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May 11, 2016

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

2015AP1286-CRNM State of Wisconsin v. David J. Gresen (L.C. # 2011CF181)

Before Lundsten, Higginbotham and Sherman, JJ.

In our order of February 10, 2016, we raised a question about the scope of our no-merit review in this appeal. The underlying question was whether appellant David Gresen could have filed an appeal as a matter of right from two misdemeanor convictions when he was placed on probation, even though at that time a felony count was the subject of a deferred entry of judgment agreement. Gresen, by counsel, has responded to that order. In the paragraphs below, we discuss that issue and explain why we choose not to resolve it. We then proceed with no-merit review with respect to Gresen's felony conviction and sentencing on his misdemeanor

convictions. As to these matters, we conclude there are no arguably meritorious appellate issues and relieve counsel of further representation.

In our February 10 order we stated that it would be in Gresen's interest for his attorney to argue for a wider scope of no-merit review, that is, for counsel to argue that the original misdemeanor convictions were not final and appealable, and are thus before us now. Gresen disputes that assertion for two reasons.

First, Gresen states that even if there is an arguable issue that could lead to withdrawal of his misdemeanor pleas, he does not want to seek that form of relief. Therefore, he states, arguing for a no-merit review of those pleas is not in his interest. We agree that if Gresen does not want that relief, he has no reason to argue for a wide no-merit review.

Second, Gresen argues that it would actually be *against* his interest to argue for a wide no-merit review. It would be against his interest because the availability of a wide review would, somewhat counter-intuitively, mean that Gresen could not receive the no-merit review of sentencing that he is currently asking for.

More specifically, the problem would be that current counsel has determined, after reviewing plea colloquy flaws identified in our February 10 order, that there would be arguable merit to a motion to withdraw one of Gresen's misdemeanor pleas. If arguable merit for plea withdrawal exists, but Gresen declines to pursue that issue, this appeal would be a "partial no-merit" of the type described in ***State ex rel. Ford v. Holm***, 2006 WI App 176, 296 Wis. 2d 119, 722 N.W.2d 609.

In ***Ford***, the issue on habeas was whether appellate counsel was ineffective by not offering the defendant the option of a partial no-merit report after the defendant elected not to pursue one arguable issue. ***Id.***, ¶6. We held that an appellant is not entitled to a partial no-merit review, and therefore counsel was not ineffective by failing to offer something the appellant was not entitled to. ***Id.***, ¶¶9-12.

As described by Gresen, then, the current situation is that if he argues that a wide no-merit review is legally available, and we agree, the effect will be to deprive Gresen of the no-merit review of sentencing that he seeks. It will do that because Gresen's decision not to pursue the arguable plea withdrawal issue will require us to dismiss this as a partial no-merit appeal. On the other hand, if we conclude that the scope of this no-merit appeal does *not* include the original misdemeanor pleas, then it is irrelevant that an arguable issue exists as to those pleas, and this appeal is a proper no-merit appeal because counsel has concluded that there is no arguable merit to any available issue. Therefore, as Gresen sees it, his interest at this time is to argue for a narrow no-merit review, because that is the position that will best preserve the availability of the no-merit review of sentencing by this court that he seeks.

We agree with Gresen that the potential for his appeal to be dismissed as a partial no-merit appeal means that it is in his interest to argue for a narrow no-merit review. However, in light of Gresen's position that he does not want to pursue misdemeanor plea withdrawal, there is another way to proceed without resolving the underlying finality issue.

Gresen cites WIS. STAT. RULE 809.32 and ***Ford*** for the proposition that a no-merit review is "only available" when there are no arguable issues. However, in ***Ford*** we noted that our past practice had been to conduct partial reviews in at least some cases. ***Ford***, 296 Wis. 2d 119, ¶6.

We believe this continues to be our practice in some cases. Ultimately, we did not conclude in ***Ford*** that partial no-merit reviews are *unavailable*, but only that a defendant is not *entitled* to receive such a review. Accordingly, if we provide a partial no-merit review to Gresen in this case, there is no need for us to decide the legal question about finality and the scope of the no-merit review, or whether his appeal must be dismissed as a partial no-merit appeal.

We recognize that Gresen has asked for full briefing and a published decision on the finality issue, or for certification. We agree that this issue should probably be resolved in a published opinion at some point. However, we do not regard this case as a suitable vehicle for publication due to its procedural posture. This case is made more complicated by the revocations of probation and the deferral agreement, and by the no-merit posture. These elements would require substantial published explanation of why Gresen is taking the position that he is, and what the significance of the finality issue is in the context of this appeal. In addition, an opinion's analysis in this posture would involve the partial no-merit concept in ways that could add yet another layer to the discussion, may require further argument, and may have unintended consequences. In contrast, the posture that was previously presented in ***Myrick*** and other cases, where we dismissed a defendant's appeal of the initial judgment due to lack of finality, is much simpler. *See* ***State v. Myrick***, No. 2012AP1543-CRNM, unpublished slip op. and order (WI App Feb. 11, 2014).

