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DISTRICT III

July 6, 2023

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

2020AP1063-CRNM State of Wisconsin v. Ronald Leon White (L. C. No. 2017CF526)

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).

Counsel for Ronald White filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22),¹ concluding that no grounds exist to challenge White's convictions for possession with intent to deliver greater than fifty grams of amphetamine; maintaining a drug-trafficking place; possession of THC; possession of drug paraphernalia; and felony bail jumping—the first

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

three counts as second or subsequent offenses, and the first four counts as a party to a crime. In his response to the no-merit report, White argued that he was denied the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-694 (1984). White claimed that his trial counsel failed to inform him of a plea offer made by the State on June 1, 2017, the day before White's preliminary hearing. In an "offer memo" attached to his response, it appears that the deputy district attorney made the following offer in this case:

Waive Preliminary Hearing, file no motions and plead to
Count 1: PWID Meth without subsequent offender enhancer and
Count 5: felony bail jumping, dismiss and read in Counts 2, 3 and
4. Order PSI. Argue disposition.

If the defendant does not waive the preliminary hearing with this offer, the State will schedule this matter for a jury trial and extend no further offers in this case.

White averred that the first time he became aware of the "offer memo" was when his appellate attorney gave him trial counsel's case file to facilitate his no-merit response. White asserted that if his trial counsel had informed him of this offer, there is a "reasonable probability" that he would have accepted its terms, thus resulting in the dismissal of three of the five offenses to which he ultimately entered no-contest pleas.

When counsel files a no-merit report, the question presented to this court is whether, upon review of the entire proceedings, any potential argument would be wholly frivolous. *See Anders v. California*, 386 U.S. 738, 744 (1967). The test is not whether the attorney expects 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 counsel to prosecute the appeal. *See McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 436 (1988).

The United States Supreme Court has held that “as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” *See Missouri v. Frye*, 566 U.S. 134, 145 (2012). Accordingly, we directed counsel to file a supplemental no-merit report addressing why it would be wholly frivolous to pursue a plea withdrawal motion based on trial counsel’s alleged ineffectiveness.

In a supplemental no-merit report, counsel recounts that before filing the present no-merit appeal, she filed a postconviction motion for plea withdrawal on grounds that White did not understand the maximum penalties that he faced when entering his pleas. Counsel adds that she cautioned White that any other issue regarding the pleas had to be raised at that time or it would, in effect, be forfeited. In the context of a no-merit appeal, however, this court can authorize an additional WIS. STAT. RULE 809.30 postconviction motion.

In any event, counsel claims that White did not raise an issue regarding his knowledge of prior plea offers at any time prior to the filing of the postconviction motion. White, however, asserted that he did not learn of the subject offer until he received trial counsel’s file to facilitate his no-merit response. If counsel is disputing White’s claim about when he learned of the offer memo, this court cannot resolve factual disputes.

Ultimately, counsel’s supplemental no-merit report has not persuaded us that it would be wholly frivolous to pursue plea withdrawal based on trial counsel’s alleged ineffectiveness.

Therefore, we will reject the no-merit report, dismiss this appeal without prejudice, and authorize the filing of an additional postconviction motion.²

Upon the foregoing,

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

IT IS FURTHER ORDERED that the time for filing an additional WIS. STAT. RULE 809.30 postconviction motion is extended to forty-five days from the date of this order.

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

Samuel A. Christensen
Clerk of Court of Appeals

² In her supplemental no-merit report, counsel states that she has been unable to contact White, who is on extended supervision. If she has not already done so, counsel may wish to contact White's probation agent for updated contact information. If White's input is necessary to pursue the postconviction motion and counsel is unable to locate him, counsel may consider moving the circuit court to relieve counsel of further representation. *Cf. State v. Bono*, 103 Wis. 2d 654, 655, 309 N.W.2d 400 (Ct. App. 1981) ("It is within the discretion of the court to refuse to decide a criminal appeal if the defendant cannot be made to respond to the court's judgment.").