief to address ambiguities in the structure of his sentences. Accordingly, we reject the no-merit report, dismiss this appeal without prejudice, and extend the deadline for filing a postconviction motion.

The circuit court pronounced sentence as follows:

- “As to Count 1, I am ordering 126 days time served. That is concurrent with all sentences and concurrent with all other counts.”
- “Count 2 is 12 months. That is concurrent with Count 1 and concurrent—I’m sorry, concurrent with everything and concurrent with all other sentences. So 12[6] days credit would also go on Count 2 as it did on Count 1.”
- “As to Count 3, I hereby sentence you to four years in the Wisconsin State Prison system, one year initial confinement, three years extended supervision. That is consecutive to all counts and any other sentence....”
- “As to Count 4, I hereby sentence you to five years in the Wisconsin State Prison system, two years of initial confinement, three years of extended supervision.... That is consecutive to all other counts and consecutive to any other sentence.”

The court then added: “Only Counts 1 and 2 have the [sentence] credit.”

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The Department of Corrections (DOC) subsequently contacted the circuit court to alert it that the sentence imposed for Count 4 exceeded the lawful two-year maximum term of extended supervision. The circuit court amended that sentence accordingly.

The judgment of conviction entered for Counts 1 and 2 states, in pertinent part: “Concurrent with all other sentences, with credit for 126 days time served.” The judgment of conviction entered for Counts 3 and 4, as amended and corrected to include a two-year term of extended supervision for Count 4, states in pertinent part: “Consecutive to all other sentences, credit for 0 days time[] served.”

In the no-merit report, Attorney Erickson advised us that the circuit court “imposed an aggregate sentence of three years of initial confinement and five years of extended supervision.” We asked him to file a supplemental no-merit report to clarify the sentence structure and to explain why if, as it appeared, Count 3 was to be served concurrently with Count 2, Canady was not entitled to sentence credit on Count 3. In the supplemental no-merit report, Attorney Erickson indicated that the DOC had construed Canady’s sentence structure as requiring Canady to serve his sentence on Count 3 consecutive to his sentence on Count 2. Attorney Erickson went on: “Counsel erroneously indicated that the aggregate sentence was three years of initial confinement and five years of extended supervision which ostensibly reflected counsel’s belief that Counts 3 and 4 were consecutive to each other but concurrent to Counts 1 and 2. Counsel was mistaken regarding this interpretation.”

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).

This court is satisfied that the sentence structure in this case is ambiguous, allowing for an interpretation both that Count 3 and Count 4 are concurrent with Count 1 and Count 2, and an interpretation that Count 3 is consecutive to Count 2. Under these circumstances, this court concludes that Canady can pursue an arguably meritorious claim to clarify the structure of his sentences, amend the judgments of conviction, and to seek any related relief. We emphasize that we do not reach any conclusion that such claims would or should prevail, only that they would not be frivolous within the meaning of WIS. STAT. RULE 809.32, and *Anders v. California*, 386 U.S. 738 (1967).

Because we cannot conclude that further proceedings in regard to the sentence structure and a related claim for sentence credit would be wholly frivolous, we must reject the no-merit report filed in this case. We add that our decision does not mean we have reached a conclusion in regard to the arguable merit of any other potential issue in the case. Canady 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 Canady, 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 Canady or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Canady 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 Officer advising either that it has appointed new counsel for Canady 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