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December 21, 2016

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

2015AP935-CRNM State of Wisconsin v. Becky L. Bishop (L.C. #2013CM395)

Before Reilly, P.J.¹

Becky L. Bishop appeals a judgment of conviction entered upon her Alford pleas to three counts of intentionally failing to provide proper shelter to an animal. Bishop's court-appointed appellate counsel has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, *Anders v. California*, 386 U.S. 738 (1967), and *State v. Brown*, 2009 WI App 169, ¶10, 322 Wis. 2d 183, 776 N.W.2d 269 (*per curiam*) (no-merit option available when appellate counsel is appointed by

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

circuit court). Bishop has filed a response to the no-merit report. In pertinent part, Bishop challenges the circuit court's order requiring that Bishop pay over \$35,000 in costs to the County as reimbursement for keeping her horses in custody. By letter, appellate counsel has informed this court that he does not intend to file a supplemental no-merit report addressing Bishop's response. For the reasons that follow, we cannot conclude that there is no arguably meritorious challenge to the circuit court's order assessing costs of \$35,802.30 against Bishop. We therefore reject the no-merit report.

Following the execution of a search warrant at Bishop's property and pursuant to WIS. STAT. § 173.13, law enforcement officers took custody of twenty-two horses belonging to Bishop. As part of a separate civil action, the circuit court ordered the return of seven horses. The State filed a three-count complaint charging Bishop with: (1) negligently failing to provide proper food, contrary to WIS. STAT. § 951.13(1); (2) negligently failing to provide proper water, contrary to § 951.13(2); and (3) intentionally failing to provide proper shelter, contrary to WIS. STAT. § 951.14(3)(a). The State later filed an amended complaint charging Bishop with eleven counts: nine counts of failing to provide proper food to certain identified horses, and one count each of failing to provide proper water and failing to provide proper shelter.

On June 30, 2014, the day before Bishop's scheduled jury trial, the parties reached an agreement. The State orally moved to withdraw the amended complaint, to reinstate the original complaint, and to amend counts one and two of the original complaint to reflect violations of WIS. STAT. § 951.14(3)(a), failure to provide shelter, the same violation alleged in count three.

Bishop agreed to enter *Alford*² pleas to the three identical charges and the State would recommend probation without any incarceration.

Pursuant to the parties' agreement, the circuit court dismissed the amended criminal complaint, reinstated the original complaint, and amended counts one and two of the original complaint "to reflect violations of section 951.14(3)(a) of the statutes, improper animal shelter."

As to each of the three counts, the court asked Bishop:

[The Court]: How do you plead to the [count in 2013CM395], Ms. Bishop, which would allege as an ongoing act or enterprise between July 30, 2013, and October 30, 2013, ... as a person owning an animal you did intentionally fail to provide the animal with housing facilities that were structurally sound and maintained in good repair to protect the animal from injury and to contain the animal.

[Ms. Bishop]: Alford.

The circuit court accepted Bishop's pleas and found her guilty.

Bishop's sentencing hearing spanned several days. At the time of sentencing, eleven horses had been returned to Bishop. The primary dispute was the amount of money Bishop should be ordered to reimburse the County for the custody and care of her seized horses.³ The State asserted that Bishop should be made to pay costs totaling \$35,802.30, and provided a detailed exhibit reflecting that \$32,512 represented amounts claimed by Nolan, while \$3290.30

² An *Alford* plea is a guilty or no contest plea in which the defendant either maintains innocence or does not admit to the commission of the crime. *State ex rel. Jacobus v. State*, 208 Wis. 2d 39, 45 n.5, 559 N.W.2d 900 (1997); see also *North Carolina v. Alford*, 400 U.S. 25 (1970).

³ The County seized the horses and contracted with a private individual, Nolan, to provide for their transport, care, food, and board. The County was also responsible for the horses' veterinary bills while they remained in custody. The issue for the sentencing court was the amount of costs to assess against Bishop in order to reimburse the County for the keeping of her horses.

represented veterinary bills. Bishop argued that she should not have to pay costs beyond amounts already paid in connection with the civil case because the horses never should have been seized in the first place, the amount charged by Nolan was unreasonable in light of the services and level of care he actually provided, and because Nolan neglected the horses causing additional illness and injury.

The circuit court determined that the amounts paid by the County for maintaining the animals were reasonable and appropriate, and ordered that \$35,802.30 “will be the costs of the action.” The court acknowledged that Nolan “apparently was providing very minimal rough—if we want to use that term—boarding, and wasn’t providing a lot of service” but stated that the County “had 22 horses that needed care and feed.... I’m not going to find that the amounts ... the county has paid for boarding are inappropriate.” The circuit court withheld sentence in favor of two years of probation with conditions to include a cap on the number of horses Bishop could possess without agent approval.⁴

Bishop’s response to the no-merit report asserts that because she was convicted of only three WIS. STAT. ch. 951 violations, the circuit court could only order reimbursement under WIS. STAT. § 173.24, for expenses incurred in keeping three of the horses. She relies on § 173.24(3), which provides:

If the person alleged to have violated ch. 951 is found guilty of the violation, the person shall be assessed the expenses under subs. (1) and (2). If the person is not found guilty, the county treasurer shall pay the expenses from the general fund of the county.

