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DISTRICT I

February 7, 2013

To:

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

2012AP36-CRNM State of Wisconsin v. Ronald R. Mueller (L.C. #2009CM6440)

Before Brennan, J.¹

Ronald R. Mueller appeals a judgment convicting him of misdemeanor theft. Appellate counsel, Crystal L. Saltzwadel, filed a no-merit report seeking to withdraw as appellate counsel. See WIS. STAT. RULE 809.32, and *Anders v. California*, 386 U.S. 738, 744 (1967). Mueller was informed of his right to file a response, but he has not responded. After reviewing the no-merit report and conducting an independent review of the record, we agree with counsel's assessment

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

that there are no arguably meritorious appellate issues. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21.

The no-merit report first addresses whether there would be arguable merit to an appellate challenge to the circuit court's restitution order. "The burden of demonstrating by the preponderance of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing is on the victim." WIS. STAT. § 973.20(14)(a). During the sentencing hearing, the victim testified about the amount of money he lost due to Mueller's theft of his forklift, including lost wages because without the stolen forklift he was unable to earn wages he would have otherwise earned. Mueller's attorney asked the victim to clarify several points with regard to his testimony about his pecuniary loss and the circuit court also asked the victim several questions regarding his \$2500 restitution claim. After hearing the victim's testimony, the circuit court awarded \$1400 in restitution, which included \$1000 for lost wages, \$200 for towing costs, and \$200 he incurred in costs to an auction employee. The circuit court based its decision on the testimony and exercised its discretion in deciding what items to allow. Therefore, there would be no arguable merit to a claim that the circuit court misused its discretion in awarding the victim \$1400 in restitution.

The no-merit report next addresses whether there would be arguable merit to a claim that Mueller received ineffective assistance of trial counsel. To establish a claim of ineffective assistance of trial counsel, a defendant must show both that his lawyer's performance was deficient and that his lawyer's deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). The no-merit report discusses whether Mueller could argue that his attorney was ineffective for failing to subpoena a witness, Michael Ellington, to corroborate Mueller's testimony that he took the forklift because Ellington asked him to move it

for him. Mueller testified on cross-examination that his attorney or his attorney's investigator had attempted to locate Ellington. He also testified that he had been looking for Ellington but had been unable to locate him, and had heard rumors that Ellington was on the run. An argument by Mueller that his attorney ineffectively represented him by failing to subpoena Ellington would be without merit because his attorney attempted to locate Ellington, but was unable to do so. We therefore conclude that there would be no arguable merit to a claim that Mueller's lawyer ineffectively represented him.²

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction. Therefore, we conclude that further appellate proceedings would be wholly frivolous within the meaning of *Anders* and WIS. STAT. RULE 809.32.

IT IS ORDERED that the judgment of conviction is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Crystal L. Saltzwadel is relieved of any further representation of Mueller in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals

² Attorney Saltzwadel suggests that there might be four different grounds for a claim of ineffective assistance of counsel, but then she presents a reasoned argument regarding only one of those grounds. Saltzwadel should in the future provide at least some argument about each potential issue she identifies in her no-merit report. With regard to this appeal, however, we have thoroughly reviewed the record and find no potential grounds for arguing that Mueller received ineffective assistance of trial counsel.