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May 13, 2016

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

2015AP2216-CRNM State of Wisconsin v. Leo J. Turk (L.C. # 2014CF733)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Leo J. Turk appeals from a judgment of conviction for battery by an inmate, as a repeater, entered on his no contest plea. His appellate counsel, Attorney Eric R. Pangburn, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2013-14)[1] and ***Anders v. California***, 386 U.S. 738 (1967). Turk received a copy of the report, was advised of his right to file a response, and

[1] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

has elected not to do so. We reject the no-merit report and dismiss the appeal because the report fails to recognize the inadequacy of the plea taking and consequently fails to demonstrate that a challenge to the plea lacks arguable merit. We deny counsel's motion to withdraw and extend the time for Turk to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30.

In addressing whether Turk's no contest plea was knowingly, voluntarily and intelligently entered, counsel's no-merit report states: "No set procedure is constitutionally required for the acceptance of a plea. [WISCONSIN STAT. § 971.08(1)], only directs the plea-taking court to address the defendant personally and to determine whether there is a factual basis for the plea." This over simplifies the plea taking procedure.

State v. Brown, 2006 WI 100, ¶35, 293 Wis. 2d 594, 716 N.W.2d 906, informs that during the plea hearing the circuit court must address the defendant personally and:

> (1) Determine the extent of the defendant's education and general comprehension so as to assess the defendant's capacity to understand the issues at the hearing;
>
> (2) Ascertain whether any promises, agreements, or threats were made in connection with the defendant's anticipated plea, his appearance at the hearing, or any decision to forgo an attorney;
>
> …
>
> (5) Establish the defendant's understanding of the nature of the crime with which he is charged and the range of punishments to which he is subjecting himself by entering a plea;
>
> (6) Ascertain personally whether a factual basis exists to support the plea;
>
> (7) Inform the defendant of the constitutional rights he waives by entering a plea and verify that the defendant understands he is giving up these rights;

> (8) Establish personally that the defendant understands that the court is not bound by the terms of any plea agreement, including recommendations from the district attorney, in every case where there has been a plea agreement;
>
> (9) Notify the defendant of the direct consequences of his plea; and
>
> (10) Advise the defendant that "If you are not a citizen of the United States of America, you are advised that a plea of guilty or no contest for the offense [or offenses] with which you are charged may result in deportation, the exclusion from admission to this country or the denial of naturalization, under federal law," as provided in WIS. STAT. § 971.08(1)(c).

(Footnotes omitted).

In accepting Turk's no contest plea to the amended charge of battery to an inmate,[2] the circuit court engaged in the following colloquy with Turk:

> THE COURT: Mr. Turk, you do understand the charge as set forth in Count 1 and the maximum penalty it provides?
>
> MR. TURK: Yes, Sir.
>
> THE COURT: To that charge, how do you plead—guilty, not guilty, or no contest?
>
> MR. TURK: No contest.
>
> THE COURT: You understand by entering your plea of no contest, you are giving up those constitutional rights that you were advised of at your initial appearance?
>
> MR. TURK: Yes, Sir.
>
> THE COURT: You have given to the Court a two-page document we refer to as a plea questionnaire and waiver of rights form. It appears to have your signature toward the bottom of the back—the second page. Is that, in fact, your signature?
>
> MR. TURK: Yes, Sir.

[2] Turk was originally charged with strangulation and suffocation, as a party to the crime and as a repeater, and misdemeanor bail jumping as a repeater. Under a plea agreement, the strangulation charge was reduced and the bail jumping charged was dismissed as a read-in at sentencing.

THE COURT: You have reviewed this document with your attorney?

MR. TURK: Yes, Sir.

THE COURT: Did you understand what it said?

MR. TURK: Yes.

THE COURT: Is the information that has been added to the document true and correct to the best of your knowledge?

MR. TURK: Yes, Sir.

THE COURT: You do indicate on the plea[ ] questionnaire that you are under—you are taking certain medication. Does that medication affect your ability to understand the nature of these proceedings?

MR. TURK: No, Sir.

THE COURT: You have discussed with your attorney the elements of the offense now before the Court?

MR. TURK: Yes.

THE COURT: Do you understand those elements at this time?

MR. TURK: Yes, Sir.

THE COURT: You understand that if the matter would go to a jury trial, the State would have to prove by proof beyond a reasonable doubt each and every one of those elements to the satisfaction of all the jurors called, did you understand that?

MR. TURK: Yes, Sir.

THE COURT: You did have a chance to read over the criminal complaint?