As might be discerned from the above discussion, with the always-improved clarity of hindsight we now recognize that it may have been better to use ***Myrick*** as the vehicle for a published decision, instead of granting leave to appeal. The issue has recurred more than we apparently expected at that time. And, since then, the supreme court demonstrated its own lack of interest in issuing a published decision when it denied a petition for review in an appeal that

we dismissed in the same posture as ***Myrick***. *See* ***State of Wisconsin v. Flahavan***, No. 2014AP2087-CR (*review denied* Mar. 16, 2015). If a decision is going to be published, we have to assume at this point that it will come from this court. However, as we said, this appeal does not appear to be suitable for that.

Although we are declining to decide the finality issue, we nonetheless make some observations about the substance of that issue. We do so for the purpose of moving the discussion forward and directing attention to law that Gresen's arguments do not acknowledge or come to terms with.

We first observe that it is doubtful whether a civil appeal in the posture of ***Myrick*** would be allowed to proceed. Although Gresen attempts to satisfy the finality language of WIS. STAT. § 808.03(1) by describing the felony count as having been "disposed of" by the deferral agreement, it appears that disposal was precisely the thing being deferred. Our current understanding is that every charged criminal count must eventually conclude with either dismissal or a conviction. Myrick's deferral agreement postponed both of those acts, and instead required the circuit court to perform one of them in the future. If we were presented with a civil appeal in which entry of judgment on a claim is deferred while one party undertakes certain acts to satisfy the other, we would likely conclude that no appeal could be taken as a matter of right.

Second, Gresen does not identify any law that exempts criminal cases from the statutory finality requirement of WIS. STAT. § 808.03(1) and its related case law. We acknowledge Gresen's argument that the criminal rule on postconviction relief, WIS. STAT. RULE 809.30, provides that judgments of conviction are appealable, and does not expressly limit appealability

to only judgments that dispose of all pending counts. However, neither does the rule expressly provide that criminal judgments are appealable *without* regard to the status of other counts.

Furthermore, the supreme court has previously applied part of the finality requirement of WIS. STAT. § 808.03(1) to the postconviction context of WIS. STAT. RULE 809.30. *See* ***State v. Malone***, 136 Wis. 2d 250, 256-58, 401 N.W.2d 563 (1987) (oral order denying postconviction motion cannot be appealed, but must be reduced to writing). Gresen does not propose any textual explanation for why only the writing requirement of § 808.03(1) applies in the criminal postconviction context, and not also the requirement that the entire matter in litigation be disposed of.

Third, Gresen argues that case law requires us to construe ambiguities in judgments in a way that preserves the right to appeal. While that may be true, the applicability of that concept to the present situation is not obvious. For one thing, it is not clear what ambiguity Gresen believes is present *in the judgment itself*. The uncertainty that exists here seems mainly to be about the legal status of the appealability of this type of judgment, not in its text. We question whether ambiguity in the law of jurisdiction is itself a basis to find jurisdiction. Furthermore, a close review of that line of cases may show that preservation of the right to appeal typically involves a holding that the original, ambiguous judgment was *nonfinal*, so as to preserve the appellant's right to appeal from a later judgment, and thus bring all issues before the court at the later time. This would be contrary to Gresen's current position that the original judgment should be held final.

Fourth, reconciling WIS. STAT. RULE 809.30, which does not expressly require finality, with WIS. STAT. § 808.03(1) and its case law requiring finality, may not be possible with a purely

textual analysis, and may instead turn largely on the policies that support a limited availability of appeals from nonfinal decisions. Those policies have been discussed in case law, so we do not repeat them here. Gresen's arguments (and, admittedly, most of our own discussions to this point) do not explore those policies and how they may apply in a criminal context, or what practical difficulties may arise if those concepts are applied in a criminal case.

In summary, we have not reached any conclusion on the finality question. However, we continue to see this as a more debatable question than Gresen's current filing suggests.

Based on the above discussion, we now proceed with the appeal. Gresen has stated that he does not want to withdraw his pleas, and therefore only sentencing remains before us.

The no-merit report addresses whether the sentence is within the legal maximum and whether the court erroneously exercised its sentencing discretion. The sentences are within the legal maximums. 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, did not consider improper factors, and reached a reasonable result. There is no arguable merit to this issue.

Gresen filed a postconviction motion asserting that the court relied on inaccurate information in sentencing. It alleged five errors related to the presentence investigation report. In denying the motion, the circuit court assumed that these inaccuracies occurred, but stated that it did not rely on the inaccurate points. As noted in the no-merit report, reliance by the sentencing court is necessary for relief on this ground. The record does not provide a basis to

argue that the sentencing court's view about its lack of reliance was erroneous, and therefore this issue lacks arguable merit.

In Gresen's response to the no-merit report he expresses dissatisfaction with several aspects of his sentencing, including lesser sentences given to other people for similar offenses, delays in his sentencing after revocation, and the ordering of a presentence investigation contrary to his desire. However, based on the information we currently have, none of these issues provide a basis for sentencing relief. Gresen asserts that the sentencing court did not take into consideration that he was already serving a sentence, but it is apparent that the court did so, because the court made the current sentences consecutive to the existing one.

Therefore,

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

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

Diane M. Fremgen
Clerk of Court of Appeals