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May 28, 2013

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

2012AP2363-CRNM State of Wisconsin v. Craig Alan Fulsom (L.C. #2010CF2362)

Before Kessler, J.[1]

Craig Alan Fulsom appeals a judgment convicting him of one count of violating a domestic abuse temporary restraining order, a misdemeanor. Appointed appellate counsel,

[1] This case 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.

Dustin C. Haskell, 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). Fulsom filed a response. Attorney Haskell then filed a supplemental no-merit report. After considering the no-merit reports and the response, and after conducting an independent review of the record, we agree with counsel's assessment 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 Fulsom's guilty plea. The plea colloquy complied in all respects with the requirements of WIS. STAT. § 971.08, and ***State v. Bangert***, 131 Wis. 2d 246, 266-72, 389 N.W.2d 12 (1986). The circuit court addressed whether Fulsom understood the elements of the charge against him, the maximum penalties he faced, and the constitutional rights he would be waiving by entering a plea. The circuit court also ascertained that Fulsom had reviewed a plea questionnaire and waiver-of-rights form with his attorney and that he understood the information explained on that form. *See* ***State v. Moederndorfer***, 141 Wis. 2d 823, 827-28, 416 N.W.2d 627 (Ct. App. 1987). Fulsom acknowledged that he had read the complaint and agreed that the facts in the complaint were true and provided a sufficient factual basis for the plea. He also indicated that he understood the plea agreement. We therefore conclude that there would be no arguable merit to an appellate challenge involving the plea.

The no-merit report next addresses whether there would be arguable merit to a claim that the circuit court erroneously exercised its sentencing discretion. The circuit court sentenced Fulsom to the maximum of nine months in jail, and granted him sentence credit for 194 days. The circuit court placed particular weight on Fulsom's extensive prior record and his poor character, as reflected in the fact that he repeatedly coached the victim about recanting more

serious charges against him despite the fact that there was a restraining order in place. The circuit court also pointed out that Fulsom had not adequately taken responsibility for his violent actions. Because the circuit court explained its application of the various sentencing considerations in accordance with the framework set forth in ***State v. Gallion***, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197, we conclude that there would be no arguable merit to a challenge to the sentence on appeal.

In his response, Fulsom argues that he received ineffective assistance of trial counsel because his lawyer failed to communicate to him a plea offer made by the prosecutor on May 26, 2010. To prove a claim of ineffective assistance of trial counsel, a defendant must show: (1) that his lawyer's performance was deficient; and (2) that the deficient performance prejudiced the defense. ***State v. Artic***, 2010 WI 83, ¶24, 327 Wis. 2d 392, 768 N.W.2d 430. To prove deficient performance, a defendant must show acts or omissions of counsel that were not "the result of reasonable professional judgment." ***Strickland v. Washington***, 466 U.S. 668, 690 (1984). To prove prejudice, the defendant must "'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" ***Artic***, 327 Wis. 2d 392, ¶24 (citation omitted).

Assuming that Fulsom's assertion that his trial lawyer did not discuss the prosecutor's May 26, 2010 offer with him is true, his lawyer rendered deficient performance. *See* ***Missouri v. Frye***, 132 S.Ct. 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecutor to accept a plea on terms and conditions that may be favorable to the accused."). Here, however, Fulsom cannot show that he was prejudiced. To establish prejudice in this instance, Fulsom would have to show that there is a reasonable

probability that he would have accepted the earlier plea offer if it had been communicated to him. *See* ***id.*** at 1409. As succinctly explained in the supplemental no-merit report:

> In this case, Mr. Fulsom cannot show that there is a reasonable probability he would have accepted the earlier plea offer because the plea he ultimately entered was on more favorable terms than the earlier offer. As the letter attached to Mr. Fulsom's no-merit response indicates, the State's earlier offer would [have] require[d] him to plead guilty to two counts of battery, one count of violating a domestic abuse temporary restraining order, and one count of disorderly conduct…. The plea that Mr. Fulsom ultimately entered in this case was to one count of violating a domestic abuse temporary restraining order, with both sides free to argue at sentencing. Thus, the plea that Mr. Fulsom entered was more favorable than the offer that was never communicated to him. Instead of pleading guilty to four misdemeanors with exposure of 30 months in jail, he pleaded guilty to one misdemeanor … with exposure of 9 months in jail.

Because the earlier offer was less favorable to Fulsom than the plea agreement he accepted, Fulsom cannot show that he was prejudiced. Therefore, there is no arguable merit to a claim that Fulsom received ineffective assistance of trial counsel.

Fulsom next argues in his response that he received ineffective assistance of appeal counsel because Attorney Haskell filed this no-merit report instead of raising meritorious issues. We have independently reviewed the record, but have found no potentially meritorious issues for appeal. Attorney Haskell did not render ineffective assistance of appellate counsel by filing this no-merit report because there are no arguably meritorious issues for appeal. Therefore, we affirm the judgment of conviction and relieve Attorney Haskell of further representation of Fulsom in this matter.

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

IT IS FURTHER ORDERED that Attorney Dustin C. Haskell is relieved of any further representation of Fulsom in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals