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DISTRICT III

November 9, 2021

To:

Hon. James C. Babler
Circuit Court Judge
Electronic Notice

Sharon Millermon
Clerk of Circuit Court
Barron County Justice Center
Electronic Notice

Winn S. Collins
Electronic Notice

Dennis Schertz
Electronic Notice

Brian H. Wright
Electronic Notice

Jay A. Hoppe 564514
Jackson Correctional Inst.
P.O. Box 233
Black River Falls, WI 54615-0233

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

2020AP1497-CRNM State of Wisconsin v. Jay A. Hoppe (L. C. No. 2018CF105)

Before Stark, P.J., Hruz and Gill, 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 Dennis Schertz, appointed counsel for Jay A. Hoppe, has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20),¹ and *Anders v. California*, 386 U.S. 738, 744 (1967). By prior order, we informed Attorney Schertz that we were unable to determine whether further proceedings would be wholly frivolous. We requested further input from counsel as to whether it would be wholly frivolous to argue that Hoppe's

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

conviction for attempted second-degree sexual assault of a child was multiplicitous to his conviction for child enticement. Attorney Schertz has now informed this court that he has determined that a postconviction motion to vacate the second-degree sexual assault of a child conviction as multiplicitous would have arguable merit. Because counsel informs this court that there is an issue of arguable merit to pursue, we now reject the no-merit report and extend the time to file a postconviction motion.

Although we now dismiss this no-merit appeal, we also address Attorney Schertz's request for clarification of our prior order. Attorney Schertz states in his letter to this court that he is unclear as to the "scope" of our prior order. In addition to the motion to vacate that he intends to pursue, Attorney Schertz asserts that Hoppe has asked him to pursue a motion for a new trial based on a claim of ineffective assistance of counsel. Attorney Schertz states that he believes that our prior order limited counsel to pursuing only the motion to vacate specifically contemplated by the order. Attorney Schertz also states that he believes a claim of ineffective assistance of counsel would lack arguable merit, and he questions whether he should file a supplemental no-merit report addressing that claim.

First, a no-merit appeal, by definition, may be pursued only in cases where counsel concludes that there are *no* issues with arguable merit to pursue. WIS. STAT. RULE 809.32(1)(a). As explained above, we now reject the no-merit report because Attorney Schertz has concluded that there is at least one non-frivolous issue to pursue by postconviction motion. Because a no-merit appeal is no longer appropriate, there is no reason for Attorney Schertz to file a supplemental no-merit report.

Second, nothing in this court's prior order limits the issues counsel may pursue on Hoppe's behalf following our decision rejecting the no-merit report, dismissing the appeal, and extending the time to file a postconviction motion. We explained in our prior order that we were unable to conclude that further proceedings would be wholly frivolous. We did not state that the issue identified in our order was the only possibly non-frivolous issue in this matter or that it is the only issue that Hoppe may pursue. Counsel remains free to choose which issues to raise by postconviction motion.

Therefore,

IT IS ORDERED that the no-merit report is rejected and the 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