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January 23, 2014

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

2013AP145-CRNM State of Wisconsin v. Nicole L. Schroeder Williams
(L.C. #2011CF40)

Before Lundsten, Higginbotham and Sherman, JJ.

Attorney Donna Hintze, appointed counsel for Nicole Schroeder Williams, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2011-12)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Counsel provided Williams with a copy of the report, and she filed several responses to it. We conclude that this case is appropriate for summary disposition. *See* WIS.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

STAT. RULE 809.21. After our independent review of the record, we conclude there is no arguable merit to any issue that could be raised on appeal.

Williams pled no contest to one felony count of child abuse. The court imposed a sentence of two years of initial confinement and two years of extended supervision.

The no-merit report first addresses whether the circuit court erred in denying Williams' suppression motion. It does not appear that this issue is directly before us on appeal. The charges in this case were previously filed, dismissed without prejudice, and then refiled as the current case. During the first case, Williams filed a suppression motion that was the subject of an evidentiary hearing and was denied by the circuit court.

In the current case, Williams renewed the suppression motion. The parties agreed that the court could use the transcript and other materials from the first case. The court provided the parties a chance to file additional argument, and said that if they did not the court would issue a written decision. However, no written or oral decision on the motion was issued before Williams entered her plea and was sentenced.

Later, Williams' postconviction counsel noted the absence of a motion decision in the record and sent a letter to the circuit court seeking "clarification of the record" for purposes of appeal. The court responded with an order denying the suppression motion.

It is not apparent that the postconviction order denying the suppression motion had any legal effect that can be reviewed directly on appeal. The motion was not formally decided by the time of Williams' no-contest plea. Under well-established case law, her plea was probably a waiver of the undecided motion. *See* ***County of Racine v. Smith***, 122 Wis. 2d 431, 434, 362

N.W.2d 439 (Ct. App. 1984) (a person who pleads guilty to an offense waives the right to raise all nonjurisdictional defects and defenses, including claimed violations of constitutional rights). Once the court accepted that plea and imposed sentence, the suppression motion was no longer pending, and thus the later order denying it does not appear to have had a legal effect. Therefore, for the suppression issue to be raised in postconviction proceedings, the argument would probably have to be that trial counsel was ineffective by failing to obtain a decision from the court before Williams entered her plea, which would then have preserved the suppression issue for appeal under WIS. STAT. § 971.31(10).

Of course, trial counsel's failure to preserve an issue for appeal has arguable merit only if the issue itself had potential merit. In other words, even if we assume trial counsel's performance was deficient by not preserving the issue, Williams has not been prejudiced by that performance unless the suppression issue itself was strong enough to undermine our confidence in the outcome. *See* ***Strickland v. Washington***, 466 U.S. 668, 687, 694 (1984).

In evaluating the suppression issue, the no-merit report concludes that the issue is frivolous because the circuit court used the proper test for the community caretaker doctrine "and reached a reasonable conclusion in applying the constitutional standard to the facts." [p.10] As the no-merit report notes elsewhere, the test on appeal is not merely whether the court reached "a reasonable conclusion." Rather, we decide the application of the legal test to the facts independently. *See* ***State v. Kramer***, 2009 WI 14, ¶21, 315 Wis. 2d 414, 759 N.W.2d 598. We assume, for purposes of our discussion, that counsel intended to say that the issue is frivolous if decided independently.

Without attempting to repeat the full analysis here, we conclude that an ineffective assistance argument based on the suppression issue would be frivolous for the reasons described in the no-merit report. The officer's entry into the residence was with consent, and the officer's further entry into the child's bedroom was a proper exercise of the community caretaker function.

The no-merit report addresses whether Williams' pleas were entered knowingly, voluntarily, and intelligently. The plea colloquy sufficiently complied with the requirements of ***State v. Bangert***, 131 Wis. 2d 246, 266-73, 389 N.W.2d 12 (1986) and WIS. STAT. § 971.08 relating to the nature of the charge, the rights Williams was waiving, and other matters. The record shows no other ground to withdraw the plea. There is no arguable merit to this issue.

The no-merit report addresses whether the court erroneously exercised its sentencing discretion. The standards for the circuit court and this court on sentencing issues are well-established and need not be repeated here. *See* ***State v. Gallion***, 2004 WI 42, ¶¶17-51, 270 Wis. 2d 535, 678 N.W.2d 197. In this case, the court considered appropriate factors such as Williams' failure to take responsibility for the crime, the need for punishment, the nature of the crime, and her need for treatment. The court did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

In Williams' responses to the no-merit report, she does not present any clearly identifiable legal issue. It appears that most of her comments are related to the strength of the evidence against her, or are about other evidence that might have been used in her favor. However, sufficiency of the evidence is an issue that was waived by Williams' no-contest plea.

Therefore, unless there is a ground for Williams to withdraw her plea, the strength of the evidence is not an issue for further consideration.

Williams also asserts that she was "promised" probation as part of the plea agreement. While it is true that the plea agreement included a joint recommendation for probation by the State and Williams, the circuit court also advised Williams that it was not bound by that agreement, and could impose a greater sentence. Williams stated that she understood the court was not bound, and she has not claimed now that she really did not understand that at the time. Therefore, there is no arguable merit to this issue.

Finally, we order the judgment of conviction amended to conform to the court's oral statement at sentencing. The judgment states, apparently as a condition of extended supervision, that the "court orders defendant obtain & maintain fulltime employment or parttime employment if enrolled in school but only if defendant is able due to her disability." However, the sentencing transcript shows the court as having stated only: "I will *encourage* the defendant to maintain full-time employment or part-time employment with a caveat that the agent has to be aware of her disability." (Emphasis added.) We do not regard that statement as an order, but merely as a recommendation. Accordingly, that provision must be removed from the judgment.

Our review of the record discloses no other potential issues for appeal.

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

IT IS FURTHER ORDERED that Attorney Hintze is relieved of further representation of Williams in this matter. *See* WIS. STAT. RULE 809.32(3).

IT IS FURTHER ORDERED that, after remittitur, the clerk of the circuit court shall enter an amended judgment of conviction deleting the provision about the defendant's employment discussed above.

Diane M. Fremgen
Clerk of Court of Appeals