⁴ It appears from the electronic circuit court docket entries that Bishop successfully completed and has now been discharged from probation.

Bishop argues that she was “not found guilty” of violations concerning the other seized horses and therefore, the circuit court could not order her to reimburse the County for the “[e]xpenses of keeping” the other nineteen horses “taken into custody,” or for their veterinary bills. *See* § 173.24(2)(b) and (d).

In anticipation of Bishop’s claim, appellate counsel’s no-merit report asserts that the amount ordered was proper as restitution under WIS. STAT. § 951.18(4)(a)2., which provides:

A sentencing court shall require a criminal violator to pay restitution to a person, including any local humane officer or society or county or municipal pound or a law enforcement officer or conservation warden, for any pecuniary loss suffered by the person as a result of the crime. This requirement applies regardless of whether the criminal violator is placed on probation under s. 973.09. If restitution is ordered, the court shall consider the financial resources and future ability of the criminal violator to pay and shall determine the method of payment. Upon the application of any interested party, the court shall schedule and hold an evidentiary hearing to determine the value of any pecuniary loss under this paragraph.

The no-merit report also pre-emptively addresses Bishop’s argument that the costs were assessed under WIS. STAT. § 173.24, such that reimbursement was only permissible as to the three violations for which she was found guilty. Acknowledging the language in § 173.24(3) which provides that the county shall pay the expenses “[i]f the person is not found guilty,” the no-merit report concludes Bishop’s argument is without merit:

Bishop believes that the last sentence above means that since she was only convicted of three counts by her *Alford* pleas that she is only liable for the expenses of three of the horses seized. However, the only reasonable construction from the plain language of that sentence in the statute is that it applies in the event of an acquittal. Bishop was not acquitted of any of the counts in the complaint or amended complaint. During the plea colloquy, [the judge] explained to Bishop that the court could order restitution on uncharged counts for which Bishop was not convicted.

Appellate counsel's no-merit report does not persuade this court that Bishop's argument is wholly frivolous. *State v. Parent*, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915 (in deciding a no-merit appeal, the question is whether a potential issue would be "wholly frivolous."). This standard means that the issue lacks any basis in fact or law. *McCoy v. Court of Appeals*, 486 U.S. 429, 438 n.10 (1988). The test is not whether the attorney or court expects the argument to prevail.

The record belies the no-merit report's proposition that the assessed costs actually represent restitution ordered pursuant to WIS. STAT. § 951.18(4). The circuit court stated that \$35,802.30 "will be the costs of the action" and explicitly corrected the judgment "to reflect Vet/Transport/Boarding expenses as costs, rather than restitution." Additionally, Bishop was not ordered to pay "restitution to a person" for actual "pecuniary loss[es]" and the circuit court did not "consider the financial resources and future ability of the criminal violator to pay." *See* § 951.18(4)(a)2.

Further, we can not conclude on this record that Bishop's argument concerning the construction of WIS. STAT. § 173.24(3) as applied to the facts of her case is wholly frivolous. Subsection 173.24(3) authorizes the court to assess expenses "[i]f the person alleged to have violated ch. 951 is found guilty of the violation." Upon her pleas, Bishop was "found guilty" of three identical violations of failing to provide proper shelter to an animal. From the record, we cannot conclude it would be wholly frivolous to argue that each count represented a single horse. Subsection 173.24(3) further provides that the county will pay the expenses incurred in connection with an alleged violation of ch. 951 "[i]f the person is *not found* guilty." (emphasis added). The no-merit report does not conclusively persuade us that the County is liable for the

expenses only in the event of an acquittal; the plain language does not require that the person be *found not guilty*. See § 173.24(3).⁵

Our discussion does not address all issues contained in appellate counsel's no-merit report or Bishop's response. Our limited analysis is not intended to suggest that we have determined that the issues addressed herein are the only potentially nonfrivolous issues arising from Bishop's case. Rather, we provide the discussion to explain our conclusion that the no-merit report has not demonstrated that there are no issues of arguable merit in this case. Because we determine there is at least one arguably meritorious issue, we reject the no-merit report.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is rejected, court-appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion or notice of appeal is reinstated and extended to sixty days after remittitur.

Diane M. Fremgen
Clerk of Court of Appeals

⁵ Though not binding authority, *see* WIS. STAT. RULE 809.23(3)(b), this court is aware of two unpublished, authored opinions issued after July 1, 2009, which address WIS. STAT. § 173.24(3). *See State v. Thiry*, No. 2015AP863-CR, unpublished slip op. ¶16 (WI App Oct. 1, 2015) (under a plain language interpretation of WIS. STAT. § 173.24(3), a criminal violator can only be required to reimburse the county for expenses relating to the animal underlying the criminal conviction); *Eau Claire Cty. v. Hestekin*, No. 2014AP952, unpublished slip op. ¶19 (WI App Nov. 25, 2014) (in a case arising out of the WIS. STAT. § 173.23 seizure of an owner's animals, the circuit court had no authority to enter a money judgment against the owner where she had not yet been convicted of the violation).