MR. TURK: Yes, Sir.

MS. BASTIL: Did you understand what it said?

MR. TURK: Yes.

THE COURT: Do you agree that you did, in fact, commit the offense now before the Court?

MR. TURK: Yes, Sir.

> THE COURT: Any questions about that statement?
>
> MR. TURK: No, Sir.
>
> THE COURT: Now the complaint does indicate the prior convictions that form the basis of the repeater allegation. Did you review that prior conviction?
>
> MR. TURK: Yes, Sir.
>
> THE COURT: You agree that it was accurately stated?
>
> MR. TURK: Yes, Sir.
>
> THE COURT: You agree that you are repeater within the legal definition of the law?
>
> MR. TURK: Yes.
>
> THE COURT: Any questions about that?
>
> MR. TURK: No, Sir.
>
> THE COURT: Do you have any questions then, Sir, as to the effect of your plea, the waiver of your rights or the maximum penalty that you face?
>
> MR. TURK: No, Sir.
>
> . . .[3]
>
> THE COURT: The Court finds the plea to have been freely, voluntarily, and intelligently entered. There is sufficient factual basis for the Court to accept the plea. Plea is accepted.

The no-merit report concludes: "The colloquy appears to be an appropriate inquiry by the court to assess Turk's voluntariness and understanding of the overall [plea] agreement," and that "[o]verall, the plea was taken adequately in open court. There do not appear to be any bases for an appeal on this issue."

[3] In the omitted portion of the plea colloquy, the circuit court questions defense counsel and ascertains that the criminal complaint provides a factual basis for the plea.

We do not agree. The plea colloquy was very abbreviated. There was no determination of the extent of Turk's education and general comprehension so as to assess his capacity to understand the issues at the hearing and no inquiry as to whether any promises, agreements, or threats were made in connection with the anticipated plea. Although Turk's knowledge of the maximum penalty was determined by reference to Turk's reading of the information, there was no recitation of the elements of the offense on the record. *See* ***Brown***, 293 Wis. 2d 594, ¶¶46-48 (the circuit court may fulfill its duty to ascertain the defendant's understanding of the nature of the charge by summarizing the elements of the crime by reading from the appropriate jury instructions or statute, asking defendant's counsel whether he explained the nature of the charge to the defendant and request him to summarize the extent of the explanation, including a reiteration of the elements, at the plea hearing, or expressly referring to the record or other evidence of defendant's knowledge of the nature of the charge established prior to the plea); ***State v. Bangert***, 131 Wis. 2d 246, 269, 389 N.W.2d 12 (1986) (establishing a mandatory obligation on the circuit court to first inform the defendant of the charge's nature or to ascertain that the defendant possess such information and to do so in a manner that is just more than a perfunctory procedure). The only reference to the constitutional rights Turk waived by entry of his plea was to advisements made at the initial appearance which took place before a circuit court commissioner more than four months earlier.[4] There was no advisement that the court is not bound by the terms of any plea agreement as required by ***State v. Hampton***, 2004 WI 107, ¶38,

[4] At the initial appearance, Turk was not personally advised of relevant constitutional rights. Turk was asked whether he had heard the court commissioner go over "the last person's rights with her," and whether he understood those rights. Turk acknowledged that he had heard the rights, understood them, and did not want the court commissioner to go over the same rights with him. There is no record of what constitutional rights were explained at the initial appearance.

274 Wis. 2d 379, 683 N.W.2d 14.[5] There was no discussion of the impact of the read-in charge at sentencing. *See* ***State v. Straszkowski***, 2008 WI 65, ¶¶5, 97, 310 Wis. 2d 259, 750 N.W.2d 835 (The circuit court "should advise a defendant that it may consider read-in charges when imposing sentence but that the maximum penalty of the charged offense will not be increased; that a circuit court may require a defendant to pay restitution on any read-in charges; and that the State is prohibited from future prosecution of the read-in charge."). Also, the required deportation warning was not given.

To conclude that Turk was given the required information and that the circuit court fulfilled its duties during the plea colloquy, we would have to rely on the information supplied by the plea questionnaire and waiver of rights form. A circuit court may use the completed plea questionnaire and waiver of rights form when discharging its plea colloquy duties. ***State v. Hoppe***, 2009 WI 41, ¶30, 317 Wis. 2d 161, 765 N.W.2d 794. "A circuit court may not, however, rely entirely on the Plea Questionnaire/Waiver of Rights Form as a substitute for a substantive in-court plea colloquy," and "the plea hearing transcript must demonstrate that the circuit court used a substantive colloquy to satisfy each of the duties listed in ***Brown***." ***Hoppe***, 317 Wis. 2d 161, ¶31. "The plea colloquy cannot … be reduced to determining whether the defendant has read and filled out the Form," and "the Form cannot substitute for a personal, in-court, on-the-record plea colloquy between the circuit court and a defendant." ***Id.***, ¶32.

