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DISTRICT I

June 28, 2013

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

2012AP181-CRNM State of Wisconsin v. Joseph T. Benson (L.C. # 2009CF4357)
2012AP182-CRNM State of Wisconsin v. Joseph T. Benson (L.C. # 2009CF4466)

Before Curley, P.J., Fine and Brennan, JJ.

Joseph T. Benson is pursuing an appeal of judgments of conviction with the assistance of Steven W. Zaleski, Esq., pursuant to WIS. STAT. RULE 809.32, and ***Anders v. California***, 386 U.S. 738 (1967). Zaleski filed a no-merit report and a supplemental no-merit report on Benson's behalf. Benson did not file a response. Upon review of the no-merit report, the supplement, and the Records, we conclude that this matter presents issues of arguable merit. Therefore, we reject the no-merit report, dismiss this appeal without prejudice, and extend the deadline for Benson to

file a postconviction motion or notice of appeal pursuant to WIS. STAT. RULE 809.30 and WIS. STAT. § 974.02.

Benson pled guilty to one count of armed robbery, a violation of WIS. STAT. § 943.32(2), and two counts of robbery of a financial institution, violations of WIS. STAT. § 943.87. Before accepting a guilty plea, a circuit court must "undertake a personal colloquy with the defendant to ascertain his understanding of the nature of the charge[s]." ***State v. Brown***, 2006 WI 100, ¶28, 293 Wis. 2d 594, 614, 716 N.W.2d 906, 916, quoting ***State v. Bangert***, 131 Wis. 2d 246, 260, 389 N.W.2d 12, 20 (1986). During the colloquy, "a circuit court must establish that a defendant understands every element of the charges to which he pleads." ***Brown***, 2006 WI 100, ¶58, 293 Wis. 2d at 627, 716 N.W.2d at 922. The circuit court may establish the defendant's requisite understanding in a variety of ways: "summarize the elements of the offenses on the record, or ask defense counsel to summarize the elements of the offenses, or refer to a prior court proceeding at which the elements were reviewed, or refer to a document signed by the defendant that includes the elements." ***Id.***, 2006 WI 100, ¶56, 293 Wis. 2d at 626, 389 N.W.2d at 922. This list is not exhaustive. ***Id.***, 2006 WI 100, ¶49, 293 Wis. 2d at 623, 389 N.W.2d at 920. The circuit court must, however, establish the defendant's understanding of the charges on the record. ***Id.***, 2006 WI 100 ¶52, 293 Wis. 2d at 623, 389 N.W.2d at 920.

A defendant may move to withdraw a guilty plea based on a deficient colloquy by making a two-prong showing. The defendant must demonstrate that: (1) the colloquy did not conform with WIS. STAT. § 971.08 or other duties mandated during a plea hearing; and (2) the defendant did not know or understand the information that should have been provided at the hearing. ***Brown***, 2006 WI 100, ¶2, 293 Wis. 2d at 604, 389 N.W.2d at 910.

In the no-merit report, Zaleski contends that the circuit court established Benson's understanding of the elements of robbery of a financial institution because Benson stated on the Record that he had read and understood the criminal complaint describing the charges. We question whether this sufficiently satisfies the obligation described in ***Brown***. *See* ***id.***, 2006 WI 100, ¶56, 293 Wis. 2d at 626, 389 N.W.2d at 922. Of equal importance here, Zaleski states that the crime of robbery of a financial institution may include elements in addition to those reflected in the description of the charges in the criminal complaint. Indeed, Zaleski's submissions indicate that, in his view, some uncertainty exists as to the elements that the State must prove to convict a defendant of robbery of a financial institution. In light of the foregoing, Zaleski's submission suggests that Benson could present an arguably meritorious challenge to the sufficiency of the plea colloquy, as required to satisfy the first prong of a motion for plea withdrawal. *See* ***Brown***, 2006 WI 100, ¶2, 293 Wis. 2d at 604, 389 N.W.2d at 910.

Turning to the second prong of a potential motion for plea withdrawal, Zaleski advises that Benson could not truthfully aver that he lacked knowledge of the elements of robbery of a financial institution, defined in WIS. STAT. § 943.87, because he knows and understands the elements of robbery, defined in WIS. STAT. § 943.32. Zaleski points out that the jury instruction committee suggests using the pattern instruction for robbery when constructing a jury instruction for robbery of a financial institution. *See* WIS JI—CRIMINAL 1508. The jury instruction committee cautions, however, that "there are differences in the crime definitions." *See* ***id.*** Accordingly, Benson's familiarity with the elements comprising the crime of robbery does not appear to foreclose a truthful averment that Benson lacked knowledge of the elements comprising the crime of robbery of a financial institution. We conclude that further

postconviction and appellate proceedings related to the sufficiency of the guilty plea colloquy would not be wholly frivolous.

When a lawyer 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***, 386 U.S. at 744. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, comment. 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***, 486 U.S.429, 436 (1988). Because the Records indicate that Benson can pursue an arguably meritorious claim for plea withdrawal based on a defective colloquy, the no-merit report is rejected.

Therefore,

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

IT IS FURTHER ORDERED that the deadline to file a postconviction motion or notice of appeal is extended to forty-five days from the date of this order.

Diane M. Fremgen
Clerk of Court of Appeals