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DISTRICT IV

January 16, 2013

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

2011AP652-CRNM State of Wisconsin v. Edward W. Bobnar (L.C. # 2010CF97)

Before Higginbotham, Blanchard and Kloppenburg, JJ.

Appointed counsel for Edward Bobnar filed a no-merit report under WIS. STAT. RULE 809.32 (2009-10).¹ In our order of November 20, 2012, we identified an issue that required further review and a response from counsel. Counsel has now filed a supplemental no-merit report stating that he has concluded that the issue is not frivolous, but that a postconviction motion on the issue is “neither appropriate nor necessary.” Counsel asks that we continue the

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

no-merit appeal and issue an order addressing other issues. We disagree with counsel's proposal, and therefore we reject the no-merit report, dismiss the appeal, and extend the time to file a postconviction motion.

Bobnar was convicted of one felony count and one misdemeanor count. The circuit court withheld sentence and placed Bobnar on probation for three years on each count, concurrently. In our November 20 order, we stated that the three-year term of probation appeared to be lawful for the felony count, but we questioned whether three years was also a permitted probation term for the misdemeanor count. We suggested that it may not be frivolous to argue that the maximum term for a misdemeanor count is one year, unless the defendant is convicted of other misdemeanors at the same time, which Bobnar does not appear to have been. *See* WIS. STAT. § 973.09(2)(a)1m. We also observed that, if the misdemeanor probation term is reduced to one year, that may not affect Bobnar's total probation term (because the felony term will control), but it would reduce his later sentence exposure if he is revoked from probation after one year.

In the supplemental no-merit report, counsel agrees that it would not be frivolous to argue that the probation term for the misdemeanor count is limited to one year. However, counsel asserts that a postconviction motion is not necessary because the error will be corrected through a "self-effectuating" process under WIS. STAT. § 973.09(2m). That statute provides: "If a court imposes a term of probation in excess of the maximum authorized by statute, the excess is void and the term of probation is valid only to the extent of the maximum term authorized by statute. The term is commuted without further proceedings."

Counsel asserts that a postconviction motion is not required because the excessive probation term on Bobnar's misdemeanor count is "commuted without further proceedings." We

do not agree that the statute is self-effectuating to the extent counsel claims. Under that statute, the term is commuted without further proceedings only if it is first determined that the court imposed an excessive term. The language counsel relies on does not obviate the need for further proceedings to answer that question. The language provides only that, once it is determined that the term is excessive, no formal resentencing or other proceeding is required to commute the term or otherwise determine the remedy.

As an alternative, appellant's counsel appears to suggest that we should ourselves make the determination that the probation term was excessive, and that we should do so in the context of this no-merit appeal. However, counsel's suggestion is inconsistent with the adversarial process and with the concept of a no-merit appeal. The State has not had an opportunity to argue the point, and has not conceded error. While we could now seek input from the State on the issue, that would stray considerably from the no-merit process. Essentially, we would be conducting a normal appeal and deciding an issue on the merits, rather than merely deciding whether there is an arguable basis for further proceedings.

Furthermore, in addition to our deciding the probation issue on the merits, counsel also asks us to address the other issues in the no-merit report and response. The result would be a peculiar hybrid of regular and no-merit appeals that we do not regard as either workable or required by law. Therefore, because counsel has now concluded that further proceedings would not be frivolous, we reject the no-merit report and provide for further proceedings.

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

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

Diane M. Fremgen
Clerk of Court of Appeals