[5] The sentencing court did not follow the prosecution's agreed upon recommendation of one year initial confinement and two years' extended supervision. Rather, the court imposed eighteen months' initial confinement and eighteen months' extended supervision.

Counsel's no-merit report further concludes: "With regard to the entry of the no contest plea, Turk answered questions about the plea and during a colloquy with the Court that complied with [***Hoppe***, 317 Wis. 2d 161, ¶18]." We do not agree with counsel's conclusion that the plea colloquy complied with ***Hoppe***. The circuit court ascertained Turk's reading and understanding of the plea questionnaire and waiver of rights form but stopped there. It did not utilize the form by reference to any specific portion in satisfying the court's plea colloquy duties. Counsel's conclusion that the plea taking was adequate is rejected.

A defendant seeking to withdraw a plea based on a violation of mandated duties must allege that the defendant did not know or understand the information that should have been provided at the plea hearing. *See* ***Brown***, 293 Wis. 2d 594, ¶18. The no-merit report does not address whether or not Turk can make that allegation. With respect to the failure to give the deportation warning, a plea withdrawal motion is only viable if the defendant can show that the plea is likely to result in deportation. *See* WIS. STAT. § 971.08(2); ***State v. Douangmala***, 2002 WI 62, ¶4, 253 Wis. 2d 173, 646 N.W.2d 1. The record does not establish whether Turk is a person that may be subject to deportation. We are unable to determine that a claim that the plea

colloquy was defective and that a ***Bangert*** motion to withdraw the plea lack arguable merit.[6] Therefore, the no-merit report is rejected and counsel's motion to withdraw is denied.

We extend the time for Turk to file a postconviction motion or notice of appeal under WIS. STAT. RULE 809.30(2)(h). This gives appointed counsel further opportunity to investigate, research, and consult with Turk about potential claims and whether a postconviction motion should be filed. If Turk does not want to pursue a postconviction motion, or for some other reason a postconviction motion lacks arguable merit, Turk could agree to appointed counsel closing the file without any appeal. *See* ***State ex rel. Flores v. State***, 183 Wis. 2d 587, 617, 516 N.W.2d 362 (1994). A motion to withdraw or no-merit report is not required in every case. *See* ***State ex rel. Ford v. Holm***, 2004 WI App 22, ¶1, 269 Wis. 2d 810, 676 N.W.2d 500. It is possible that if Turk declines a postconviction motion, does not desire to proceed pro se, and refuses to consent to counsel closing the file without further representation, that a second no-merit notice of appeal under WIS. STAT. RULE 809.32(1) may be filed. If so, the no-merit report should address the issues identified by this order and may include, by affidavit, information concerning Turk's waiver of the right to pursue issues of arguable merit, if any. *See* RULE 809.32(1)(f).

[6] We recognize that a defendant may not wish to pursue a motion to withdraw a no contest plea, particularly where, as here, a plea agreement results in the dismissal of other charges and plea withdrawal may expose a defendant to a greater sentence upon reinstatement of the original charges. Although we might require appointed counsel to consult with the defendant about his desire to pursue a postconviction motion on potential meritorious issues and possibly obtain the defendant's waiver of the right to pursue those issues, we do not do so in this case because counsel's no-merit conclusion and advice to Turks, if any, about pursuing postconviction relief was based on counsel's erroneous conclusion about the sufficiency of the plea colloquy. A no-merit appeal tests whether appointed counsel has conscientiously determined there are no issues for appeal. ***State v. Tillman***, 2005 WI App 71, ¶16, 281 Wis. 2d 157, 696 N.W.2d 574. Here we cannot conclude that counsel has conscientiously reviewed the plea colloquy for possible appellate issues.

Upon the foregoing reasons,

IT IS ORDERED that the no-merit report is rejected, Attorney Eric R. Pangburn's motion to withdraw is denied, and the appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the time for filing a notice of appeal or postconviction motion under WIS. STAT. RULE 809.30(2)(h), is extended to sixty days from the date of this opinion and order. *See* WIS. STAT. RULE 809.82(2)(a).

Diane M. Fremgen
Clerk of Court of Appeals